ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
Suit No.1316 of 2004

Date | Order with signature of Judge

1- For hearing of CMA No. 5379 of 2014.
2- For hearing of CMA No. 15179 of 2015.

16.02.2017

Mr. Saathi M. Ishaque, Advocate for Defendant No.1.

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Through CMA No. 5379 of 2014, defendant No. 1 (widow of deceased Hashmatullah) seeks correct distribution of the amount, left by deceased Hashmatullah, whereas through CMA No. 15179 of 2015 the plaintiff seeks restraining order with regard to notices and BWs against other legal heirs of Hashmatullah in view of order dated 30.09.2015.

At the outset, case of the Defendant No.1 (Widow of deceased Hashmatullah) is that suit No. 1316 of 2004 was preferred with following prayers:-

(a) to declare that the deceased mother Hashmat-un-Nisa was the original/real nominee of the deceased in insurance policy No.501576318-2 and after his death the legal of the family alongwith plaintiff are entitled to inherit the above Insurance claim.

(b) to declare that defendant No.1 after the death of her husband namely Hashmatullah in connivance and collaboration with the defendant No.2 managed to change the nomination form and got inserted her name as a nominee in the insurance policy after scoring off/deleting the name of the mother of the plaintiff in the record of the defendant No.2.

(c) to grant permanent injunction in favour of the plaintiff and against the defendant No.2 restraining them from releasing/dispersing insurance policy amount to the defendant No.1 or her mother or any other relative.

(d) any other relief/relieves/directions/orders as this Hon'ble Court may deem fit and proper.

The record shows that by order dated 22.11.2005, Nazir was directed to distribute the amount of policy among the legal heirs of Mst. Hashmat-un-Nisa; before Nazir, statements were filed with regard to share of the legal heirs and on 24.03.2008 instant suit was not pressed by making statement that all legal heirs have received their share in

pursuance of order dated 22.11.2005. Record further reflects that the shares of defendant No.1 and minor Samiaya (Defendant No.3) were invested in profitable scheme as defendant No.1 had objected the distribution of shares.

It is further reveals that by order dated 02.03.2009, instant suit was restored with following observations:

> *" I have gone through the record available before me. The matter was fixed on 24.03.2008 when Mr. Abdul Salam Baloch advocate for the plaintiffs made statement that the amount has been disbursed amongst all the parties in the proceedings in pursuance of the report submitted by the Nazir on 13.02.2006 and at present nothing remained to be decided in this case and according to him the suit becomes infructuous. Such statement, by making grievance by defendant Nos.1 and 3 appears to be false, fallacious and fabricated which could not be expected from a senior member of the bar. The order also shows that defendants and their counsel were not in attendance at the time of hearing of CMA No.735/2006 and as such it appears that defendant Nos.1 and KASHAN were condemned unheard while passing the order dated 24.03.2008. The application has, therefore, sufficient substance, which is allowed and the order dated 24.3.2008 is hereby recalled. Office is directed to fix the matter as per roster."*

Since then matter is fixed for hearing of the controversy with regard to legal heirs and distribution of amount among them.

Before proceeding any further, keeping in view the *peculiar* facts and *pleas,* involved in the matter, I would add that matters, involving *inheritance,* normally revolve round the rights and entitlement of **'widows'; 'old aged parents'** and **'minors'** hence such like matters always require to be decided *expeditiously* whether the same are brought under title of **'Succession Act'** or as **'suits'** because per settled law the successor *automatically* becomes *owner* hence no law or *procedure* could be made a *justification* to keep the *owner* away from his property (entitlement) rather the Courts should facilitate such persons which, if given expeditiously, shall serve the purpose and object of commandment of *'divine directions'* under which law of inheritance *normally* operates. Since, I am conscious of the legal position that principle of law decided by the Apex Courts are of binding effects hence those *terms,* already defined by Apex Courts should not be reopened by *lower Courts* nor should attempt *jugglery* of words thereupon so as to draw a *different* view which *legally* a lower court can't within meaning of Articles 189 and 202 of the Constitution. Therefore, these matters should be

decided *expeditiously* keeping in view certain settled questions of law, involved in such like matters.

I would say that in such like matters, the questions, could not go beyond certain *limitations* which the Courts should keep in view so as to achieve *expeditious* disposal of such like matters i.e :

i) *the question with regard to status of* rightful persons (L.Rs);

ii) *role of* nominee, if is involved?;

iii) *whether property, left falls within meaning of* TARKA *or otherwise?*

As regard the **'status of rightful persons or otherwise'**, in matters, involving question of entitlement under inheritance, it would be necessary to add that question of *'entitlement* to a share*'* in a TARKA shall always be governed by the law of inheritance (faith) which the deceased had. Since, it is by now a well settled principle of law that the moment one dies, his *lawful* successors (L.Rs) become sharers in the property (TARKA), so left by deceased and an incorrect periodical entry e.t.c *even* does not operate as a bar to such **entitlement** of lawful successors (L.Rs) nor *limitation* can be pressed in such *like* matters so as to deprive a lawful successor. Reference can well be made to the case of *Mahmood Shah v. Syed Khalid Hussain Shah* 2015 SCMR 689 wherein it is held as:

> *'7. The first argument questioning the judgments of the for a below as well as High Court is that the suit being hopelessly time barred is liable to be dismissed. This argument would have been viable otherwise but not in a case where co-heirs become co-owners in the property left by their propositus on his demise. Their succession to the property of their propositus becomes a fait accompli immediately after his demise.* **It , thus, does not need the intervention of any of the functionaries of the Revenue Department and remains as such irrespective of what Patwari, Girdawar and Revenue Officer enter in the mutation sanctioned in this behalf.** *Since possession of one co-heir or any number of them would be deemed to be on behalf of even those who are out of it, preparation of every new record of rights, in their case, would confer on them a fresh cause of action.* **No length of time, therefore, would culminate in the extinguishment of their proprietary or possessory rights.**

