

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Ex. No.15 / 2009

Date

Order with signature of Judge

Present: Mr. Justice Nazar Akbar

Decree Holder : Mst. Shahida Rani,
since deceased
through her Legal Heir
Mst. Sidra Ijaz
Through Mr.Mehmood A. H. Baloch,
advocate.

Judgment Debtor : Muhammad Chuttal Khan
Through Mr. Wasif Riaz, advocate.

Date of hearing : 21.10.2016

Decided on : 01.11.2016

1. For hearing of CMA No.362/2015
2. For hearing of CMA No.37/2015
3. For hearing of CMA No.320/2015
4. For hearing of CMA No.265/2015
5. For hearing of objections of J.D on Nazir's report dated **16.9.2015.**
6. For hearing of objections of J.D on Nazir's report dated **10.10.2015.**

ORDER

Nazar Akbar.J.- By this order I intend to dispose of CMA No.320/2015. The applicant Mst. Sidra Ejaz after taking over possession of Apartment No.A-3/F Central Point building Phase-I DHA Karachi, (the suit flat) through the Nazir of this Court as reported by Nazir in his report dated **10.10.2015** has now filed this complexed application (CMA No.320/2015). The J.D has filed objection to the Nazir report and handing over possession of the suit flat to the applicant. The applicant through the instant complexed application has prayed for various relief(s) which can be deciphered as follows:-

- i. Payment of mense profit amount to Rs.36,40,000/- to her.

- ii. Damages of Rs.10,00,000/- and cost of suit Rs.1524/- and additional amount of Rs.28,000/- to be paid to the Nazir for appointment of security guard such total amount come to Rs.4,68,024/-.
- iii. She has also prayed encashment of behbood certificate deposited by the decree holder with the Nazir of this Court in terms of certain order in High Court Appeal and to be paid to her alongwith profit accrued thereon.
- iv. She also claims damages caused to the article of Plaintiff as mentioned in para-5 of the Nazir report and value of missing articles which she will calculate subsequently.

The J.D has filed counter affidavit to this application in which he has challenged status of the applicant as legal representative of deceased D.H. He alleged that she is adopted daughter of the deceased Shahida Rani. The applicant has relied on her certificate of secondary school examinations and also alleged that CNIC issued by NADRA is manipulated or fraudulently obtained. The J.D has also objected to the handing over possession of the suit property to said Sidra by the Nazir for which he has filed separate objections which are also required to be decided by this Court.

The counsel for Mst. Sidra has not filed reply to the objections filed by J.D to the two Nazir reports. However, in para-7 of rejoinder affidavit she has given sweeping statement that everything has been done by the Nazir in accordance with law. In her affidavit-in-rejoinder, she has averred that she is daughter of D.H from her first husband namely Rana Muhammad Ejaz. Her counsel has contended that she has been shown legal heir of the D.H in High Court Appeal

and she was brought on record in this execution as legal heir of the deceased Decree Holder by an order dated **19.9.2013** therefore, such objection cannot be considered at this stage. The order on her CMA No.205/2013 & 206/2013 to bring her on record is reproduced as under:-

1. For hearing of CMA No.205/2013.
2. For hearing of CMA No.206/2013.

19.9.2013

Mr. Mehmood A. Baloch, Advocate for D.H.

1&2) Notice issued to the Judgment Debtor, according to Bailiff's report dated 18.6.2013, returned duly served upon him. The J.D was also present before this Court on 24.06.2013. On 03.07.2013 Mr. Abdul Hakeem, who was holding brief for Mr. Abdul Wahab Baloch, Advocate for the J.D, appeared before this Court. Despite such facts nobody is in attendance on behalf of the J.D. The JD preferred High Court Appeals No.114/2009 and 115/2009, impleading the Legal Heirs of D.H as one of the respondents, which were dismissed by a Division Bench of this Court vide order dated 26.04.2013. Legal heirs of the decree holder was brought on record in both the above referred appeals. On 28.02.2013 amended title was filed by the appellant/the present judgment debtor in those appeals. No reply to any of the listed application has been filed by the JD as yet. Hence there is no impediment to grant both the applications. Legal heir of the decree holder is brought on record. In the first instance, immoveable properties of the JD be attached by the Nazir of this Court.

Adjourned to 07.10.2013

Sd-
Judge

The applicant has mainly relied on the fact that her name was mentioned in HCA as legal heir. She has, however, not offered any reply to the allegation on oath that she is adopted daughter of the D.H and J.D (C. K. Chachar) as name of J.D is shown as her father in the school record and that NADRA has issued CNIC in which she has been shown daughter of Rana Muhammad Ejaz. These two documents are also on record and I have gone through the same and both gives conflicting information about the parents of the applicant.

