

IN THE HIGH COURT OF SINDH KARACHI

Suit No. 983 of 2017

[Mrs. Hina Mumtaz Soomro & others v. Abdul Sami Soomro & others]

Date of hearing : 23.04.2018

Date of Decision : 03.07.2018

Plaintiffs : Mrs. Hina Mumtaz Soomro and 4 others, through M/s Mukesh Kumar G. Karara & Mehfooz Yar Khan, Advocates.

Defendants : Abdul Sami Soomro and 2 others, through Mr. Nadir Khan Burdi, Advocate.

ORDER

ADNAN IQBAL CHAUDHRY J. -

1. The Deceased, Mr. Mohammad Afzal Soomro passed away at Karachi on 04-12-2015. The Deceased had married twice, first to the defendant No.4 (Zainab Khatoon) and then to the plaintiff No.1 (Hina Mumtaz). The plaintiffs 2 to 4 are children of the Deceased through the plaintiff No.1, while the defendants 1 to 3 are the children of the Deceased through the defendant No.4.

2. SMA No.72/2016 was filed by the plaintiff No.1 as widow of the Deceased for Letters of Administration and Succession Certificate for his estate. However, such petition became contentious when the defendants filed objections to the SMA contending *inter alia* that the defendant No.4 (Zainab Khatoon) too was the widow of the Deceased and that her omission from the list of legal heirs of the Deceased was *malafide*. The plaintiff No.1 had contended that the defendant No.4 had been divorced by the Deceased during his lifetime vide a Divorce Deed dated 15-4-2008 which was followed by Divorce Confirmation Certificate in 2010 and thus the defendant No.4 did not inherit from the Deceased. On the other hand, the defendant No.4 (one of the objectors to the SMA) denied that she had ever been divorced. The defendant No.4 averred that both the Divorce Deed and the Divorce Confirmation Certificate had been manipulated by the plaintiff No.1 inasmuch as the Deceased was living the plaintiff No.1, was a patient

of mental disorder and was mentally incapacitated from acting as such; that such mental incapacity of the Deceased had come on record in C.P. No. D-2957/2012, a petition for *habeas corpus* filed by the defendant No.2 for the production of the Deceased from the custody of the Petitioner, when both the Registrar of this Court and subsequently a Medical Board had examined the Deceased and confirmed his mental disorder; that when the defendant No.4 discovered the manipulated divorce documents, she made a representation to the concerned authority and thereafter the Union Council concerned cancelled the Divorce Confirmation Certificate on 20-03-2012. Given the said objections to the SMA, this Court had to convert the SMA to a civil suit, which was done vide order dated 03-03-2017.

3. The Deceased was a retired Chief Justice of the High Court of Sindh and was receiving pension as such at the time he passed away. After his demise and owing to this dispute, it is said that the pension payable to his next-of-kin is accumulating with the Accountant General Sindh, which pension is hereinafter referred as 'Family Pension'. It is the said Family Pension and the question who is entitled to receive the same after the Deceased that is in issue here.

4. The plaintiff No.1 has moved CMA No.691/2016 (before conversion to suit) and CMA No.11803/2017 (after conversion to suit) praying for an order for the release of the Family Pension of the Deceased exclusively to the plaintiff No.1 as widow of the Deceased. These applications are of course contested by the defendants but to the extent that the defendant No.4 too is the widow of the Deceased and is therefore entitled to receive her share in the Family Pension.

5. Learned counsels for both sides were one on the view that the Family Pension of the Deceased was not heritable property i.e. it did not constitute *tarka* of the Deceased, and that its distribution would be governed under the statute/rules that provide for such pension. This much had been settled by the Shariat Appellate Bench of the Supreme Court of Pakistan in the case of *Wafaqi Hakoomat-e-Pakistan v. Awamunnas (PLD 1991 SC 731)* wherein it was held that pension did not form part of *tarka* because on the death of the pensioner his entitlement thereto ceases, and if then the relevant statute/rule provides for pension to the deceased

pensioner's family, it is in the nature of a grant and payable only to the next-of-kin prescribed by the said statute/rules. However, learned counsels for both sides opined differently as to the applicable statute/rule that regulated payment of Family Pension to next-of-kin of the Deceased. Per Mr. Mukesh Kumar Karara and Mr. Mehfooz Yar Khan, Advocates for the plaintiffs, since the High Court Judges (Leave, Pension and Privileges) Order, 1997 did not discuss pension payable after the demise of the deceased Judge (i.e. Family Pension), the statute applicable was the West Pakistan Civil Services Pension Rules, 1963 which Rules when read with the Esta Code clarified that only the widow or widows and minor children of the Deceased would be entitled to Family Pension of the Deceased. On the other hand Mr. Nadir Khan Burdi, Advocate for the defendants contended that only the Fifth Schedule to the Constitution of the Islamic Republic of Pakistan, 1973 was applicable and under clause 4(a) thereof (applicable presently), only the widow or widows of the Deceased would be entitled to receive the Family Pension in equal share.

