

ORDER SHEET  
IN THE HIGH COURT OF SINDH, KARACHI  
SMA NO. 144 OF 2010

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Date	Order with signature of Judge
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1. For order on CMA No.335/2016
2. For hearing of CMA No.1045/2015
3. For hearing of CMA No.734/2010

**21.04.2016**

Mr. Mehmood Habibullah, Advocate for petitioner.  
Mr. Muhammad Amjad Awan, Advocate for objector.

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**Salahuddin Panhwar, J.** The instant SMA is filed by the petitioner, Mst. Hameeda Begum which relates to the property of the deceased Syed Ahmed, consisting of 3 storied house on Plot No.R-285, Block-2, Federal 'B' Area, Karachi.

2. The petitioner is seeking transfer of title in favour of all the legal heirs of the deceased, details whereof is given in para-4 of the SMA. After the death of Syed Ahmed, the legal heir Maqbool Ahmed also expired. Learned counsel for objector has filed objections and has stated that title of the subject matter/property in question is *benami* hence cannot be transferred in the name of other legal heirs except legal heirs of Maqbool Ahmed, the actual owner. The legal heirs of objector then also filed a suit and by order dated 20.04.2011 parties agreed to adjourn this SMA *sine-dine* till disposal of the suit. The record also reflects that the suit has been dismissed by this Court and in para-9 thereof, it is categorically mentioned that the instant SMA was adjourned sine-die but the same shall be heard and decided on merits.

3. The Late Syed Ahmed passed away on 04.04.1973 and the moment he died the succession became *open*. According to Islamic law of Inheritance, the

inheritance opens to all the legal heirs and all legal heirs become sharers in whatever *movable or immovable* , so left by deceased *but* after discharge of liabilities of deceased and they *automatically* earns the status of co-sharers/co-sharers/co-owners. In the case of *Mst. Suban v. Allah Ditta & Ors* (2007 SCMR 635), it was held that:

11. It is a proposition too well-established by now that as soon as someone who owns some property, dies, the succession to his property opens and the property gets automatically and immediately vested in the heirs and the said vesting was not dependent upon any intervention or any act on the part of the Revenue Authorities or any other State agencies... It may also be added that efflux of time did not extinguish any rights inheritance because on the death of an owner property; all the co-inheritors, immediately and automatically, became co-sharers in the property and as has been mentioned above, limitation against them would start running not from the time of the death of their predecessor-in-interest nor even from the date of mutation, if there be any, but from the date when the right of any such co-sharers/ co-inheritors in such land was denied by someone.

*(Underlining is provided for emphasis)*

With regard to plea of *objector* that title in name of deceased was benami, it was/is for him to establish the same before proper forum through independent *lis*. Admittedly, the suit, *so filed* by *objector* in that regard, failed and was dismissed as such. I am conscious of the fact that in summary proceedings no declaration can be given with regard to any disputed fact hence I refrain myself from making any comments in that regard, *however*. Since it is well established principle of law that succession opens the moment one dies (*as per law of inheritance applicable to such person*) hence it would not be in line of equity, good conscious and administration of justice to keep a *legal person* out of his/her right *hanging* for an indefinite period merely for

reason that one disputes title of deceased but without disputing status of legal heirs.

4. The legal heirs of objector *though* have filed appeal which is pending which requires independent adjudication but at the same time it must also be kept in view that Syed Ahmed died in year 1973 which means, the legal heirs of Syed Ahmed, *per settled law*, earned status and title of co-owners/co-sharers at such time yet are away from their right merely on a claim, not brought by claimed *actual* owner *himself* but by his legal heirs. It is pertinent to mention that **'a declared or settled legal right should not be delayed or avoided merely for reason that a litigation, launched to establish a claim'** because a 'declared or settled legal right' requires to be enforced *immediately* while a claim is to be tried for its *success* or *failure*. The law, equity and good conscious insists '**adal**' (*justice*) which shall never satisfy its meaning, purpose and object if a *legally* declared or determined right is kept hanging for decades *together* pending determination of such claim which may take *decades* together, particularly when such *claimant* has an *edge* to keep such litigation continue at cost of those, *whose legal right is* otherwise determined/settled, per law.

