

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Muhammad Shafi Siddiqui
& Jawad Akbar Sarwana JJ

High Court Appeal No. 162 of 2023

Dr. Masuma Hasan v. Imtiaz Ali Khan

Appellant: Dr. Masuma Hasan widow of
Fatehyab Ali Khan, through Mr.
Asad Ali Khan, Advocate

Respondent: Imtiaz Ali Khan through Wiqas
Ahmed Khan, Advocate

Date of hearing: 19.10.2023

Date of decision: 06.11.2023

J U D G M E N T

Jawad A. Sarwana, J.: Through this High Court Appeal, the Appellant (Dr. Masuma Hasan, widow of Late Fatehyab Ali Khan) has impugned the learned Trial Court's Order dated 08.03.2022 passed in S.M.A. No.155/2021 converting an administration petition into a civil suit and directing the office to assign a docket number, and Dr. Masuma Hasan to file an amended title impleading the objector, Imtiaz Ali Khan, son of Late Fatehyab Ali Khan's brother, Mumtaz Ali Khan and Dr. Masuma Hasan's nephew, as one of the defendants in the said suit, the other defendant impleaded being the custodian of the record of the property in question; whereafter, the petition is to be treated as a plaint and the objections filed by Imtiaz Ali Khan as his Written Statement. Aggrieved by the said Order, Dr. Masuma Hasan preferred this appeal.

2. The background of the case is that Dr. Masuma Hasan filed SMA No.390/2012 before the Illrd Additional District Court Judge

Karachi East for the administration of the only property of her deceased husband, Fatehyab Ali Khan, i.e. Bungalow bearing No.93-C, PECHS Block 6, Karachi measuring 1,200 Sq. Yds. (hereinafter referred to as "Subject Property"). During the proceedings before the Additional District Court, Dr. Masuma Hasan's nephew, Imtiaz Ali Khan,¹ filed objections claiming that the Late Fatehyab Ali Khan's brother, Late Mumtaz Ali Khan, who passed away on 13.05.1976, was the real owner of the Subject Property, and Fatehyab was his benamidar. On 30.08.2017, the Additional District Judge-III Karachi East held that based on the Subject Property's market value, the Additional District Court did not have pecuniary jurisdiction and returned the SMA No.390/2012 to the Petitioner. Thereafter, on 23.02.2021, almost 3.5 years later, Dr. Masuma Hasan recommenced administration proceedings with filing of SMA No.156/2021 in the High Court of Sindh at Karachi.

3. Dr. Masuma Hasan and her children have claimed title in the Subject Property belonging to Late Fatehyab Ali Khan, based on a bundle of documents, including, inter alia, an Agreement of Sale dated 01.01.1966 between one Wajihuddin and Late Fatehyab Khan for a price of Rs.87,500 including a mortgage loan amount of Rs.35,000/- etc.; and relying on proceedings in Suit No.378/1969 relating to the Subject Property filed by State Life Insurance Corporation (formerly American Life Insurance Company)("ALICO") against the above-mentioned parties to the Agreement of Sale. According to the recitals in the Judgment dated 05.06.1970 in Suit 378/1969, during the pendency of the said suit for recovery of loan advanced to the first defendant, Wajihuddin, and securitised by an equitable mortgage over the Subject Property, the latter successfully impleaded Fatehyab in ALICO's suit based on the above-mentioned Agreement of Sale and the ground that Wajihuddin's mortgage stood transferred to Fatehyab. ALICO filed an Amended Plaint and denied any transfer of

¹ Dr. Masuma's pleadings in this appeal also appear to challenge the objector's relationship with Mumtaz Ali Khan, calling for FRCs and Birth Certificate of Imtiaz Ali Khan