The term *'nominee'* also stood defined as '**nominee is the person who can receive the amount and distribute among the legal heirs**' *however* this may vary if subject matter is not falling within meaning of **'TARKA'** and is required to be governed *independently*. Here, it is relevant to mention that the term **(TARKA)** has already defined, and would need no further *scholarly* works by lower courts. The term **'TARKA'** was defined by me in the case of *Erum v. Ameena* PLD 2015 Karachi 360 as:

> "10. There can be no cavil to deny that the legal heirs are entitled to inherit what the deceased leaves behind him whether movable or immovable, including a right of claim which would be available for distribution among the legal heirs as per, their legal entitlement. Let me be a little specific. Only what could be distributed among the legal heirs which the deceased was owning or possession as owner and all other claims and rights which the deceased himself was entitled to make during his life time. It is always ***the left assets of the deceased*** which the legal heirs can distribute among them as per their legal entitlement. The ***'the left assets of the deceased'*** has been termed as **'TARKA'** which, no doubt, is inheritable by all the legal heirs as per ther entitlement but this term would not include those things which would fall within meaning of **'concession', 'grant'** or **'compensation'** particularly when such things become due after death of the person. Another test to understand the difference between **'TARKA'** liable to be distributed among legal heirs or **'other dues'** is that
>
> > **as to whether deceased during life time could have claimed the same?**
> >
> > **OR**
> >
> > **was the deceased entitled for the same at time of his death?**
>
> If the answer to above proposition is in '**affirmative'** then such thing would also form the part of the **'TARKA'** liable to be distributed among the legal heirs but if the answer is in **'negation'** then that would be liable to be given as per terms under which such **'concession' 'grant'** or **'compensation'** are directed to be disbursed. The claim or question of entitlement of the legal heirs would have no relevance for such amount."

Thus, I would conclude that if a *lis* involves a dispute with regard to status of successors, it would certainly fall out of the scope of **'Succession Act'** , being summary one and would require determination by a **'Civil Court'** which the Court should examine by making it as *preliminary* '**issue of fact'** while rest of *issues* should also be responded as preliminary **'legal issues'** and such like matters should not be left hanging for *indefinite* period**.**

Reverting to merits of the case, I have perused the basic order dated 22.11.2005. Admittedly policy holder was Hashmatullah and declaration was sought that Mst.

Hashmat-un-Nisa was his real nominee which *involves* another aspect that whether insurance claim (on death of deceased) would fall within meaning of **TARKA** or shall be governed by independent rules of Insurance company which *prima facie* has not been attended, therefore, apparently order dated 22.11.2005 was illegal on two counts; firstly, due to clerical error and secondly ***per incuriam*** which this Court has *itself* recalled within meaning and object of **'rule of administration of justice'** which always require the court to undo wrong or prejudice caused to a party by the act of the Court as held by honourable Apex Court in the case of *Khushi Muhammad v. Fazal Bibi* PLD 2016 SC 872. The relevant portions thereof are referred hereunder:

> "39. The noted maxim which connotes "an act of the court shall prejudice no man" is founded upon justice and good sense; and affords a safe and certain guide for the administration of law and justice. It is is meant to promote and ensure that the ends of justice are met; it prescribes that no harm and injury to the rights and the interest of the litigants before the court shall be caused by the act or omission of the court. This rule of administration of justice is meant for the benefit of both sides of litigants before the court and it would be illogical to conceive that the rule would or should be applied for the advantage of one litigant to the prejudice and disadvantage of the other. It is the duty of the court to act as a neutral arbiter between the parties and to provide justice to them through strict adherence to law and keeping in mind the facts of each case.
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> "… This maxim appears to be as old as the Court itself. The rationale behind this maxim is to undo the wrong or prejudice caused to a party by the act of the Court. Its application assumed different forms and manifestations at different stages of the history. Even today this maxim is applied to undo an injury or injustice caused to a party by an act of the Court or by the laches or mistakes of its officers. It is also applied to restore what has been delayed or denied to a party by the act of the Court or negligence or the persons manning and managing it. ..

Accordingly, let the *preliminary* issue be framed as:

> *'whether* subject matter (amount) falls within meaning of **'TARKA'** or otherwise?. If not what would be its effects?

Accordingly, the CMA,, listed at serial no.1 is disposed of in above terms. As regard the CMA, listed at serial no.2, it would suffice to say that if one wants to avoid coercive measures, initiated by the Court of law, for appearance, he shall have to surrender before the Court of law and not *otherwise.* Since, the legal heirs are not appearing hence without complying with order of the Court, they cannot ask for an order thereby restraining the process of law *itself.* Thus, application (CMA, listed at Sr.no.2), being misconceived, is dismissed. At this juncture, it is also pertinent to mention that Nazir

has submitted report contending therein that after a detailed deliberation with learned counsel for the respective parties he has reached to the conclusion that distribution was not made legally in fact there was mistake in the names of legal heirs. Accordingly, Nazir shall ensure that amount withdrawn by legal heirs is deposited with the Nazir office within 15 days with due notice the disbursement thereof shall be subject to above *preliminary* issue. However, in case of failure, Nazir shall take all coercive actions, which includes seizer of their bank accounts to the extent of amount which was enchased /received by them.

To come up on 07.03.2017.

JUDGE

SAJID