

**Mst. HALIMA**  
**Versus**  
**MUHAMMAD KASSAM and others**  
**1999 M L D 2934**

Brief facts of the case are that the plaintiffs are the five daughters of the deceased Haji Hasham while the defendants are widow, one daughter, three sons and children of a pre deceased son of Haji Hasham. Thus, it would appear that battle lines are drawn between the daughters of deceased Haji Hasham (hereinafter referred to as the Deceased) on one side and the sons on the other with the addition of one sister and the widow. Basically the contention of the plaintiffs is that the deceased was an exceedingly wealthy man who owned almost an empire consisting of many business houses and real estate of great value. It is also propounded that the deceased was kind of a carpet-bagger from the pages of Herold Robins' book. He seems to have run the entire business single handedly and any partnerships or corporate entities that he condescended to create were in fact in name only and he himself' remained the altar ego of his so-called business empire without any constraints on his freedom to dispose of the assets thereof as he willed. It is further contended by the plaintiffs that for purposes of saving taxes the deceased indulged in the exercise of conferring Benami ownership of part of his assets upon his sons namely the defendants Nos. 1, 2 and 3 (three brothers) his wife, the remaining daughter and the children of his pre deceased son.

The contention of the plaintiffs is that when the shares in various 'companies' of this so-called empire of the deceased were transferred to these' individuals, of whom' plaintiff's special is reserved for the three others the defendants Nos. 1, 2 and 3, they were in fact minors or in their late teens and were students and consequently not in a position to own shares in the properties on their own. It was, the plaintiffs contend, a sham transfer that the deceased indulged in purely for purposes of evading and avoiding taxes. Consequently, the plaintiffs would have the Court believe, that it was entirely a Benami transaction and the deceased remained the real owner of those shares and thus after his death the shares held in the defendants' name ought to be regarded as part of the deceased's assets. The plaintiffs contend that the brothers and the other defendants are now claiming exclusive control over these business houses and refuse to include these in the estate of the deceased and are thereby depriving his five daughters, the plaintiffs in this suit, of their rightful share in the inheritance.

Through this application under Order 39, Rules 1 and 2, C P.C. the plaintiffs seek to restrain the defendants Nos. 1, 2, 3 and 4 from alienating, transferring or parting with possession of all shares held by them in Mehran Sugar Mills Limited, Mughal Tobacco Co. (Pvt) Ltd. and Usman Textile Mills limited pending the trial of the suit. In filing this

application the plaintiffs main motive is to prevent the brothers in particular, namely the defendants Nos. 1, 2 and 3, from creating third party interest with respect to their shares in these companies described above as they fear that since the trial would take considerable time, the brothers would certainly sell or alienate or transfer their shares and thus, the plaintiff sisters would have no remedy left.

On the other hand the defendant brothers have filed detailed counter affidavit and also written statement and have maintained that the shares they own in the 'three companies, the subject matter of this application were obtained either through their own resources or through funds made available to them by gifts from their father or their aunts or uncles. They also contest plaintiff's contention that the entire assets described by the plaintiffs to plaintiff were in fact the sole properties Of the deceased and that all legal heirs stand to inherit these.

In fact the brothers have already made the offer to the plaintiff sisters to divide the assets of the deceased, which were in his name, between all the legal heirs including the plaintiff sisters in accordance with the Shariat Law of inheritance.

A perusal of the pleadings and the affidavits counter-affidavits and Re-Joinders would show that these are replete with allegations and counter-allegations. While the plaintiff sisters are claiming inheritance in respect of everything or anything that was owned by their family the defendant brothers are saying that the sisters are only entitled to what actually stood in the name of their father. It is obvious that it is not possible for me at this interlocutory stage to decide whether the assets of the deceased described in the plaint were wholly owned by the deceased or not. This would require detailed evidence. but before any evidence is led in order to decide this application the question that has to be addressed is whether it is possible in law and indeed expedient in equity to go behind the estate left by the deceased to determine as to whether he was in fact the owner of all those assets and whether the brothers are only the Benami owners of the properties that they claim to be the exclusive owners of.

