

**IN THE HIGH COURT OF SINDH AT
KARACHI**

Suit No. 128 of 2017

Plaintiff : Mst. Shaista Nafees, through Mr. Mushtaq A. Memon, Advocate.

Defendants 1 to 4: Haji Muhammad Zaki & others, through Mr. Salahuddin Ahmed, Advocate

Interveners : Umar Ali Chohan & others, through Mr. Noor Ahmed Malik, Advocate.

Date of hearing : 12.02.2019

YOUSUF ALI SAYEED, J. - The Suit has been brought seeking Administration of the estate of late Haji Muhammad Rafique (the “**Deceased**”), who apparently expired at Karachi on 11.09.1998 and was survived by his widow, who is the Defendant No.4, three sons, who are the Defendants No.1 to 3, and nine daughters, one of whom is the Plaintiff whereas the rest are arrayed as the Defendants No.5 to 12 respectively.

2. The case of the Plaintiff is that the Deceased was the absolute owner of 14 immoveable properties, listed from Serial “A” to “N” in Paragraph 3 of the Plaintiff, the particulars of which are as follows:

A. Rafiq Plaza, constructed on Plots No.RB-12/18, RB-12/19, RB-12/20, near Japan Plaza, M. A. Jinnah Road, Karachi with Ground plus eight storeys building, Ground & Mezzanine floors have 450 shops and upper floors are still vacant.

- B. United Mansion 1&2, Plots No.LR-9/36/1, Alvi Street, Nishter Road, near Karachi Sweets, Ramswami, Karachi, Ground plus five storeys building on front side of ground floor there are 14 shops and of back side of ground floor and upper floors there are 92 flats.
- C. Madina Manzil 1 & 2 Plot No.LR-6/3/5, Kaka Street, Nishter Road, Karachi (Ground plus five storied building, on the ground floor there are 41 shops and 35 flats on upper floors).
- D. Zaki Building, Plot No.RS-1/45, Pitamber Street, off: Jamila Street, Ramswami, Karachi, Ground plus six storey building, total flats 12 and 14 shops.
- E. Rashid Manzil (formerly Zaki Manzil) Plot No.RC-1/16, Chand Bibi Road, near Urdu College, Nanakwara, Karachi Ground plus six storeys building on the ground floor there are 14 shops and upper floors there are 36 flats.
- F. Plot No.RS-1/45, Ragoos Street, Ramswami, Karachi open Plot.
- G. Sabira Manzil, Plot No.RC-3/21, Kaloo Veshoo Road, Off: Jinnah Street, Ramswami, Karachi, Ground plus five storey building, on the ground floor there are 3 shops and 10 flats on upper floor.
- H. Madina Square, Plots No.GK-7/79, 7/80, 7/81 & 7/82, Zohra Street, Kharader, Karachi. There are two buildings on above Plots, in Block-A the building is ground plus five storeys and Block-B building is ground plus four storeys, there are 60 shops in both the buildings and 72 flats.
- I. Rafiq Center, Plot No.250, RA Lines, Abdullah Haroon, Road, Saddar, Karachi. On ground floor, mezzanine floor and ten upper floors building, ground & mezzanine floor there are 100 shops and upper floors there are 140 flats.
- J. Rafiq Manzil, Plot No.RS-1/113, Jamila Street, Ranshoreline, Karachi (ground plus five storeys building, there are 08 flats, 1st floor of the said building has been made out as Godown.
- K. Shaheen Market, Plot No.RS-1/114, Jamila Street, Ranshoreline, Karachi (ground plus five storeys building, on the ground floor there are 14 shops and there are 20 flats on upper floors.