mortgage. Wajihuddin took the defence that he owed nothing to ALICO after the transfer of the mortgage, and Fatehyab took the position that although he had an interest in the Subject Property, after March 1968, he had not paid Wajihuddin instalments towards the sale of the property because the latter was claiming interest for delayed payment. Based on the evidence brought on record in Suit 378/1969, the learned Judge granted ALICO a Preliminary Decree dated 23.10.1971 against Wajihuddin only. The legal heirs of Late Fatehyab Ali Khan contend that subsequently, after the death of Mumtaz Ali Khan on 13.05.1976, during the execution proceedings which followed in ALICO's Ex. No.80/1976, Fatehyab Ali Khan, as Judgment Debtor, No.2, made all payments towards satisfaction of the decretal amount in Suit No.378/1969. Thereafter, in the year 1980, State Life Insurance Corporation initiated fresh execution proceedings, namely, Ex. No. 119/1980, wherein they dropped Wajihuddin and requested the Court to allow them to proceed against Fatehyab Ali Khan, the Judgment-Debtor No.2, only towards recovering the loan amount. The L.R.s of Fatehyab Ali Khan argue that the deceased Fatehyab essentially redeemed the loan for the Subject Property through Court. However, the Subject Property remained in the name of Wajihuddin. It was not transferred in the name of Fatehyab Ali Khan in his lifetime. Further, the "Original title documents" of the Subject Property remain in Nazir's custody. On 27.02.2012, the legal heirs of Fatehyab Ali Khan obtained an Order from the High Court in Suit No.378/1969-Execution No.80/1976 for the release of the Original documents of the Subject Property subject to the condition that they would appear personally before the Nazir, prove to his satisfaction the death of Fatehyab Ali Khan, disclosure of his legal heirs, and if all the legal heirs file individual affidavits stating that the original title documents of the Subject Property referred to may be handed over to any one of them then the Nazir may do the needful in this regard. It is unclear what happened next before the Nazir or in Suit No.378/1969 / Ex.80/1976 / Ex. No.119/1980, except that Dr. Masuma apparently

filed SMA No.390/2012 before the Additional District Judge Karachi East seeking administration of the Subject Property.

4. As in SMA 390/2012, the objector, Imtiaz Ali Khan, appeared before this Court in SMA No.156/2021, claiming the title in the Subject Property as the legal heir of Mumtaz Ali Khan, the alleged “real owner” of the Subject Property with Fatehyab Ali Khan as his benamidar. Although Mumtaz Ali Khan passed away on 13.05.1976, his legal heirs have neither filed any administration proceedings nor any suit claiming title in the Subject Property.

5. Dr. Masuma Hassan’s Counsel, Barrister Asad Ali Khan, argued that the objector was neither the legal heir nor a legatee of the Late Fateyab Ali Khan. He conceded that Imtaiz Ali Khan, shared part-possession in the Subject Property but denied Imtiaz Ali Khan’s claim as a “real owner” and Fatehyab as his benamidar. In support of his client's claim, the Counsel for Imtiaz Ali Khan argued that Imtiaz had been settling electricity bills in respect of the Subject Property for many years. Further, Fatehyab Ali Khan had executed in favour of his sister, Sughra Bano, and his nephew, Imtiaz Ali Khan, General Powers of Attorney in relation to the Subject Property dated 19.01.1982 and 09.04.1986, respectively. This he submitted would confirm Mumtaz Ali Khan’s claim that he was the real owner of the Subject Property and his brother was his benamidar.

6. The issue before this Court in the appeal is whether the learned trial judge has rightly converted an administration petition, namely SMA No.156/2021, into a civil suit based on the objections of Imtiaz Ali Khan in accordance with law. A learned Division Bench of this Court in the case of Muhammad Zahid v. Mst. Ghazala Zakir and Others, PLD 2011 Karachi 83 has discussed at length based on a review of several Judgments of the Supreme Court of Pakistan and the Division Benches of this Court the determining factors regarding whether a dispute or objection of an objector, other than legal heir of

deceased, as to ownership of property could be adjudicated within the framework of a suit for administration. The test has been applied in several subsequent judgments of the Division Bench as well as followed by Single Benches of this Court.² For the sake of convenience, the key paragraphs and propositions from the Ghazala Zakir case (supra) are reproduced herein below.

“4. Mr. Shafaat Hussain, learned counsel for the appellant, submitted that the learned single Judge had erred materially in his appreciation of the scope of an administration suit. He submitted that the court seized of an administration suit had ample jurisdiction to decide all matters between the heirs, including whether any alienation made by the deceased during his lifetime to an heir was valid or not. He referred to a number of decisions, including a decision of a single Judge of this Court reported as Ghulam Jilani and others v. Abdul Kadir and others 1996 CLC 1847. This was a case involving an administration suit in which one of the properties sought to be administered as part of the estate of the deceased was claimed by one of the heirs as his own property, although as the learned Judge noted, the heir did not in his pleadings specifically aver the basis on which he claimed that the property was his. It was contended that the question whether the deceased had title to the property being claimed by the heir could not be the subject of an administration suit. A number of cases was cited before the learned single Judge and considered by him, being essentially the same case law that was considered in the impugned judgment. The contention was repelled by the learned single Judge, who held as follows:

"What then, is to be scope of such an inquiry to ascertain what immovable property the deceased was seized of or entitled to at the time of his death? and is the Court debarred from making such an inquiry merely because a defendant asserts simply that he claims a property in his own right? It is true that the scope of a suit for administration is limited and such a suit cannot be converted into a suit for an altogether different purpose such as setting aside alienations by the deceased but, on principle, there appears to be no reason why in a suit for administration properly so-called, viz. a suit the main or the real object of which is to obtain administration of the estate of the deceased, the Court should not determine the question of a party's claim to be entitled to a property in his own right and for that purpose determine the existence or validity of any alleged alienation by the deceased; for ultimately determination of . such.

