

Order Sheet
IN THE HIGH COURT OF SINDH, KARACHI
Suit No.826/2019

| Date | Order with signature of Judge |
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| 1. | For hearing of CMA No.7143/2019 |
| 2. | For hearing of CMA No.13344/2019 |
| 3. | For hearing of CMA No.5951/2021 |
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Date of Hg: 07.02.2022

Syed Irshad ur Rehman, Advocate for the Plaintiff.
 Mr. Muhammad Ali Lakhani Advocate for Defendants 1 to 3.
 Mr. Tanveer Babar Advocate for Intervenor.

ARSHAD HUSSIN KHAN, J.- This order will dispose of the listed Application at Sr. No.1 [CMA No.7143/2019] filed by the Plaintiff, under Order XXXIX Rules 1 & 2, CPC., seeking a restraining order against the defendants from making changes, transferring the assets of the deceased and or creating any third party interest in the immoveable properties including House No.E-86, Block-F, North Nazimabad, Karachi.

2. Concisely, the facts essential for disposal of the above application are that the present suit has been filed by the plaintiff for Administration and Permanent Injunction in respect of the properties of his deceased father namely Mushtaque Ahmed Kapoor [**the deceased**]. It is the case of the plaintiff that all the suit properties were either purchased by the deceased in his name, or in the names of defendants [the brothers of the plaintiff] as benamidar and/or by defendants No. 1 to 3 from the funds /business /income/assets left by the deceased and as such the properties always known to be family properties to be inherited amongst all the legal heirs of the deceased. Through instant proceedings the plaintiff seeks the distribution of the estates of the deceased amongst the legal heirs. It has also been stated that defendants No.1 to 3 are in control and possession of all assets of the deceased along with title documents of the properties and they are using and utilizing the earning from the assets in different ways by depriving the plaintiff from her shares vested in the assets under inheritance. However, when defendants No. 1 to 3, have refused to pay the shares of the plaintiff, she has filed the present Suit. Along with suit, the plaintiff has also filed application [CMA No. 7143 of 2019] for interim relief.

3. Upon notice of the case written statement and counter affidavit to the listed application has been filed on behalf of defendant Nos. 1 to 3, denying the contents of the injunction application and the supporting affidavit. Rejoinder to the counter affidavit in the above CMA has also been filed on behalf of the plaintiff.

4. Learned counsel for the Plaintiff during his arguments on the application has contended that the immoveable properties as mentioned in para 3(i)(ii) of the Plaint are either the real / beneficial ownership of the **deceased** or have been acquired / purchased by the defendants in their names from the funds left by the deceased. As far as property viz. offices No.25 and 26, Hilal Chambers, MR 25/1 & 25/21, Kanda Gali, Jodia Bazar, Karachi, are concerned the same were acquired by the deceased in his life time by paying the huge amount of pugree of Rs.1,50,000/-, which later clandestinely got transferred by Jalil Ahmed Kapoor and Shakeel Ahmed Kapoor [defendants 1 & 2] in their names in collusion with defendant No.3 as now divulged. Today's value of pugree of the said two offices is approximately 5,000,000/- [Rupees Five Million Only]. The defendants did not annex the documents of the said offices including the rent agreement and pugree receipts and the documents on the basis of which they got the above offices transferred in their names. It has been argued that at the time of death of the deceased in the Month of April, 1989, defendants 1 to 3 did not have any independent, individual or joint business but they were only assisting the deceased in his business. The company Allied Chemical Industries [Pvt.] Limited has been purchased from the funds / assets left by the deceased in the Month of April, 1989. It has further been contended that the title documents of the factory at Hub River Road, Baluchistan, have also not been filed with counter affidavit to defraud and mislead this Court and to conceal the fair market value of the factory building and its assets. The fair market value of the said factory and assets are approximately Rs. 80,000,0000/- [Rupees Eighty Million Only]. It is also contended that the current market value of commercial property [SC-6, Block-F, North Nazimabad, Karachi] is approximately Rs.2,40,000,000/- He has argued that the immoveable property