5. At this juncture, while taking a breath, I would refer the case of *Mst. Bor Bibi v Abdul Qadir* as 1996 SCMR 877, wherein the honourable Supreme Court of Pakistan, while referring to *numerous* case laws observed as:-

'This view was almost confirmed in PLD 1991 SC 242 wherein it was observed that sale agreement or any other transaction relied upon by tenants was seriously and bonafide disputed by landlord, **tenants could not be allowed to retain possession during the litigation**, where they continued to deny the ownership of landlord who had inducted them as tenants without any condition or reservation.

Tenants in such case, although had a right to adduce evidence and take short time for that purpose to remain in occupation despite having set up hostile title which was denied by landlord, but on the bar of estoppel in this behalf they could not be permitted to remain in occupation and fight the litigation for long time even for decades. Tenants for more than a decade having been able to keep possession on a claim which had been denied by landlord, would be at liberty to prosecute the litigation wherein they could try to establish their claim but same should not be at the cost of landlord owner. Tenants could prosecute their claim at the cost of themselves by vacating the premises, though they would be entitled to an easy and free entry as soon as they finally succeed in establishing their title against the landlord.'

(underlining is supplied for emphasis)

6. Since, there can be no denial to the legal position that a '*sale agreement*' only creates a '*right of claim*' but such right of claim *alone* was not approved by Apex Court to keep or deny a right of '*owner*' to possession if he/she succeeds in legal proceedings i.e (*Rent proceedings*)*however* the right to get such '*right of claim*' declared by Court of law was not denied but continuity *thereof* at the cost of '*owner*' was disapproved.

7. The *touch stone* has *now* attained the status of '*well established principle of law*' hence it shall have its application wherever following facts are *floating* on surface i.e:

- i) a right is *either* declared or determined;
- ii) a *claim* has been set-up against such declared or determined right;
- iii) such claim is denied or disputed;
- iv) continuation of such *claim* is at the cost of a declared or determined right.

Resuming again, in my view that above principle is fully applicable in the matter because:-

a) per settled law, the moment Syed Ahmed died, his legal heirs became co-sharers/co-owners in subject matter on opening of succession;

b) disputing title of deceased Syed Ahmed as *benami* is a mere claim, *required* to be determined;

c) such claimant is enjoying possession/fruit of subject matter hence *prima facie* continuing such litigation at cost of legal heirs of Syed Ahmed;

8. The procedure for disposal of SMAs is *limited* and *summary* in nature which does not permit determination of *disputed* question which be left open to be determined by a competent forum but a mere *claim* alone should not be allowed to avoid or delay a legal person from his right for decades *together*. In short, the entitlement to legal persons be not delayed or avoided by keeping petitions *sine die* only for determination of an independent *claim* denying or disputing the title of *deceased* as in the instant case. However, to avoid any *prejudice* to rights of claimant, in case of his/ her, success at ends of day, it would be appropriate if a mechanism in permissible procedure of taking surety *e.t.c* is ensured from legal heirs to indemnify rights of *claimant* in the event of subsequent success. This, *however*, shall not be applicable where the status of '*legal heir*' is disputed and requires determination by a Court of law.

9. The instant SMA is only for transfer of property in the name of all the legal heirs. Accordingly, instant SMA is allowed.

10. At this juncture, learned counsel for objector have taken plea that the instant SMA is not disclosing the names of Feroz, Shahnaz, Saleem, Aslam, Shamim, Nasreen and Razia as legal heirs. Accordingly, the Nazir shall call for family registration certificate as well as certificate from concerned Union Council with regard to status of legal heirs of the deceased Syed Ali. Further,

if the property is found on rent, the Nazir shall direct the tenant for depositing rent before him and that amount shall be distributed amongst the legal heirs, besides the parties are not agreed to partition. The Nazir shall with the consent of the parties auction that property and distribute the amount between the legal heirs. The legal heirs shall, *however*, furnish P.R bonds (or surety) equivalent to his/her respective entitlement whereby indemnifying the right of *objectors* if they succeed in their *lis*.

**JUDGE**

saleem