² **Division Bench:** Saifullah Khan and Others v. Mst. Afshan and Others, PLD 2017 Sindh 324; Muhammad Suleman and Others v. Muhammad Ahsan and Others, 2017 MLD 1867.

Single Bench: Khair Muhammad Khaitan and 5 Others v. Liaquat Ali G. Kazi and 9 Others, 2017 CLC Note 172; Shaukat Zaib and 8 Others v. Khuram Zaib and 3 Others, 2018 CLC 970; Suit No.712 of 2001, Order dated 27.03.2017; Noor Muhammad v. Zafar Ali, Suit No.321 of 2007, Order dated 03.12.2019; Muhammad Khalid v. Mst. Mehmooda Khanum & Others, Suit No.267 of 1997, Order dated 03.09.2018; Mst. Shaista Nafees v. Haji Muhammad Zaki & Others, Suit No.128 of 2017, Order dated 12.02.2019.

questions is nothing more than an inquiry as to what property the deceased was seized of or entitled to at the time of his death. If it were otherwise, any suit, even if its main or real purpose is to have the estate of the deceased administered, would be liable to be defeated merely by the defendant alleging that he is the owner of the property in question; and the result would be multiplicity of litigation." (pp..1851-52)

"It would, thus, appear, both on principle and on authority, that in a suit for administration properly so-called i.e. a suit the main or the real purpose of which is to have the estate of the deceased administered by the Court, this Court can for the purpose of achieving the object of such a suit, namely, collection and distribution of the estate, and as ancillary to order for administration, decide the question of Title to any property; and the power of the Court to do so extends to determining the existence or validity of any alienation of the property not only by other persons after the death of the deceased but also by the deceased during his lifetime." (pg. 1862)

. . .

11. The nature of an administration suit, as explained by the Supreme Court, has been noted above. There are, in general, two classes of persons who can be regarded as having an interest in the estate of the deceased: creditors and sharers. The present proceedings are not concerned with creditors and therefore nothing more need be said about this class. Insofar as sharers are concerned, they fall into two categories, heirs and legatees (i.e., those entitled to a share, whether of movable or immovable property, under a will). The first order of business therefore is to determine who are the sharers, and as the Supreme Court has made clear, this is a matter well within the scope of an administration suit. Since an administration suit, even if adversarial in nature, is for the benefit of all the sharers, the next question is a determination of the properties of the deceased since it is these properties that constitute the estate and are to be administered by the court. The key question is, what is the proper scope and extent of this enquiry, within the context of an administration suit. This is the question that lies at the heart of the present appeal. (It is important to keep in mind that even if the question whether a particular property is part of the estate cannot be decided in an administration suit, such a question can undoubtedly be decided in separate proceedings.) How is the boundary to be drawn to determine what lies within the scope of an administration suit, and what is outside its purview? On one hand is the reluctance of the law to countenance any multiplicity of litigation and its desire that such an outcome be avoided if at all possible. On the other is the recognition that the nature of an administration suit is limited, inasmuch as it is intended only to settle issues and matters among the sharers. **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. This conclusion is fully in accord with the decisions of this Court in Asghar Ali and Tahira Parveen (supra). As noted above, in both cases, one of the heirs claimed in his own right a property standing in the name of the deceased. Notwithstanding such claim, the preliminary decree included the property. In both cases, an appeal against such inclusion failed, and it was held that the putative owner could have the issue determined in the administration suit.

. . .

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 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.

. . .

19. In view of the foregoing discussion and analysis, we hold in conclusion that the impugned judgment must be reversed and set aside (except to the extent of the making of the preliminary decree in respect of the undisputed properties), with the result that the decision as reported (Ghazala Zakir v. Muhammad Khurshid and others 1997 CLC 167) cannot be regarded as good law. Furthermore, subject to what has been said in this judgment, the observations made in Ghulam Jilani and others v Abdul Nadir and others 1996 CLC 1847 (as reproduced above in para.4) and in Muhammad Bibi and others v. Abdul Ghani and others PLD 1975 Kar 979 (as reproduced above in para.14) are approved. . . .”

