

ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1750 of 2009

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DATE

ORDER WITH SIGNATURE OF JUDGE

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For hearing of CMA No.12649/15 U/O 22 rule 2 CPC.

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03.10.2016.

Mr. Haider Raza, Advocate for the plaintiff.

Mr. Badarul Alam, Advocate for the defendant.

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This is an Application under Order 22 Rule 2 CPC, whereby, the plaintiff seeks impleading legal heir(s) of defendant No.1 Muhammad Naqi Malik, who has expired on 05.01.2010.

Counsel for the plaintiff submits that earlier an application bearing CMA No.5120/2010 was also filed for a similar relief and on 20.01.2014; the same was treated as having become infructuous in view of the order passed on another CMA No.2467/2011. Counsel submits that through CMA No.2467/2011 only one legal heir namely Shaukat Bi, on her own application, was brought on record, whereas, the other legal heirs, who are children of the brothers and sisters of deceased defendant No.1, who died issueless, were not brought on record. In the circumstances, he submits that it would be in the interest of justice as well as fairness that all the legal heirs of deceased defendant No.1 be brought on record, whereas, per Counsel the earlier Application bearing CMA No.5120/2010 was not dismissed on merits and therefore instant application being maintainable may be allowed.

On the other hand, learned Counsel for defendant No.1 opposes grant of such application and submits that in view of the order passed

on 20.01.2014, no fresh application can be entertained, whereas per learned Counsel in view of Article 53 of Mulla's Mohammedan Law, the children of pre-deceased brothers and sisters cannot be treated as legal heirs. In the circumstances, he submits that the listed application may be dismissed.

I have heard the learned Counsel and perused the record. Insofar as the dismissal of an earlier application is concerned, it appears that the same was in fact dismissed as infructuous and not on merits, whereas, the same was treated as infructuous in view of the fact that CMA No.2467/2011 had already been granted for bringing one legal heir namely Shaukat Bi on record, therefore, it appears that the application for bringing all the legal heirs on record was neither dismissed on merits nor for any other reason except as discussed hereinabove. In the circumstances, entertaining another application does not seem to be prohibited, and defect, if any, can be cured as the matter is to be decided on merits and not on technicalities. Insofar as, the objection of the learned Counsel for defendant No.1 that the legal heirs, which are being brought on record are in fact not the actual legal heirs is concerned, it would suffice to observe that mere impleadment as legal heirs does not ipso-facto confer any legal right in heir-ship, whereas, such question is to be decided on its own merits by the Court, and if needed, on the basis of evidence led by the parties. If any support is needed one may refer to the case of **Abdul Waheed Khan and others vs. Mst. Rifat Zamani** reported as **(1968 SCMR 873)**, wherein, the Hon'ble Supreme Court was pleased to observe that an Order under Order 22 Rule 5 of CPC would be limited to the purposes of carrying on the Suit and could not have the effect of conferring any right of heirship on the added defendant and not will it operate as a res judicata.

Moreover, the learned Counsel has also not pressed this objection with force, and has confined his objection on filing of a second application after passing of order on 20.1.2014.

In view of hereinabove discussion, I do not see any impediment in granting listed application as the plaintiff is adding the said legal heirs only in order to safeguard his interest, therefore, the same is allowed and Counsel for the plaintiff is directed to file an amended title and plaint, if so advised, whereafter notices be issued to the newly impleaded defendants for the next date, whereas, the defendants may file their written statement, thereafter. However, it is clarified that joining of aforesaid defendant(s) as legal heir(s), does not, in any manner, suggest that it confers any absolute right of heir-ship, which question will be decided by the Court on its own merits and in accordance with law at the stage of Trial, if needed.

Application stands allowed in the above terms.

J U D G E

Ayaz P.S.