- L. Rafiq Manzil, Plot No.RS-1/95, Moosajee Street, off: Jamila Street, Ramsawami, Karachi ground plus six storeys building. On ground floor there are 10 shops and upper floors there are 12 flats.
 - M. Rafiq Manzil, Plot No.1/70, Pitamber Street, off: Jamila Street, Ramswami, Karachi, Ground plus five storey building. On ground floor there is 01 shop and upper floors there are 10 flats.
 - N. Green City Hotel (formerly Al-Rafiq Hotel), Plot No.242, Sohrab Katrak Road, Saddar, Karachi, the consisting of ground plus seven storeys, buildings. On ground plus two floors there are shops and upper floors hotel for boarding and lodging.
3. The case set up by the Plaintiff is that such of these properties as are not held in the name of the Deceased, were kept by him in the names of the respective Defendants by design and were in fact held by them benami on his account and for his benefit, it being alleged that following the demise of the Deceased, the Defendants No.1 to 3 took over the management of the estate and remained in enjoyment of the benefit/income thereof to the exclusion of the other heirs, continually denying them their due share despite promises of distribution being extended from time to time, and that in doing so they had also since alienated the immovable properties arrayed at Serial "A", Rafiq Plaza, and Serial "B", United Mansion, in favour of persons who were strangers to the estate.
4. As such, in terms of the Plaint, a prayer for judgment and decree has broadly been advanced in the following terms:-
- "a. Administration, marshaling, distribution and possession of the estate of deceased Haji Muhammad Rafique by holding such enquiry and accounts as deemed necessary and/or by passing preliminary or final decree or decrees as this Hon'ble Court may find appropriate.

- b. Mesne profits against the defendants or any of them as may be found to have benefited to the exclusion of other legal-representatives and/or unduly enriched himself/herself out of the estate of the deceased described in paragraph 3 of the plaint and any other property/properties as may be found to have been left by the deceased Haji Muhammad Rafiq.
 - c. Grant costs of the proceedings.
 - d. Any other/additional relief(s) as may be found and considered appropriate by this Hon'ble Court in the circumstances of the case.”
5. The Defendants No.1 to 4 filed their written statement wherein the transactional history of the immovable properties in Paragraph 3 of the Plaint was enumerated, it being admitted that those properties as are listed at Serial H, L and M thereof were indeed the properties of the Deceased and formed part of the estate, with it also being brought to fore that there were two other properties that the Plaintiff had overlooked, which were also owned by the Deceased and thus also comprised a part of the estate, being (i) a 1/4th share in Rais Manzil, bearing No.RS-1/83, Moosajee Street, Ramswami, Karachi and (ii) Plot No.30-A, Qureshi Colony, Karachi. As to the remaining properties, it was submitted that the same never belonged to the Deceased and did not form part of the estate. Furthermore, it was disclosed that of those properties, the ones specified at Serial “A”, “B”, “I” and “N” had since been sold, and the remaining properties were all legally and beneficially owned by the Defendants No.1 to 4, who had been enjoying the benefit/income thereof since the outset and that the Plaintiff had also remained silent in that regard albeit that the Deceased had met his demise as far back as 11.09.1998.

6. Of the other Defendants, the Defendants 6, 8, 9, 10 and 12, submitted identical written statements wherein they endorsed the stance of the Plaintiff as to the properties specified in Paragraph 3 of the Plaint forming part of the estate of the Deceased and similarly asserted that the same remain to be administered with accounts having not been rendered to date.

7. The Applications arising for consideration within this framework are three that have been filed on behalf of the Plaintiff, firstly under Order 39, Rules 1 and 2 CPC (CMA 663/17), seeking that the Defendants be restrained from transferring, alienating, selling or disposing of the immovable properties, secondly under Order 40, Rule 1 CPC (CMA 664/17), seeking that a receiver be appointed in respect of such properties, and thirdly under Order 20, Rule 13 CPC (CMA 8934/17) seeking that a preliminary decree be made for appointing an administrator to make enquiries as to the estate and income derived therefrom by the Defendants Nos. 1 to 4 as well as the share/entitlement of the Plaintiff, if any, as a legal heir of the Deceased, as well as three Applications (CMA 8935/17, CMA 13896/17 and CMA 15552/17) that have been forthcoming on behalf of separate sets of persons otherwise unrelated to the Deceased or the estate, on the basis that they are bona fide purchasers of the immovable properties arrayed at Serial "A" and "B", (i.e. Rafiq Plaza and United Mansion).

