

IN THE HIGH COURT OF SINDH AT KARACHI

HCA No.176 of 2022

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Date	Order with signature of Judge
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Present: **Aqeel Ahmed Abbasi &  
Abdul Mobeen Lakho, JJ.**

1. For orders on CMA No.1590/2022.
2. For orders on office objection a/w reply as at 'A'.
3. For orders on CMA No.1591/2022.
4. For hearing of main case.
5. For orders on CMA No.1592/2022.

30.5.2022

Syed Irshadur Rahman, Advocate for Appellants.  
Mr. Muhammad Ali Lakhani, Advocate for Respondent  
No.1.

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**O R D E R**

Instant High Court Appeal has been filed against the impugned order dated 11.5.2022 passed by learned Single Judge in Suit No.826/2019, whereby, an application filed by the appellant under Order 39 Rule 1 & 2 CPC (CMA No.7134/2019) seeking a restraining order against respondents from creating third party interest in respect of properties of deceased, namely, Mushtaq Ahmed Kapoor, has been dismissed. According to learned Counsel for Appellants, a suit for administration was filed by the Appellant No.1 in respect of the properties, which according to learned Counsel for Appellant, were infact, part of estate left behind by deceased namely Mushtaq Ahmed Kapoor, the father of the Appellants and the Respondents, whereas, two of such immoveable properties were Benami and the other properties were also acquired from the funds of the deceased, however, subsequently such assets were reportedly transferred/gifted in the name of male legal heirs of deceased Mushtaq Ahmed

Kapoor, while depriving the female legal heirs including the Appellants. Per learned Counsel, in the Suit for Administration, injunction application was filed by the Appellant with a prayer that Respondents may be restrained from creating any third party interest in respect of the properties which according to appellants are part of the estate left behind by the deceased father, however, the learned Single Judge has dismissed such application through impugned order, which will adversely affect the claim of appellants. Learned Counsel for Appellant has prayed that since there is a claim of the Appellant in respect of properties in a Suit for Administration, as the said properties are either Benami in the name of the Respondents or have been acquired through funds of the deceased, therefore, till decision in the Suit and final determination regarding subject properties in dispute, Respondents may be directed not to create any third party interest in respect of such properties and the impugned order may be set-aside.

2. Mr. Muhammad Ali Lakhani Advocate, present in Court on notice under Order 43, filed his Vakalatnama on behalf of Respondent No.1, waives notice and requests for time to file reply/objections, however, vehemently opposed the contention of learned counsel for appellants and submits that the impugned order passed by learned Single Judge in the instant case does not suffer from any factual error or legal infirmity as the appellants miserably failed to make out prima-facie case for grant any injunctive relief for the reason that properties being disputed are admittedly in the name of the Respondents through valid registered documents, whereas, the deceased father, namely, Mushtaq Ahmed Kapoor, never claimed such properties to be Benami during his life time, and even after his death in the year 1989 none of the legal heirs including appellants came forward to dispute the ownership of such

properties. According to learned Counsel for Respondent, the claim of the Appellant No.1, besides being false and frivolous, is not duly supported by any documentary evidence, whereas in order to cover the period of limitation, for challenging the transfer of property by way of Gift, the Appellant has filed the Suit for Administration, however, in respect of the properties which are admittedly not in the name of the deceased. Per learned counsel, since the deceased never came forward to allege that subject properties are Benami, were in fact owned and acquired through his funds or the gift was illegal and invalid, therefore, such claim cannot be agitated by the Appellants after his death in the year 1989. In support of his contention learned Counsel for Respondent has placed reliance in the case of *Farrukh Afzal Munif v. Muhammad Afzal Munif and 29 others (PLD 2022 Sindh 34)*.

3. We have heard learned Counsel for the parties, perused the record and the impugned order passed by the learned Single Judge with their assistance, which reflects that after having taken cognizance of the material facts and the record, the learned Single Judge has been pleased to observe that the Appellant is not entitled to any injunctive relief as, prima facie, the ingredients required to be taken into consideration for grant of injunction viz. (i) prima-facie case, (ii) balance of inconvenience and (iii) irreparable loss and injury, are not in favour of grant on injunction. The finding of the learned Single Judge to this effect has been recorded in paras 8 and 9 of the impugned order, which reads as follows:-

“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 some 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 30.5.2019 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."

4. In view of hereinabove facts and circumstances of the instant case, we are of the opinion that the impugned order, whereby, the injunctive relief sought by the appellants in respect of properties, which are admittedly not in the name of deceased, namely, Mushtaq Ahmed Kapoor, therefore, on the face of record, cannot be treated as part of the estate left behind by the deceased to be further distributed among all legal heirs, appears to have been rightly declined at this stage of proceedings. Moreover, no sufficient material appears to have been produced by the appellants to make out a prima-facie case for grant of any injunctive relief in subject Suit, which prima-facie involves issue of limitation besides other legal impediments to the claim of Benami or to dispute the validity of gift and transfer of properties through registered documents. Accordingly, instant appeal, being devoid of any merits, is dismissed in limine along with listed applications. However, it is clarified that dismissal of instant High Court Appeal in above terms may not affect the merits of the case in the Suit, which may be decided in accordance with law by the learned Single Judge.

JUDGE

JUDGE