Mst. Sidra Ejaz in her rejoinder affidavit or even in earlier pleadings have not offered any comment on her secondary school certificate carrying different name of her father.

The above controversy is in the nature of a dispute which is covered by **Section 47(3) CPC** for determination by the executing court by application of a conscious mind. Section 47(3) CPC is reproduced below:-

47. Question to be determined by the Court executing decree.

- (1).
(2).

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purpose of this section, be determined by the Court.

This issue cannot be considered as decided by default in a collateral proceeding on an application under **Order XXII Rule 2 CPC**. The orders on the said application of Mst. Sidra reproduced above does not show that this issue was examined by the Court in the said order. The said order dated 19.9.2013 indicates two things which are very obvious and need to be taken care of by this Court for proper administration of justice without compromising the law on the subject of inheritance in Islam to claim benefit of the decree by someone on the death of Decree Holder.

Firstly; the order dated **19.9.2013** was an exparte order and the J.D appears to be victim of the counsel he chose to engage one after the other. In this context last para of the order in High Court Appeal No.114/2009 is worthy of its reproduction here as under:-

Let a copy of this judgment be sent to the Chairman Sindh Bar Council for initiating an inquiry against Mr. Ejaz Ali Mangi Advocate and for taking action against him in accordance with law.

Same is the position of the lawyers engaged by the J.D in this execution proceeding. They never showed any sense of responsibility and let everything in Court go in default against the J.D. The Court order sheet right from day one suggests that J.D was not properly represented. On **3.7.2013** Mr. Abdul Hakeem held brief for Mr. Abdul Wahab Baloch for J.D then again on 29.8.2013 and **19.9.2013** none was present when on last mentioned date the Court passed the afore quoted order allowing the applicant to be impleaded as legal heir of D.H. Then again none was present on 25.8.2014. Mr. Saadat Hussain Khan, advocate on **24.9.2014** filed power on behalf of J.D but he also never turned up except on **23.10.2014** when he filed applications bearing CMA Nos.327 & 328 of 2014 but avoided to argue on 12.11.2014 when the case was fixed for orders on his applications and thereafter he remained absent on **18.12.2014** and on **22.1.2015** when on the last mention date the two applications filed by him were dismissed for non-prosecution. He then on **12.2.2015** filed an application for restoration of said applications with his own affidavit bearing CMA No.37/2015. However, he again did not turn up to press his CMA No.37/2015 and one Ms. Aysha Faryal, advocate held brief for him until adverse orders were passed on **19.8.2015** against J.D pending his CMA No.37/2015. Therefore, on **31.8.2015** he filed another application (CMA No.265/2015) for recalling the order dated **19.8.2015** and got a fixed date for hearing on **09.9.2015**. However, again he was absent and one Mst. Aisha, advocate held brief for him and in her presence a comprehensive order was passed on Nazir report dated **28.8.2015** pending his both CMA No.265/2015 and 37/2015. Mr. Saadat Hussain Khan, advocate representing J.D did nothing except filing applications, for recalling adverse orderly and therefore, he deserved to be treated like

Mr. Ejaz Ali Mangi, advocate about whom the Hon'ble Division Bench in High Court Appeal No.114/2009 has directed the Bar Council to take action in accordance with law. Let copy of this order also be sent to the Chairman Sindh Bar Council for initiating an inquiry and action be taken against **Mr. Saadat Hussain Khan**, advocate for his failure to discharge his duty as an advocate to protect interest of his client.

Secondly; the order of bringing Mst. Sidra Ejaz on record as legal heir was passed without considering the issues raised by the J.D in his objection about her status as legal representative of deceased Mst.Shahida Rani (D.H). It was an order on an application under **Order XXII Rule 2 CPC** and the Court has neither raised the issue touching the controversy needed to be decided under **Section 47 CPC** nor passed any order. Therefore neither the order dated 19.9.2013 was a decision of the Court on this issue nor the said order shall operate as resjudicata for deciding this issue. Court is under its statutory obligation to decide all the issues raised by a party, therefore even in the present application filed by the applicant (Sidra Ejaz) under **Section 151 CPC**, this Court has to give its verdict on this issue. The inherent powers of Civil Courts under **Section 151 CPC** are unlimited to pass orders to meet the ***“ends of justice or prevents abuse of the process of Court”***. Therefore, both to meet the “ends of justice” and to “prevent the abuse of the process of Court” caused by the counsel on account of his repeated absence from Court on mentioned dates I am under an obligation to pass an order on the controversy raised by J.D in his counter affidavit regarding the status of the applicant as representative of the deceased D.H.