8. It was contended by learned counsel for the Plaintiff that whilst the immovable properties mentioned in the Plaint were held in the names of the Defendants Nos. 1 to 4, the Deceased was the real beneficial owner of thereof. It was averred that such properties had been acquired at a point in time when the Defendants Nos. 1 to 3 were of young age and lacked independent means,

whereas the Defendant No.4 was a housewife and did not have any source of income other than through the Deceased. In support of such contention it was pointed out that the Deceased had been involved in the transactions relating to several of the properties and orchestrated the same in his capacity as attorney for the ostensible title holder. It was also submitted that it was the Deceased who used to maintain the properties during his lifetime and clear the rates/taxes levied thereon. It was submitted that the composition of the estate was a matter that properly fell to be determined within the scope of an administration suit, and such a suit would be maintainable even where properties were claimed by legal heirs in their own independent right. Reliance was placed in that respect primarily on the judgment of a learned Division Bench of this Court in the case reported as Muhammad Zahid v. Ghazala Zakir PLD 2011 Karachi 83.

9. Conversely, it was submitted that other than the properties listed at Serial H, L and M, all of the other properties mentioned in the Plaint had been independently owned by the answering Defendants (solely or collectively, as the case may be) and did not form part of the estate. It was clarified that only the property mentioned at Serial C had ever stood in the name of the Deceased at any point in time and even that property had then been sold to the Defendant No.4 as far back as the year 1976. It was submitted that possession of the properties and the title documents thereof also lay throughout with the Defendants Nos. 1 to 4, and their ownership was also duly reflected in their tax returns and not in those of the Deceased. Notably, the deceased expired in 1998 while the instant suit was filed in 2017.

10. Furthermore, it was contended that an Administration Suit would only lie in respect of properties that are admittedly part of the estate of the Deceased or stood in his name at the time of his demise, but would not be maintainable in respect of properties that were in the names of legal heirs claiming independent title thereto. It was averred that in respect of such properties, the Plaintiff must firstly succeed in a suit for declaration of the deceased's benami ownership and only then could an administration suit be brought. On this basis, it was contended that a preliminary decree could not be passed and no case for grant of relief by way of injunction or appointment of a receiver stood made out. Learned counsel for the Defendants Nos. 1 to 4 sought to argue that the judgment of the learned Division Bench in the case of Ghazala Zakir (Supra) as to the maintainability of an administration suit under circumstances where an issue arose in respect of properties claimed by a legal heir in his own independent right was not in consonance with the principles laid down earlier by the Honourable Supreme Court in its judgment in the case reported as Mehdi Hussain Shah v. Shadoo Bibi PLD 1962 SC 291, On this basis it was contended that the judgment of the learned Division Bench had been made *per incurium* and ought not to be followed.

11. In the alternative, it was submitted on behalf of the Defendants Nos. 1 to 4 that even if the Plaintiffs claim of the Deceased's benami ownership could be agitated, such claim(s) must nonetheless satisfy the legal test for proving a benami transaction, being that a showing that the Deceased had been the source of the consideration for the acquisition of such properties, that possession of the properties and custody of the original title documents thereof had remained with

him, as well as demonstrating the motive underpinning the arrangement. It was pointed out that the Deceased had never impugned the ownership of the Defendants Nos. 1 to 4 during his lifetime, but had he done so he would have had to satisfy such test, and the Plaintiff in her professed capacity as a legal heir could not be put in a better position and would similarly have to demonstrate such a case and could not avoid doing so by simply framing the matter as an administration suit.

12. On that note, it was submitted that the Plaintiff itself contained only generalized allegations about benami ownership, and it was only through the written statement of the Defendants Nos. 1 to 4 that the transactional history of the immovable properties had been set out. It was submitted that the suggestion made on behalf of the Plaintiff that a presumption of benami ownership would arise as to the properties at Serial D and F due to their acquisition having taken place when the Defendant Nos. 1 and 2 were at a young age was misconceived in as much as it had specifically clarified in their counter affidavit to CMA No.663 of 2017 that as scions of a business family, they had been encouraged to be self-sufficient in their business/property dealings from a young age and been filing their independent tax returns from the outset, and no rebuttal had been forthcoming on this aspect vide an Affidavit-in-Rejoinder.