[Bungalow No.E-86, Block-F, North Nazimabad] was held by the mother Mumtaz Begum as only Benamidar for the deceased. The Gift Deed dated 18.07.2017 is a pure fraud to deprive the other legal heirs from inheritance of their late father. The current fair market value of the said property is approximately Rs.1,30,00,000/- [Rupees One Hundred Thirty Million Only]. Likewise House No.K-123, Karim Block, Model Town, Lahore, [120 Sq. Ft. double storey] was purchased by defendant No.1 as now appeared, from the funds' assets of the deceased, in his own name. The market value of the said property is Rs.15,000,000/-. Another property, viz. F-15, Ist Floor, Hill View Hotel & Arcade, 5-Balance Road, Shamlah Pahari, Lahore, was purchased by defendants through defendant No.3, as now appeared, from funds / assets of the late Mushtaque Ahmed Kapoor. The market value was Rs.5,000,000/- at the time of sale in the Month of August, 2009. Learned counsel has argued that it is a fact that all the business was of the deceased and the deceased left the business and properties as enumerated above as real or beneficial owner or the assets / funds left by him at the time of his death in the year 1989, which the defendants No.1 to 3 did not make known to the Plaintiff. Earlier, there was no denial of distribution of legacy of the late father but now it is an open secret that defendants No.1 to 3 have no intention to distribute the legacy of their deceased father amongst the legal heirs of the deceased and malafidely want to usurp the inheritance share of other legal heirs. Defendants 1 to 3 utilized the funds and assets of their deceased father for the purchase of properties, business etc., which are liable to be inherited and distributed amongst all the legal heirs of the deceased father and the profits and earnings are also to be distributed amongst the legal heirs of the deceased father. It is only the deceased who was the owner actual or beneficial of all business and properties and defendants 1 to 3 only assisted him in his business. After the death of the deceased, the said business run by defendants 1 to 3, being the male legal heirs. All the properties as enumerated in para 3 of the Plaint were either inherited or created and/or acquired from the funds left by the deceased. It has been argued that no limitation runs in cases of succession and administration. In support of his contention learned

counsel has relied upon the case law viz. *Hamid Hussain Paliwalla v. Firasat Hussain Paliwalla and others* [PLD 2015 Sindh 304], *Muhammad Zahid through legal heirs v. Mst. Ghazala Zakir and 7 others* [PLD 2011 Karachi 83], *Mrs. Samia Aamir v. Mst. Salma Nilofar and 4 others* [2015 YLR 1755], *Ghulam Jilani and 10 others v. Abdul Kadir and 17 others* [1996 CLC 1847], and *Syed Mehdi Hussain Shah v. Mst. Shadoo Bibi and others* [PLD 1962 SC 291].

5. Learned counsel for Defendants, in his defence, has contended that the suit and the injunction application are misconceived and not maintainable in law. The suit is hit by Section 42 of the Specific Relief Act and it is hopelessly time barred. Further the suit has been filed through unauthorized person. It has been denied that the deceased-Mushtaque Ahmed Kapoor has left any of the properties / business, mentioned in para-3 of the Complaint, which could be inherited by his legal heirs. That the deceased [Mushtaque Ahmed Kapoor] was doing business as commission agent of local oil and his income was not sufficient to maintain his family. The Defendants neither inherited a single share nor any property from their late father. The Plaintiff has filed this suit after about 34 years from the death of her father without any concrete or convincing evidence in respect of any estate or asset left by their late father or inherited by them. The defendants have their independent business and properties. It has been argued that the Plaintiff has no concern with any of the properties or assets purchased or acquired by the defendants from their own sources and that too after the death of their late father. It has been urged that House No.E-86, Block-F, North Nazimabad, Karachi, was purchased by their mother Mst. Mumtaz Begum from her own sources by way of allotment from the Government in the year 1958-59 and she transferred and conveyed the same to the defendants by way of Deed of Gift dated 18.07.2017, registered at No.1692. He has argued that the Plaintiff has no prima facie case and balance of inconvenience does not lie in her favour. It has been argued that the present application is liable to be dismissed. In support of his contention he has relied upon the cases of *Mst. Halima v. Muhammad Kassam and others* [1999 MLD 2934], *Muhammad Ali v. Mahnga Khan* [2004 SCMR 1111], *Chuttal Khan Chachar v. Mst. Shahida Rani and another* [2009 CLC 324], *Mst. Shaheena Bibi v. Shauykat Ali and others* [2020 MLD 1279] and *Ghulam Murtaza v. Mst. Asia Bibi and others* [PLD 2010 SC 569].

6. I have heard the arguments, perused the record and the case law cited by the learned counsel for the parties.

Since the question of maintainability of the lis is strongly pressed, therefore, it would be in all fairness to decide this issue first.

The defendants have questioned the maintainability of the suit with reference to scope of the 'administrative suit' while pleading that plaint, so framed and relief (s) sought are sufficient to hold the suit to be out of the scope of the 'administrative suit'.

