

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

SMA No.174/2016

Date	Order with signature of Judge
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For Hearing of Main Petition

December 22, 2016

Mr. Ghulam Abbas Pishori, Advocate, for the Petitioner

This petition under section 276 of the Succession Act, 1925 has been filed for Probate of the Will of the deceased, Fatima Mansuri, executed at Karachi on 16.01.2010 in the presence of four persons, of whom two, namely Mr. Sikandar Ghulamali and Mr. Qurban Ali A. Hussain, are specifically designated therein as Witnesses No.1 and 2 respectively.

It appears that the legatees under the Will, are the four children of the testator, namely her son, Shariq Mansuri, and her daughters, Summera Mansuri, Samina Mansuri and Ghazala Mansuri, to whom she has bequeathed her entire estate to be divided between them in equal shares. Furthermore, vide a codicil/addendum executed on 25.10.2010 the testator had named her daughter, Ghazala, and her sister, Shireen Rehmatalluh, as the executors of her Will. In this context it merits mention that while the capacity of a Muslim to make a bequest is circumscribed by the principles of Islamic law, as per which a bequest can be only to the extent of a third of the testator's property, however, in a case such as this, where the heirs consent to it, a bequest of more than one-third of the property which by itself is not valid, would become valid.

Furthermore, whilst, as has been held in a Judgment of the Baluchistan High Court, reported at 1993 CLC 1552, with reliance on an earlier judgment of this Court, reported at 1983 CLC, matters of Muslim inheritance are governed by personal law in view of the West Pakistan Muslim Personal Law (Shariat) Application Act, 1962, and thus, strictly speaking probate of a will executed by a Muslim is not required due to the consequent non-applicability of Sections 211 and 213 of the Succession Act to a will executed by a Muslim, that is not to say that probate cannot be sought, or granted by the Court.

Proceeding further on this basis, I have noted that the present Petition has been filed by the above-named executors, and in support thereof a sworn Affidavit of each of the three other legates/legal heirs has been submitted, wherein each of them has affirmed the execution of the Will as well as the appointment of the executors, and categorically stated that he/she has no objection to the grant of probate of the Will in terms of this Petition. Furthermore, Shariq Mansuri, Summera Mansuri and the Petitioner No.1, Ghazala Mansuri, have each appointed separate attorneys to represent them before this Court for the purposes of the present petition in terms of Powers of Attorney executed in that regard, which, as per the endorsement on the face of the photocopies on the Court file, have been seen and returned by the Deputy Registrar (O.S.).

The presence before the Court of Mr. Basit Alavi, attorney of the Petitioner No.1, as well as Mr. Qurban Ali, attorney of Shariq Mansuri, and Mr. Ishrat Alavi, attorney of Summera Mansuri, was duly noted, as was that of Mrs. Nilofar Ghulamali, who along with Mr. Qurban Ali (Witness No.2), has filed a sworn Affidavit confirming execution of the will by the testator, Fatima Mansuri. It has been submitted by Mrs. Ghulamali in her affidavit that her husband, who had set his hand to the will as Witness No.1 is not keeping good health and is confined to bed. As such he is not in a position to sign and swear an affidavit and attend the proceedings before this Court. It has been further submitted by Mrs. Ghulamali in her affidavit that she was present at the time of execution of the

Will by the testator, and her presence has been specifically mentioned therein, and that she has accordingly sworn the Affidavit in the capacity of a witness. In view of the facts narrated in her Affidavit viewed in juxtaposition with relevant narration in the Will, her Affidavit is found to be valid and is accepted in support of the Petition.

As regards the witnesses to the Will, I have noted that in terms of the Order passed on 25.11.2016, learned counsel for the Petitioner was put on notice as to Section 281 of the Succession Act, 1925, since the Petition had not been verified by one witness to the will, as prescribed therein. The said section states as follows:

281. **Verification of petition for probate by one witness-to will.** Where the application is for probate, the petition shall also be verified by at least one of the witnesses to the will (when procurable) in the manner or to the effect following namely:-

"I (C.D), one of the witnesses to the last will and testament of the testator mentioned in the above petition, declare that I was present and saw the said testator affix his signature (or make) thereto (to that the said testator acknowledge the writing annexed to the above petition to be his last will and testament in my presence).

Having examined, the aforesaid provision, I am of the view that this rule of procedure is not of any particular importance in a non-contentious case such as the one at hand, when the existence and content of the Will is uncontested and the entire matter is being proceeded consensually with the concurrence of the executors and legatees/heirs. I am fortified in this view by the classic statement of law laid down by the Honourable Supreme Court in *Imtiaz Ahmad v. Ghulam Ali etc.*, (PLD 1963 SC 382), as follows:-

"...the proper place of procedure in any system of administration of justice is to help and not to thwart the grant to the people of their rights. All technicalities. have to be avoided unless it be essential to comply with them on grounds of public policy. Any system which by giving effect to the form and not to the substance defeats substantive rights is defective to that extent. The ideal must always be a system that gives to every person what is his."

Furthermore, in the context of the verification of an election petition in terms of Section 55(3) of the Representation of the People Act, which stipulates that "Every election petition and every schedule or annex to that petition shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (Act V of 1908), for the verification of pleadings.", the Honourable Supreme Court, in the case of Zaffar Abbas v. Hassan Murtaza, reported at PLD 2005 SC 600, considered the question of whether a separate affidavit could be treated as a verification complying with the aforementioned provision. It was noted by the Honourable Supreme Court that "the controversy now boils down to the only point as to whether the verification should be at the end of election petition on the same page or any verification given on a separate page would meet the requirement though in the shape of an affidavit." After framing the aforesaid question, in the given circumstances the learned Bench came to the conclusion that:

"there is no material difference between a verification on oath and a verification through an affidavit. An affidavit is a sworn statement in writing while a verification is a confirmation in law by oath in order to establish the truth, accuracy and reality of a statement of fact. Thus, there is practically, no difference whatsoever by verifying a statement on oath and by verifying the same statement on affidavit. It also loses significance when such affidavit on oath is attested by the authority competent to administer oath. The objection as to why such verification is on a separate page or leaf, is rather, too immature to be taken notice of and sustained."

Analogously, it appears that in the present case substantial compliance has been made in the form of the two sworn supporting affidavits filed by the aforementioned witnesses at the time of presentation of the Petition, as well as in the shape of a further affidavit filed subsequent to the Order of 25.11.2016 one of the witnesses, Mr. Qurban Ali, wherein he has reiterated and reaffirmed his having witnessed the execution of the Will and stating his readiness to put his signature to the Petition if permission be given on the date of hearing.

In support of the Petition, the Petitioners have also filed (a) the original Certification of Death issued on 16.05.2014 by the Department of Health and Senior Services of the State of Missouri, USA, showing that the testator died in St. Louis County on 10.05.2014, and (b) photocopies of the documents in respect of the properties and credits which the Testator died possessed of or entitled to at the time of her demise, as specified in the Schedule of Assets filed as Annexure "C" to the Petition. These facts have been duly confirmed by the Deputy Registrar (O.S.) in his report, who in terms thereof has also confirmed that publication of the main petition was effected in the Daily Jang, Karachi, on 15.08.2016, and that no objection has been forthcoming from any quarter. As such, it appears that the matter is non-contentious and all formalities have been completed.

As all the necessary legal requirements have been fulfilled, and there appears to be no impediment to the grant of this petition, the same is therefore allowed. Let a Letter of Probate be issued to the Petitioners accordingly, subject to furnishing/deposit of such surety/security and other compliances as may be required as per Rules.

JUDGE