6. Article 205 of the Constitution of the Islamic Republic of Pakistan, 1973 states that remuneration and other terms and conditions of service of a Judge of the High Court shall be as provided in the Fifth Schedule. The relevant portion of the Fifth Schedule under the head of "The High Court" reads as follows:

"2. Every Judge of a High Court shall be entitled to such privileges and allowances, and to such rights in respect of leave of absence and pension, as may be determined by the President, and until so determined, to the privileges, allowances and rights to which, immediately before the commencing day, the Judges of the High Court were entitled.

3. The pension payable per mensem to a Judge of a High Court who retires after having put in not less than five years service as such Judge shall not be less or more than the amount specified in the table below, depending on the length of his service as Judge and total service, if any, in the service of Pakistan:

Provided that the President may, from time to time, raise the minimum or maximum amount of pension so specified:

Table

4. The widow of a Judge of the High Court shall be entitled to a pension at the following rates, namely :—

(a) if the Judge dies after retirement—50 per cent of the net pension payable to him; or

- (b) if the Judge dies after having rendered not less than five years' service as Judge and while still serving as such—50 per cent of the pension admissible to him at the minimum rate.
- 5. The pension shall be payable to the widow for life or, if she remarries, until her marriage.
- 6. If the widow dies, the pension shall be payable
 - (a) to the sons of the Judge who are less than twenty-one years of age, until they attain that age; and
 - (b) to the unmarried daughters of the Judge who are less than twenty-one years of age, until they attain that age or are married, whichever first occurs.”

7. In furtherance of Clause 2 of the Fifth Schedule to the Constitution of Islamic Republic of Pakistan, 1973 [reproduced above] the determination by the President of the pension and other entitlements of a Judge of the High Court is embodied in Presidential Order No.3 of 1997 titled “The High Court Judges (Leave, Pension and Privileges) Order, 1997”. The pension of a Chief Justice and Judge of a High Court on his retirement, resignation or removal is determined under Paragraph 15 read with Paragraph 14 of the said Order. Where a Judge of the High Court suffers injury or dies as a result of violence, that pension is determined under Paragraph 18 of the said Order which entitles him/her to “Extraordinary Pension” as applicable to an officer of the Federal Government under the Central Civil Services (Extraordinary Pension) Rules subject to the modification that references in those Rules of tables relating to injury, gratuities and pensions and family gratuities and pensions shall be construed as references to the corresponding tables in the First Schedule to the said Order.

8. Like most pension schemes, the Fifth Schedule of the Constitution of the Islamic Republic of Pakistan, 1973 and the High Court Judges (Leave, Pension and Privileges) Order, 1997 also contemplate payment of pension for two different scenarios; (a) to the Judge after his retirement, resignation or removal; and (b) to his next of kin after his demise (i.e. Family Pension). For the purposes of CMA No.691/2016 and CMA No.11803/2017, the case falls under scenario (b) where pension is payable after demise. Except where a Judge suffers injury or dies as a result of violence and becomes entitled to ‘Extraordinary Pension’ under Paragraph 18 of the High Court Judges (Leave, Pension and Privileges) Order, 1997, the said Order in my view is not relevant for determining who is entitled to receive pension on

the demise of a High Court Judge. For such determination, as is the case in hand where the Deceased passed away due to illness after retirement, it is only the Fifth Schedule to the Constitution of the Islamic Republic of Pakistan, 1973 that is relevant, and under Clause 5 thereof, since the widow(s) is/are alive and is/are not stated to have re-married, only she/they are entitled to receive the Family Pension of the Deceased and not any other legal heir.