13. Furthermore, it was pointed out that in order to obtain interim relief, the Plaintiff necessarily had to make out a prima facie case of benami ownership on the touchstone of such test, whereas in the instant case the Plaintiff had not filed any document to support her claim of benami ownership of the Deceased or made

any specific assertion addressing those factors. It was pointed out that whilst the Plaintiff claimed that the Deceased was the owner of the properties specified in the Plaintiff and that she had a share therein by way of inheritance, with the cause of action having said to have arisen in the year 1998, the Suit had been instituted as belatedly as 2017, and that neither the Plaintiff nor the Defendants 6, 8, 9, 10 and 12 had placed any material on record to indicate that they had ever previously espoused such a claim or otherwise refuted the Defendant Nos. 1 to 4's ownership. It was submitted that the challenge had now been brought under the umbrella of an administration suit so as to avoid the bar of limitation that would otherwise arise and that even if the bar of limitation could be so avoided, the delay of itself was fatal to any claim for equitable relief, whether by way of injunction or through appointment of a receiver, and the applications moved in that regard were liable to be dismissed on that score alone.

14. It was submitted that, even otherwise, as the Deceased had left behind a widow, 3 sons and 9 daughters, the Plaintiff's share in the estate of the deceased was only 7/120 (i.e. less than 6%) and even if the shares of the Defendants 6, 8, 9, 10 and 12 were factored in the combined share of all 6 would come only to 42/120 (i.e. around 35%), and in the unlikely event of the Plaintiff succeeding in her claim the proceeds of the five properties that admittedly form part of the estate could be fully utilized to satisfy their shares. As such, an injunction in respect of those 5 properties alone would serve to fully safeguard their interest, if any.

15. Learned counsel appearing on behalf of the Interveners adopted the arguments advanced on behalf of the Defendants Nos. 1 to 4 as regards their claim to ownership and right of dealing in Rafiq Plaza and United Mansion. It was submitted that the Interveners were bona fide purchasers for value and the question of those properties being administered did not arise as the Interveners could not be deprived of the benefit of their transactions, which stood past and closed. It was submitted that as the Plaintiff espoused a claim to such properties, the Interveners were proper and necessary parties and ought to be joined as Defendants.

16. Having considered the arguments advanced at the bar, it merits consideration at the outset that question of the proper scope and extent to which an enquiry may be made within the context of an administration suit for arriving at a determination of the properties of the deceased and composition of the estate was examined in Ghazala Zakir's case (Supra), and with reference to various earlier judgments on the subject, the learned Division Bench formulated a test in that regard. Turning firstly to the submission made on behalf of the Defendants Nos. 1 to 4 that the Judgment of the learned Division Bench in that case ought not to be considered binding as it was made per incurium, I am of the view that the same is misconceived and bereft of substance in as much as it is apparent that the Judgment of the Apex Court in the case of Mehdi Hussain Shah (Supra) was considered by the learned Division Bench, it also being observed that the question raised before and decided by the Apex Court was entirely different from the question before it. That being said, this Court remains bound to follow the principles and test formulated by the learned Division Bench, which is in the following terms:

“In our view, when these considerations are balanced, 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. It is immaterial whether the alienation sought to be challenged was by way of registered instrument or otherwise. A few examples may help illustrate the point. Suppose the question is whether the sale of a property by the deceased to a stranger is liable to be set aside on account of fraud. A determination of this issue does not affect the *inter se* position of the sharers. If the issue is decided in favour of the estate, all the sharers will benefit equally to the extent of their respective shares (the property will form part of the estate). If the decision is to the contrary, the *inter se* position of the sharers will again remain unaltered. A determination of this question then lies beyond the scope of an administration suit, and it must be settled by separate proceedings. On the other hand, suppose the question is whether the sale of a property by the deceased to an heir is liable to be set aside on account of fraud. As is obvious, a determination of this issue does affect the *inter se* position of the sharers. This question then lies within the scope of the administration suit. If the question were held to be outside the scope of such a suit, that would lead to needless multiplicity of proceedings. A separate suit would have to be filed among the same parties to determine whether the property forms part of the estate, and if the question is answered in the affirmative, the property would have to be administered separately or afresh. A third situation could be where an heir claims a property in his own right and contends that it does not form part of the estate. This again is a question the determination of which could affect the *inter se* position of the sharers. The question would therefore fall within the scope of the administration suit.”