(bold highlight added for reference)

7. In the current scenario, the objection to the administration petition has been raised by a non-legal heir and non-legatee, the son of the brother of Fatehyab Ali Khan. Neither the brother of Fatehyab Ali Khan, i.e. Mumtaz Ali Khan, nor the Late Mumtaz Ali Khan’s son challenged the ownership / title of Fatehyab Ali Khan in the Subject Property during the lifetime of Fatehyab Ali Khan. Further, they also did not initiate any legal action to safeguard their rights and interest in the Subject Property. The challenge from the legal heir of Mumtaz Ali Khan alleging Fatehyab has benami interest in the Subject Property has arisen after the passing away of Fatehyab Ali Khan. It is a matter of the Court’s record that after March 1968, the payments made to ALICO/State Life Insurance Corporation to redeem the Subject Property in the mortgage suit were made by Fatehyab Ali Khan after the death of Mumtaz Ali Khan on 13.05.1976. Imtiaz Ali Khan has only now come to challenge the estate of Late Fatehyab Ali Khan within the umbrella of an administration petition. We do not find (in this Appeal) any averment on the part of the objector, Imtiaz Ali Khan, when (what date) he acquired knowledge of his father’s interest in the Subject Property and Fatehyab his benamidar or why he waited until 2012 to challenge Fatehyab Ali Khan’s title in the Subject Property? Even otherwise, in general, claims for the cancellation of a document or declaration of benamidar or recovery of possession

from the deceased's estate are to be avoided in an administration petition for the several reasons discussed in Ghazala Zakir. To this end, the impugned Order dated 08.03.2022 does not address any of the principles discussed by the Division Bench of this Court in Ghazala Zakir for Dr. Masuma's administration petition to be converted into a suit.

8. First, as per paragraph 13(a) of Ghazala Zakir (supra), 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 through separate proceedings. In the case at hand, Imtiaz Ali is not a legal heir of Fatehyab Ali Khan. He is a stranger in the administration petition. Therefore, his claim of Fatehyab as benamidar of Mumtaz Ali Khan is to be determined through a separate suit and Not in Dr. Masuma Hasan's petition for administration converted into a suit. Paragraph 13(b) of Ghazala Zakir (supra) does not rescue Imtiaz Ali as he is neither a sharer nor legatee in the estate of Fatehyab Ali Khan.

9. Further, according to paragraph 13(d) of Ghazala Zakir (supra) it is immaterial whether or not the property in question stood in the name of the deceased at the time of his death. In the case at hand, the Subject Property was not in the name of the deceased, Fatehyab Ali Khan. The records of rights do not show him as its owner. The Subject Property stood in the name of Wajihuddin. The Judgment dated 05.06.1970 in Suit No.378/1969 discusses in detail, with reference to evidence brought on record, ALICO's claim against Wajihuddin in the background of the Agreement of Sale, alleged transfer of a mortgage from Wajihuddin to Fatehyab, the consequence of payment to Plaintiff of said suit by Fatehyab, Fatehyab's refusal to pay to Wajihuddin instalments under the Agreement of Sale after March 1968, Wajihuddin claim from Fatehyab for interest for delay in payment, ALICO's letter to Fatehyab

accepting the transfer of mortgage from Wajihuddin to Fatehyab, and Fatehyab not filing any claim for enforcement of his right in the Subject Property, etc. Be that as it may, the Court's record also reflects that from the date of the Preliminary Decree dated 23.10.1971 to the Final Decree dated 29.01.1973 and in Execution No.80/1976, Fatehyab Ali Khan alone made payments to the Court towards the redemption of Subject Property as execution went undefended by Wajihuddin.³ In State Life Insurance Corporation Execution No.119/1980, the Decree-holder submitted a Statement to drop execution proceedings against J.D.-1, Wajihuddin, and proceed against J.D.-2, Fatehyab Ali Khan, alone. Mumtaz Ali Khan finds no mention in the Court proceedings. He never stepped in the proceedings. Further, after March 1968, Fatehyab's payments were made in Court to redeem the mortgage loan of Wajihuddin after Mumtaz Ali Khan had passed away on 13.05.1976. Finally, following the Final Decree dated 29.01.1973, the original title documents of the Subject Property were submitted to the Court and are presently in the physical custody of Nazir of this Court. Therefore, in the first instance, Imtiaz Ali's contention that the Subject Property is not in the name of Late Fatehyab Ali Khan is immaterial and has no bearing on converting his estate's administration petition into a suit. Further, as available on record, the case facts do not assist Imtiaz Ali's contention to convert Dr. Masuma's Administration Petition into a suit and implead Imtiaz Ali Khan in the said suit.