9. This brings us to the prayer of CMA No.691/2016 and CMA No.11803/2017. Mr. Mukesh G. Karara, Advocate for the plaintiffs had at the outset candidly conceded that at this stage of this suit the plaintiff No.1 as widow of the Deceased cannot be released the entire Family Pension of the Deceased when the defendant No.4 was also claiming to be the other widow of the Deceased. Therefore, he prayed for an order for the release of half of the said Family Pension to the plaintiff No.1 whose status as widow of the Deceased was free from doubt. At the same time he sought an order restraining the release of the other half of the said Family Pension to the defendant No.4 on the ground that her status as widow of the Deceased was under dispute in these proceedings, and submitted that till such time that she proves by way of evidence the said status, as observed by this Court in the order dated 03-03-2017, she has no right to claim any share in the Family Pension of the Deceased. On the other hand Mr. Nadir Khan Burdi, Advocate for defendants contended that the burden to prove that the defendant No.4 was not the widow of the Deceased was on the plaintiffs and till such time they can prove so, the defendant No.4 should also be allowed to receive her half of the Family Pension of the Deceased. He further submitted that by way of an administrative order passed by the Chief Justice of the High Court of Sindh, the defendant No.4 is being sanctioned reimbursement of her medical bills as widow of the Deceased and thus she should also be entitled to receive her share in the Family Pension.

10. It will be seen that to dispute the status of the defendant No.4 as widow of the Deceased, the plaintiff No.1 relies on a Divorce Deed dated 15-04-2008 and a Divorce Confirmation Certificate of 2010. But to counter that, the defendant No.4 relies on documents which show that by the year 2012 the Deceased had become mentally incapacitated; that the notice

allegedly sent to the concerned Union Council under section 7 of the Muslim Family Laws Ordinance, 1961 for initiating proceedings for confirmation of divorce, was not signed by the Deceased but by his counsel, and was sent after 2 years of the Divorce Deed, making the both the Divorce Deed and the said notice controversial; that in any case, the Divorce Confirmation Certificate was subsequently cancelled by the issuing authority. Therefore, apart from a disputed Divorce Deed, which is yet to be proved, there is presently nothing else to question the status of the defendant No.4 as widow of the Deceased. In my view, in terms of Articles 118 and 119 of the Qanoon-e-Shahadat Order, 1984 the burden to prove the disputed Divorce Deed lies on the plaintiffs, and till such time they do so the defendant No.4 would be seriously prejudiced if her entitlement to the Family Pension of the Deceased is stayed. The balance of convenience is in her favor.

11. There is another reason for not holding the said Divorce Deed against the defendant No.4 for the time being: after the conversion of the SMA to a civil suit, no attempt has been made by the plaintiffs to amend the plaint to plead the Divorce Deed. True that this is a suit on conversion from an SMA, but the rules of pleadings set out in the CPC are fully applicable to it. Section 295 of the Succession Act, 1925 under which the conversion was made stipulates that on conversion "*.....the proceedings shall take, as nearly as may be, the form of a regular suit, according to the provision of the Code of Civil Procedure, 1908,*". Therefore, in my view, until the plaintiffs plead the Divorce Deed, there is no cause to hold it against the defendants. Reliance placed by the learned counsel for the plaintiff on the order dated 03-03-2017 to contend that no interlocutory order can now be passed for releasing any part of the Family Pension to the defendant No.4, is misplaced. It is manifest that the order dated 03-03-2017 does not deal with any interlocutory application and that the observation therein that the controversy requires evidence was made to justify the conversion of the SMA to a civil suit.

12. In view of the foregoing, I dispose of CMA No.691/2016 and CMA No.11803/2017 in the following terms:

(a) subject to final determination in this suit, both the plaintiff No.1 (Hina Mumtaz) and the defendant No.4 (Zainab Khatoon) are

entitled to receive the monthly Family Pension of the Deceased in equal share as widows of the Deceased in terms of Clause 5 of the Fifth Schedule to the Constitution of the Islamic Republic of Pakistan, 1973;

- (b) that in the event the plaintiff No.1 succeeds in proving that the defendant No.4 had been divorced by the Deceased, the plaintiff No.1 would be entitled to recover from the defendant No.4 the Family Pension received by her;
- (c) the Nazir of this Court is directed to communicate this order to the Accountant General Sindh for releasing the Family Pension of the Deceased in terms hereof.

13. Nazir's Report dated 16-04-2016:

Per the report, the Nazir has received the original death certificate of the Deceased from the Union Council 11, Kehkashan, Saddar Town Karachi, under cover of letter dated 6-4-2016. Such death certificate was not given by the Union Council to the legal heirs owing to competing applications for its release. The defendant No.2 (Irshad Ali Soomro), the son of the Deceased, has also disputed the mention of the plaintiff No.2 (Ali Arsalan, the other son of the Deceased) in the said death certificate under the head of "Information of Burial / Last rite by" on the ground that the last rites of the Deceased had been performed by him (the defendant No.2). Subject to the objections of the defendant No.2, the said death certificate and the Nazir's report dated 16-04-2016 are taken on record.

JUDGE