17. In its Judgment, the learned Division Bench then summed up its 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 the 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 the 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.

18. Having considered the matter at hand in light of aforementioned test, it is apparent that the scope of the present dispute falls within the parameters of an administration suit. As to the aspect of the properties in respect of which transactions have been made in favour of strangers to the estate, it is to be considered that whilst an administration suit is not a vehicle for cancellation or recovery of possession of such properties from such persons, as is apparent from the prayer in the instant suit, the same is essentially one for accounts and the fact that certain properties alleged to form part of the estate have already been sold out does not stand in the way of the question as to

the composition of the estate being determined. Needless to say, if it is found at the appropriate stage that any one or more of such properties formed part of the estate, then the alienating parties would have to account for the sale proceeds. This aspect also appears to have been considered in Ghazala Zakir's case (Supra) whilst examining the precedents pertaining to administration suits, with it being observed as follows:

“The third decision is reported as *Muhammad Yunus Qureshi and others v Mrs. Feroz Qureshi and others* 1982 CLC 976. In this administration suit, one property was in dispute, which the widow of the deceased claimed had been gifted to her by the latter, and on which she had raised a construction with her own funds. The widow claimed that she had subsequently sold away the property. It was held that the dispute whether the property formed part of the estate did not lie within the scope of the administration suit, and could only be decided by separate proceedings. In our view, with respect, this decision cannot now be regarded as good law. Clearly, the *inter se* position of the heirs was affected by the claim put forward by one of them, i.e., the widow. Putting them to separate proceedings would only lead to a needless multiplicity of litigation. The fact that the widow had sold away the property also could not stand in the way of the question being determined in the administration suit. If the court concluded that the property formed part of the estate, then the widow would have to account for the sale proceeds of the property, and the other heirs would be entitled to their respective shares therein. [Underlining added]

19. As such, in view of the aforementioned test and further observations in Ghazala Zakir's case (Supra), it is apparent that the contentions raised on behalf of the Interveners cannot be addressed within the framework of the present Suit, hence CMA 8935/17, CMA 13896/17 and CMA 15552/17 stand dismissed accordingly.

20. Needless to say, a primary object of an administration suit is to determine what estate the deceased left and it is axiomatic that this cannot be achieved without an inquiry. A plea of denial that a specific property was not owned by deceased alone can never be sufficient to hold that a suit is not-maintainable nor can it prevent the Court from an inquiry in that regard; Order 20, Rule 13 CPC specifically providing that in an administration suit the Court shall pass a preliminary decree before passing the final decree, directing accounts to be taken and enquiries to be made. However, that is not to say that a restraint be imposed as a matter of course on the Defendants in respect of the properties in dispute, which apparently do not stand in the name of the Deceased. As pointed out, the Defendants have been dealing with and enjoying such properties since at least the time of the demise of the Deceased without any apparent question having been raised. Even at present, the allegation of benami ownership remains precisely that, without a prima facie case for the grant of an injunction being demonstrated. Even otherwise, as pointed out, the interest of the Plaintiff as well as the Defendants 6, 8, 9, 10 would be safeguarded by an injunction in respect of the properties at Serial H, L and M and two other properties disclosed by the Defendants Nos. 1 to 4, being (i) a 1/4th share in Rais Manzil, bearing No.RS-1/83, Moosajee Street, Ramswami and (ii) Plot No.30-A, Qureshi Colony, Karachi (hereinafter collectively referred to as the “**Admitted Properties**”). As such, the case for injunction only stands out for the time being to that extent and CMA 663/17 stands disposed of in such terms.

21. Under such circumstances, CMA 8934/17 is allowed and it is Ordered that a preliminary decree be drawn up. The Nazir is appointed administrator for the time being of the Admitted Properties and to conduct the requisite enquiries for purposes of the preliminary decree, including as to the further composition of the estate and to submit a report so as to enable the Court to pass a final judgment and decree in the matter. The parties are directed to file their respective claims as to their entitlement before the Nazir and lead evidence in support thereof. Nazir's fee in the sum of Rs.50,000/- to be paid by the parties in accordance with their respective shares, and a further sum of Rs.10,000/- per witness to be paid by the relevant party.

JUDGE