10. Finally, as held by the Division Bench in paragraph 11 of Ghazala Zakir (supra) as highlighted herein above, if the determination of title of the Subject Property will not disturb the inter se position of the sharers and will affect all the sharers equally, then the challenge lies outside the scope of the administration proceedings. If, however, the determination will affect and upset the inter se position of the sharers and may give one or more of the heirs

³ The Order dated 08.09.1979 in Ex. No. 80/1976 (after Mumtaz Ali Khan's death) records that Fatehyab Ali Khan has paid Rs.45,000 plus Rs.6,300 to State Life Insurance Corporation.

an advantage over the others, then the question lies within the scope of the administration proceedings. Imtiaz Ali Khan's challenge to the estate of Fatehyab Ali Khan will not disturb the inter se position of the legal heirs/sharers of Fatehyab Ali Khan. Imtiaz Ali Khan's challenge raised in Dr. Masuma's Administration Petition impacts all the legal heirs equally. Therefore, Imtiaz Ali Khan's challenge on this score fails in the administration petition. Imtiaz Ali Khan's plea that his uncle, i.e. Fatehyab Ali Khan, was a benamidar and his father, Mumtaz Ali Khan, was the real owner of the Subject Property, is to be determined by means of separate proceedings, if so desired, against all the legal heirs of Fatehyab Ali Khan.

11. Imtiaz Ali Khan's contentions cannot be addressed within the framework of the administration petition. Even if there are allegations of benami ownership, allowing Imtiaz Ali Khan to file a Written Statement will allow him to "side-step" the procedure and "frog-leap" the vested rights of the legal heirs of Late Fatehyab Khan in their administration proceedings. Suffice it to say that an essential goal of administration proceedings is to ascertain the extent of the deceased individual's estate and the ratio within which it is devolved amongst the legal heirs. Simply agitating that there's a benamdar, does not translate automatically into impleading a stranger in an administration matter. Such challenges cannot be deemed sufficient to dismiss an administration petition or challenge an administration suit's validity. The Respondent/Objector may prove his claim before the proper forum subject to all just exceptions.

12. In view of the above discussion, observations of Ghazala Zakir's case, including applying its principles, propositions and tests to the facts in hand, and for the reasons discussed in this Judgment, the appeal is allowed in terms of this Judgment. The Nazir is directed to ascertain, following the Order dated 08.09.1979, the status of Ex. No.80/1976 filed against the Judgment-Debtors for recovery of the balance amount of interest for the period commencing from

01.09.1976; the current status of State Life Insurance Corporation Ex. No.119/1980 filed against Judgment-Debtor No.2 (Fatehyab Ali Khan); and to obtain information from the Custodian of Record regarding the chain of title of the Subject Property, from the date of filing of Suit No.378/1969 till present. Nazir should complete the exercise within four (4) weeks from the announcement of this Judgment and place a Report of his findings before the learned Single Judge for further consideration, leading to the grant letters of administration.

13. Another aspect of the matter needs to be addressed. How in so far as the title that is being drawn in favor of the legal heirs of Fatehyab Ali Khan and based on the events, stamp duty and other related charges arising out of such transfer, have remained unpaid. Neither the deceased nor the legal heirs can escape the liability of payment arising from such legal dues in connection with the transfer/transmission of the Subject Property from Wajihuddin to Fatehyab. Thus, the original title documents of the Subject Property cannot be released to the legal heirs until the requisite transfer fee, stamp duty, and any other charges in relation to the Agreement of Sale have been paid, which, even otherwise, apart from the reasons given hereinabove, following the succession of payments made by Fatehyab Ali Khan after 1976 (after the death of Mumtaz Ali Khan on 13.05.1976) were in the nature of an agreement coupled with interest under Sections 202 of the Contract Act, 1872.

14. While we hold that Imtiaz Ali Khan has no right to participate any further in the administration proceedings filed by the legal heirs of Fatehyab Ali Khan, this Judgment is without prejudice to his rights, which he is at liberty to agitate in separate proceedings. The contents of this Judgment on facts and its discussion thereof are confined to this Judgment alone and should not be taken as decided/settled, as the case may be. Additionally, they may not be read against any rights

accrued to either party, including a waiver of limitation in any future action.

The parties are left to bear their own costs.

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