It is true that in our social milieu and in our culture it is not unusual for female children to be deprived of their share in the property of their father, not for any mala fide motive but for motive for filial love is essentially altruistic, of perpetuation of their dynasty and keeping their properties in their own line. This 'is resorted to even though the law of inheritance in Islam is exceedingly strict and the shares of male and female children are well-defined.

The inequality between the shares of male and female children in Islamic Law of Inheritance, as it is being practised in an essentially male dominated society of ours, is by no means a declaration of a female's inferiority in status and thereby lending sanction to such despicable practise as depriving of females of their right of inheritance. Indeed the provisions regarding a female child is being entitled to half the share of the male child is being subjected to wrong interpretation by attributing immutability to it and is being perpetuated only because of male chauvinistic attitudes that pervade our

society. Our religion by giving half a share to females only lays down the lowest limit and not the highest. Seemingly it would be possible for an Islamic State, through exercise of Ijtihad, to increase the female's share. At least in one Muslim country i.e. Turkey male and female children have equal rights of inheritance. It is paradox of our times that because Islam has given full rights to a woman over her property as enshrined in Married Women's Property Act, 1874 (Act No.III of 1874), ironically enforced in British India by non - Muslim colonial rules, that such deplorable practices as aforesaid have arisen with regard to deprivation of the women of the shares that they are rightfully entitled to.

Islam, of course does permit a person to give away his property to any one during his life time but this has to be done through the instrument of gift which has strict coordinates, the most important of which being "delivery" to the Donee that entails divestation of all rights of the Donor. Most entrepreneurs and heads of business houses in our society are wary of following this course to spread their tax liability because of its obvious pitfalls. It is not unusual for a recalcitrant son egged one by an ambitious spouse to claim de facto ownership of the property along with the de jure ownership. This obvious drawback in the process of gifting of property gave rise to the concept of Benami transaction. In such a transaction the real owner of the property keeps all documents of title to the property in his custody but has it legally transferred in the name of the favoured person, the Benami owner then continues to manage the property as if it is his own and often obtains a power of attorney from the Benami owner to avoid any difficulties in day to day management. Such Benami transactions are usually resorted to in case of children of the person concerned or wife of many years, because the real owner wished to leave the property to them in any case after his death. If such Benami distribution of the Real Owner's assets during his life time is resorted to fairly and justify in accordance with the shares that the children stand to inherit after his death, then there is no difficulty but if it is not, then those that have been disinherited in the process would obviously have a grievance, as allegedly is the case in this matter before me.

There is no doubt that ethically and morally benami ownership cannot be justified because it is invariably resorted to for dishonest, if not illegal motives but the law, as it has developed in Pakistan, as by now come to accept Benami ownership of properties. However, there are certain qualifications to such acceptance, that is to say that the real owner must prove that it is his funds that were used to purchase the property and that there should be intention on his part to maintain the property as a Benami property. The burden is, thus, on the Real owner to show this because, prima facie, the person in whose favour the document or instrument of title has been registered would be regarded as the owner. Proof of such intention and source of funds can be easily provided if the Real owner is alive but becomes difficult if not impossible, after his death. Does it mean then that such difficulty should result in the denial of an opportunity to the allegedly deprived legal heirs of making the necessary enquiry and obtaining the necessary proofs? It is obvious that such difficulty in obtaining proofs should not be set up as an argument for the acceptance of fait accompli by those who regard themselves

as deprived. Death cannot right a "Wrong". Evil that men do lives after them' is an age old saying. There is a perpetual quality to a 'wrong', an infiniteness that transcends boundaries or generations. Even scriptures of all revealed religions have imparted immortality to 'first sin' or the first wrong' committed by man by defying it in the shape of 'Satan' or Ablis' that lives to haunt us across time and space. A wrong, thus, can be investigated and remedied howsoever far into time or distance it may reach, be it a wrong rooted in deprivation or even acquisition of a property, the only limitation being that, of necessity, it ought to be a corporeal wrong, for incorporeal wrongs, such as emotional excesses or deprivation die with the propositus.