It may be observed that relief (s), if any, in Civil Jurisdiction are usually recognized and granted under the Specific Relief Act but there are certain reliefs (s) which the Court (s) can competently grant, although, the same are not covered by the Specific Relief Act. One of such relief (s) is that which can be granted in a suit for 'Administrative Suit'. The question in such like suit (s) regarding relief (s) was answered by the Honourable Supreme Court in the case of *Syed Mehdi Hussain Shah v. Mst. Shadoo Bibi and others* [PLD 1962 SC 291] as:-

“In absence of any specific provision in the procedural law the question as to the matters to be determined and the parties to be impleaded in a suit depends on the relief that is to be granted in that suit”

In order to ascertain whether the lis falls with the ambit of Administrative suit and limitation (s) to grant relief (s) in such like suit in absence of any specific provision of law, it would always be material to examine the relief (s) sought and effect of such relief (s) against the parties (persons). A learned Division Bench of this Court in the case of *Muhammad Zahid through Legal Heirs v. Mst. Ghazala Zakir and 7 others* [PLD 2011 Karachi 83], while dilating upon the scope of administrative suit has setup guideline to gauge the maintainability of the 'Administrative suit' as under:-

“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.”

7. Manifestly, above criteria is in conformity to the fact that determination of maintainability shall be subject to the relief (s) and effect thereof. If the relief (s) sought effects upon a stranger it shall be beyond the scope of Administrative Suit and a separate suit shall be competent. Keeping in view the above criteria, the reliefs sought in the instant case does not appear to effect the stranger, hence present suit, in my opinion, is maintainable.

8. Reverting to the injunction application, a perusal of the pleadings, the affidavits in support of the injunction application, counter-affidavits and Re-Joinders would show that these are replete with allegations and counter allegations. While the plaintiff-sister claiming inheritance in respect of properties that are in the names of their brothers being family properties, the defendants-brothers are saying that they are exclusive owners of the said properties and their sister is only entitled to what actually stood in the name of their father. It is obviously not possible for me, at this interlocutory stage, to decide whether the assets of the deceased described in the plaint were solely owned by the deceased and/or have been purchased from the funds left by the deceased and /or whether the brothers are Benami owners of the properties for which they claim to be the exclusive owners thereof. This would require detailed evidence. The plaintiff’s right to investigate and to seek remedy is rooted into immutable principles of morality. Such a right that plaintiff claims is inchoate and will become choate only upon proofs being provided in respect of the Benami transactions of her father during his lifetime. The plaintiff herself has not brought anything definite on the record to show that any irregularity was in fact committed. It is also not the plaintiff’s case that the properties were transferred on the death bed of the deceased. The plaintiff’s mother and the deceased's widow, who ought to have known about such Benami transactions, did not support the plaintiff’s contention in her life time.

In the circumstances, I am of the opinion that no prima facie case has thus been made out by the plaintiff nor does balance of inconvenience lie in her favour, in fact, it lies in favour of Defendants who are prima facie the owners of the properties in their own right. The loss that the plaintiff claims she will suffer, if the injunction is not granted is also not irreparable because if she finally succeed in the suit she can claim her share from the defendants as rights accruing from inheritances are perpetual in nature. I, therefore, find no merit in this application, which is accordingly **dismissed**, and the ad-interim order dated 30.05.2019 is hereby recalled / vacated.

9. To shorten the proceedings and to lessen the agony of both parties, it would be well within spirit of safe administration of justice to have an inquiry about properties, so left by deceased-Mushtaq Ahmed Kapoor at time of his death and subsequent transaction (s), if any, in that respect so as to determine claims, status and title of parties and that of document (s) within four corners of '*administrative suit*'. This shall cause no prejudice to either of the parties but shall help in bringing genuine claim, rights and liabilities of each which is, no doubt, had been the ultimate objective of '*administrative suit*'. Therefore, in all fairness, equity and good conscious I am of the view that inquiry / investigation in that respect is necessary. Accordingly, Nazir of this Court is hereby appointed as Commissioner / Inquiry Officer to conduct an inquiry in respect of the details of the properties either movable or immovable, so left by deceased Mushtaq Ahmed Kapoor, at the time of his death including liabilities of the deceased, if any, and subsequent transaction (s) / changes, if any, in respect of that properties. All the quarter concerned shall cooperate with the Nazir in finalizing such task. The order for appointment of the Nazir is subject to payment of the Commissioner's fee i.e Rs. 50,000 to be paid by the plaintiffs.

JUDGE

Karachi;

Dated: 11. 05.2022.

*Jamil**