In reply to the objections, the applicant in her affidavit-in-rejoinder has expressed her surprise and stated as follow:-

“more so it is very surprising that the same J.D had preferred HCA Nos.114 & 115 of 2009, wherein he himself made me party and filed amended title of memo of appeal”.

She has given an impression as if the J.D / appellant has brought her on record at his will. I have called record of High Court Appeal and the two suits and found that a wrong impression has been given. In High Court Appeal, Mst. Sidra Ejaz herself has filed an application under **Order XXII Rule 2 CPC** bearing CMA No.2140/2012 which is identical to CMA No.206/2013 filed subsequently in these proceeding. The J.D / appellant in High Court Appeal has filed objections to the application to bring Mst. Sidra Ejaz on record. The said application was allowed in the absence of counsel of the appellant/J.D in the same manner in which her CMA for impleading her in this execution was allowed on **19.9.2013**.

The propriety demanded that Mst. Sidra Ejaz in her application under **Order XXII Rule 2 CPC** should have disclosed details of her maternal uncles and aunties and brought all of them on record alongwith herself. To the contrary, on perusal of record I have noticed that when she filed such an application both before the Division Bench in HCA No.114/2009 and also in these proceedings, she has suppressed the names of other legal heirs of the deceased D.H. She seems to have purposely suppressed details of other legal heirs and the Court overwhelmed by the repeated absence of the counsel for J.D not only ignored his objections but also did not appreciate the obvious legal position that under Islamic Law of inheritance she alone could not be the legal heir of the deceased. This Court cannot overlook the mandate of Divine Law of inheritance which ordains that

sole daughter of a Muslim man / woman cannot inherit entire property on his / her death. Therefore to check the list of presumptive legal heir, if any, was filed by the deceased D.H. I called files of suit No. 243/2000 and cross suit No. 1666/2000 filed against her by J.D. She has not filed list of legal representative required under **Order VII Rule 26 CPC** with her plaint in suit No.243/2016 but same was available in the other suit with her written statement. In the said list, she has mentioned Ms. Sidra and two of her brothers as her legal heirs and in her evidence, as pointed out by learned counsel for the J.D, she has named three brothers. It is pertinent to mention her that in her list of presumptive legal heir, the deceased has nominated her brother, **Shaheen Hussain Soomro** to inform the Court in the event of her death and pursue the case. Therefore, the record also clearly suggest that the applicant was not the sole legal representative of the J.D and she has purposely not disclosed names of other legal heirs. Her such conduct strongly points towards the need to determine her status as legal representative of the J.D in terms of **Section 47(3) CPC**. Consequently, as the first step, the office is directed to amend the title of this execution application and implead the following persons as Decree Holders namely.

- i. Shaheen Hussain Soomro,
- ii. Shahid Hussain Smmor,
- iii. Saleem Hussain Soomro

and serve them with notices/summons at the address provided by deceased herself, that is, **House No.56/2, Kashmir Cottage 5th Commercial Street Phase-V, DHA, Karachi**. In any case, even if it is established that Mst. Sidra Ejaz is legal representative of the deceased D.H even then she would not be entitled to inherit the entire benefits under the decree.

In view of the above facts and law, Mst. Sidra Ejaz is directed to clear her status as legal representative of deceased Decree Holder by cogent evidence. Since she has herself filed an application claiming to be legal representatives of deceased D.H., the initial burden is, therefore, on her shoulders. She is directed to submit original metric certificate to MIT-II for verification from the Board of Secondary Education. The NADRA Authorities are also directed to produce complete record of her original CNIC which was issued prior to the smart card issued to her. The J.D is also free to file any document on record to show that the applicant (Mst.Sidra Ejaz) was an adopted daughter of the deceased.

Now I will dispose of objections of J.D on Nazir reports. The D.H has reply to these objections. The J.D has raised number of objections on the Nazir reports which, amongst other, include that the Nazir without notices had reached the suit flat same day (9.9.2015) with police and the Nazir has forced the J.D to remove moveable articles from the suit property, though there was no such order of the Court. I have gone through the Nazir reports dated **28.8.2015**, **16.9.2015** and **10.10.2015** and the orders passed by this Court on different dates. In this context, it is pertinent to mention that once Nazir of this Court files a Reference pursuant to a particular order, and the Reference is disposed of by another order, the earlier order comes to an end or merges in the fresh order to be complied with, if any, directions are given to the Nazir in the fresh order. The first Reference of Nazir dated **28.8.2015** was pursuant to the order dated **19.8.2015** and in para-4 of the said reference the Nazir has prayed that :-

“4 Based on above circumstances, the matter is referred before the Hon’ble Court for kind orders of break

opening the lock OR any other order deem appropriate”.