The plaintiffs in this suit, therefore, have a right to investigate the alleged wrong done to them by their father through depriving them of their inheritance and if proved, to have it remedied. Thus, a detailed enquiry must ensue into the circumstances in which the shares in the three companies mentioned in this application were transferred to the defendants at the time of trial through leading of evidence. However, the question that is posed before me in this application is whether plaintiffs are entitled to an injunction restraining them from transferring or alienating these shares. Here there is a clash between two contending rights. The plaintiff's right to investigate and to seek remedy is rooted in immutable principles of morality. But the courses of morality and law, though often divergent, occasionally do converge but seldom merge. Thus such a right that plaintiffs claim is inchoate and will become choate only upon proofs being provided of the Benami transactions of their father during his lifetime. To this extent this right, as of now is imperfect. On the other hand the right of the defendants to enjoy and do what they will with what is theirs is a right that has already been crystallised and choate and is a fundamental right guaranteed to them by the Constitution of Pakistan. It is a right then that is perfect and hence superior to the right of defendants at this point of time. Prima facie the shares that the defendants own are theirs and the death of the alleged true owner of these has covered up, though not obliterated, the tracks of any irregularity that may have been committed by him during his lifetime. The plaintiffs themselves have not brought anything definite on record to show that any irregularity was in fact committed. It is also not the plaintiffs' case that the shares were transferred on the death bed of the deceased. In fact the shares were transferred almost two to three decades before his death. Nor has the plaintiffs' mother and the deceased's widow, who ought to have known about such Benami transactions, supported the plaintiffs in their contention. Indeed a perusal of the plaintiffs' pleadings would show that there is more a consciousness on part of the plaintiffs of a perceived deprivation rather than existence of an actual or proven wrong.

Can an injunction issue on the basis of a perceived wrong when it is yet to be established whether such wrong is in itself actionable or not? I think not. No prima facie case has thus been made out by the plaintiffs nor does balance of inconvenience lie in their favour, in fact it lies in favour of Defendants who are prima facie the owners of their shares. The loss that the plaintiffs claim they will suffer, if the injunction is not granted is also not irreparable because if they finally succeed in the suit they can claim their share

from the defendants as rights accruing from inheritances are perpetual in nature. I, therefore, find no merit in this application and it is accordingly dismissed.

However, in order to protect the interests of the plaintiffs in the event of their succeeding in the suit, I direct that the defendants will file in Court within one month from the date of this order a statement of the shares that they claim ownership of in the two listed companies namely Mehran Sugar Mills Limited and Usman Textile Mills Limited alongwith their prices quoted on the stock exchange on the day of death of the deceased Haji Hasham duly certified by the Auditors of the said companies. In so far as Mughal Tobacco Company (Pvt.) Limited is concerned, the Official Assignee is appointed as a Commissioner to prepare an inventory of all its assets alongwith his assessment of market value of these and submit his reference in this regard within one month. The inventory is to be prepared after serving notices on the counsel of parties or the parties themselves if they are not represented by the counsels.

The fees of the Official Assignee are fixed at Rs.10,000 to be shared equally by plaintiffs and defendants. If an inventory of the assets of this company has already been prepared in some other suit pending between parties, a copy of such inventory along with assessment of the value of such assets by the Official Assignee is to be placed in this file by the Official Assignee and in such an event the fees of Official Assignee will be Rs.5,000 to be shared equally between plaintiffs and defendants. Finally in order to preserve the shares and the assets till time for filing of an appeal from this order expires, I direct that the defendants will not sell, transfer, or alienate their-shares in Mehran Sugar Mills Limited, Usman Textile Mills Limited and Mughal Tobacco Company (Pvt.) Limited and will not create any third party interest in the assets of Mughal Tobacco Company (Pvt.) Limited till expiry of 30 days from the date of this order.

Q.M.H./MAX./H-81/K  
injunction refused

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