

Order Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

High Court Appeal No. 48 of 2012

Date	Order with signature of Judge
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Present :

Mr. Justice Irfan Saadat Khan
Mr. Justice Nadeem Akhtar

1. For hearing of CMA No.581/2012 (U/S 5 of Limitation Act) :
2. For hearing of CMA No.582/2012 (Exemption) :
3. For orders on office objection & reply of advocate as at 'A' :
4. For hearing of CMA No.583/2012 (Stay) :
5. For Katcha Peshi :

Appellants : Muhammad Shafat Khan and Muhammad Nasir Khan,
through M/S Mohammad Rashid and Asif Mubarak Ali
Advocates.

Respondents 1 to 3 : Mst. Inayat Bibi and others, through
Mr. Farhan Zia Abrar Advocate.

Respondents 4 to 7 : Called absent.

Date of hearing : 30.05.2014.

ORDER

NADEEM AKHTAR, J. – The appellants have impugned the order passed by a learned single Judge of this Court on 15.03.2012 in Suit No.247/2009 filed by respondents 1, 2 and 3 against the appellants and respondents 4 to 7 for administration, partition, accounts and permanent injunction, in respect of the properties and assets left by late Saadat Khan S/O Imran Khan, who was the real father and predecessor-in-interest of the parties.

2. On 15.03.2012, the matter came up before the learned single Judge, when the impugned order and a preliminary decree in terms of Order XX Rule 13 CPC were passed with the consent of the parties' counsel. For the sake of convenience and ready reference, the impugned order and preliminary decree, which have been impugned in this appeal, are reproduced here :

“Mr. Farhan Zia Abrar, Advocate plaintiffs a/w plaintiffs.

*Mr. Saeed Ahmed Awan, Advocate for defendant No. 1.
Mr. Muhammad Rasheed, Advocate for defendants No. 2 & 3.*

Parties to the proceedings and their Advocates agree for the following consent order :-

(1) Plaintiffs and defendants are the surviving legal heirs of deceased Saadat Khan s/o Imran Khan, who died at Karachi on 12.09.2006. They also submit that mother of the parties also died at Karachi on 12.11.2003.

(2) It is stated that House No.1124-A measuring 100 sq. yards, street No.45, Block-C, Jinnah Road, Sher Shah, Karachi is in the name of their father is constructed up to ground plus two storey and is in possession of defendants No.2 and 3.

(3) They also submits (!) that House No.1125, measuring 200 sq. yards, street No.45, Block-C, Jinnah Road, Sher Shah, Karachi is in the name of their mother. It has construction only up to ground floor and is in possession of defendants No.1, 2 and 3.

(4) They also submit that the third property left behind by their deceased parents is in the name of their mother bearing House No.1093-A measuring 120 sq. yards, street No.45, Block-C, Jinnah Road, Sher Shah, Karachi, is constructed up to ground plus two storey and is in the possession of tenants and defendants No.2 and 3 are collecting rent.

(5) Parties agrees (!) that all the above three properties mentioned in para No.3 of the plaint be put to public auction and once the bids are received, the parties to the proceedings be given an opportunity to match the highest bid. In the circumstances, it is ordered by consent that Nazir of this Court shall take steps for putting all the three properties to public auction and once the bid are received by the Nazir, he should provide an opportunity to the parties to the proceedings to match the highest bid and submit his report.

(6) With regard to the rent collected by the defendants No.2 and 3 in respect of property bearing No.1093-A, measuring 120 sq. yds, street No.45, Block-C, Jinnah Road, Sher Shah, Karachi, statement is to be filed by the defendants No.2 and 3 as to how much amount they have collected from different tenants after the death of their father from the year 2006 till date. Such statement be filed before the Nazir of this Court within a month's time.

Parties to bear the expenses for auction proceedings by the Nazir, which shall be adjusted towards their shares at the time of distribution of their share in the estate left behind by their deceased parents.

(7) Preliminary decree as above in terms of Order XX Rule 13 CPC be prepared by the office."

3. Learned counsel for the appellants, who are defendants 2 and 3 in the Suit, contended that the impugned order and preliminary decree were passed without hearing them and without their consent. He further contended that consent on behalf of the appellants was erroneously recorded in the impugned

order as no such consent was given either at the time of the hearing or at the time of the passing of the order and preliminary decree. According to the learned counsel, the impugned order is not a consent order. He submitted that the appellants are particularly aggrieved with paragraph 5 of the impugned order, whereby public auction of the properties under the supervision of the Nazir of this Court has been ordered with an opportunity to the parties to match the highest bid. A perusal of the impugned order shows that the plaintiffs / respondents 1 to 3 were present along with their counsel when the impugned order was passed ; whereas, the appellants were not present, but their counsel was present. On our query, the learned counsel for the appellants conceded that he has not filed his personal affidavit in support of the assertion that he did not give consent on behalf of the appellants or he was not heard when the impugned order was passed. We are of the view that in the absence of any such affidavit on oath, mere assertion in relation to the impugned order is of no significance. Even otherwise there was no reason or occasion for the learned single Judge to record the consent on his own, and it must be presumed that the impugned order, being a judicial order, was passed with the consent of the parties.

4. As far as the preliminary decree is concerned, it is to be noted that in a Suit for administration it is mandatory under Order XX Rule 13 CPC that the Court should first pass a preliminary decree directing accounts and inquiries. It is also to be noted that it is after the preliminary decree that the Court inquires about the assets left by the deceased. We have not been able to find any illegality or infirmity in the impugned order as a preliminary decree has been passed by the learned single Judge in terms of Order XX Rule 13 CPC. The final rights and entitlements of the parties are yet to be determined in the Suit, and they will be at liberty to prove the same in accordance with law.

5. The appellants have filed CMA No.581/2012 under Section 5 of the Limitation Act, 1908, for condoning the delay in filing this appeal. The record shows that the impugned order was passed on 15.03.2012 ; the appellants applied for its certified copy on 20.03.2012, which was made ready and was delivered to them on the same day ; and, the appeal was presented on 10.04.2012. The appeal against the impugned order is, therefore, barred by six (06) days. It is well-settled that while seeking condonation of delay, the applicant must explain the delay of each and every day. In the present case, the only reason given by appellant No.1 in his affidavit is that the appellants were busy in the treatment of his wife who was admitted in a maternity home. This so-called ground can hardly be treated as a plausible explanation as ; firstly, it is vague and ambiguous ; secondly, there are two appellants and there is no

explanation or affidavit by the other appellant ; and, lastly, the delay of each and every day has not been explained.

6. In view of the above discussion, we are of the opinion that this appeal is liable to be dismissed on the ground of limitationas well as on the ground that the impugned order and preliminary decree do not call for any interference by us.

Foregoing are the reasons of the short order announced by us on 30.05.2014, whereby this appeal and the listed applications were dismissed with no order as to costs.

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