On the above Reference, the Court on **9.9.2015** deemed it appropriate to pass the following orders for the Nazir;

“Nazir may break open the lock in presence of police officials and proper inventory of the articles lying inside the premises be prepared.....

.....
“For the time being Nazir shall retain possession with him under his lock and key and shall also post his security guard / chowkidar at the expense of Decree Holder, which shall be adjusted subsequently, this arrangement is only for one month. Nazir submit report within one week”.

By order dated **9.9.2015** the mandate of Nazir was reduced to prepare an inventory and retain the possession under his lock and key with himself and submit report within one week. The Nazir had no further authority to force the J.D to remove articles from the suit flat at the strength of police. Police was allowed to accompany him only to see the breaking of locks to open the premises, if found locked, be done smoothly.

Dy. Nazir Accounts on **16.9.2015**, that is, within one week filed Reference pursuant to order dated **9.9.2015** which was taken on record on **30.9.2015**. However, on **30.9.2015** learned counsel for the D.H informed the Court that the case is fixed before Nazir on **2.10.2015** for preparation of inventory. It was wrong statement as the inventory was already attached with the Nazir Report dated **16.9.2015** and the report did not mention that case is again fixed before the Nazir on **2.10.2015** for anything to be done by him. However, the Court believed the statement of counsel for D.H as correct and ordered that the Nazir is allowed to prepare inventory and file the same in Court. Again in the order dated **30.9.2015** no further directions were given to the Nazir to comply with any previous order before preparing the inventory and filing the same in Court. Copy of

order dated **30.9.2015** was issued to the Nazir. However, instead of informing the Court that the order dated **9.9.2015** was complied with in letter and spirit and even inventory had already been prepared and filed in Court, the Nazir without referring to the order dated **30.9.2015** at his own filed another Reference dated 10.10.2015 and disclosed that on **9.10.2015** he released the guards and handed over possession of suit flat to Mst. Sidra. It was defiance of the order dated 9.9.2015 to prepare inventory and retain possession of the suit flat. In his report dated 10.10.2015, the Nazir has not even referred to the orders dated **30.9.2015**. He has also not mentioned in the report that on **2.10.2015** the case was fixed before him as was stated by the counsel for D.H in Court on 30.9.2015. I must mention here that the misstatement of the counsel for D.H namely **Mr. Mehmood A. H. Baloch**, in Court on **30.9.2015** that case is fixed before the Nazir on **2.10.2016** for preparation of inventory was not without purpose. It cannot be believed that Deputy Nazir Accounts was not aware of what he was doing. But for this kind of his smartness, the Deputy Nazir Accounts, **Mr. Asim Jamil Zubedi** is already under suspension and facing inquiry, therefore, I do not feel it appropriate to pass any fresh order of inquiry against him. However, a copy of this order may be placed before the Hon'ble Inquiry Officer for perusal.

In view of the above facts on record in my humble view, subsequent to the order dated **9.9.2015** whereby the Nazir was ordered to make an inventory and take over possession and retain, the action of the Deputy Nazir Accounts namely **Mr. Asim Jamil Zubedi**, to force the J.D to remove articles from the suit flat and also instead of retaining the possession handing over to Mst. Sidra was sheer misuse of his authority as Court official. After the order dated 9.9.2015 on the first reference of Nazir dated 28.8.2015, the Nazir

was fully aware that now he has to retain possession of suit flat. This is where the office of Nazir of the Courts contribute badly in lowering the reputation and brining bad name to the Courts.

In view of the above facts and circumstances, it is clear that neither the Deputy Nazir Account was directed to give up possession obtained by him by order dated **9.9.2015**, nor the applicant (Mst. Sidra) was entitled to take over possession of the suit flat. Consequently, Nazir reports are disposed in the following terms:-

- i. The Nazir should immediately recover / take possession of property bearing Flat No.A-3/F, Central Point Building, Phase-I, D.H. Karachi from Mst. Sidra and seal the said flat pending the actual legal heirs and claimants namely brothers and sisters of deceased Decree Holder come forward to claim benefit of decree.
- ii. In any case Mst. Sidra Ejaz would not be entitle to the possession of the suit flat since her share, subject to clearance of her status shall be limited according to Mohammeden Law in the benefits of the decree.
- iii. Nazir should retake possession within one week and submit report.
- iv. Ms. Sidra Ejaz should not be allowed to remove or take away anything from the suit flat mentioned in the inventory filed by the Nazir with his report dated 16.9.2015.

In view of the above discussion on facts, and law CMA No.320/2015 and objections on Nazir's reports are disposed of. The above order has rendered the other applications infructuous.

JUDGE