

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.233 of 2011

Plaintiff No.1 : Mst. Rukhsana
Plaintiff No.2 : Muhammad Asad
Plaintiff No.3 : Muhammad Usman
Plaintiff No.4 : Muhammad Ismail
Through Mr. Abbadul Husnain, advocate.

Defendants : Muhammad Sohail & others
Through Ch. Jawed Yousif, advocate.

Date of Hearing : 14.01.2015

CMA No.3039/2011

ORDER

NAZAR AKBAR, J. By this order, I intend to dispose of **CMA No.3039/2011** under Order VII Rule 11 CPC filed by Defendants No.1 & 3 to 9 on the ground that the deceased Muhammad Ismail and his wife Khadija have expired in 1973 and 1989 respectively and their son Muhammad Aqeel, the predecessor-in-interest of the Plaintiffs, has also expired in 1996, therefore the suit after 15 years of the death of their predecessor-in-interest is time barred. The other grounds taken in detailed application of four pages are that the suit is hit by Section 42 of the Specific Relief Act, 1877 and also that the Plaintiffs have already realized their share from the estate of the deceased Muhammad Ismail after the death of their predecessor-in-interest, which they have suppressed. The Defendants have also filed several documents with their

application under Order VII Rule 11 CPC. The Plaintiff has agreed to argue this application without formal counter affidavit.

2. Learned counsel for the Defendants is in support of his above contentions has relied on the following case law;

- i. **1995 MLD 397**
(Abdul Rashid Velmi ..Vs.. Habib-ur-Rehman and 4 others)
- ii. **2001 MLD 1159**
(Ghous Bux ..Vs.. Muhammad Suleman and others)
- iii. **2008 SCMR 877**
Masroor Afzal Pasha and another ..Vs.. D.H.A., Karachi and another
- iv. **SBLR 2010 Sindh 1511**
(Muhammad Sabir (through L.R's..Vs.. Maj. (Rtd) Muhammad Khalid Naeem Cheema & others)
- v. **2012 MLD 970**
(Masroor Afzal Pasha ..Vs.. Defence Housing Authority)
- vi. **2000 SCMR 1305**
(Maulana Nur-ul-Haq..Vs.. Ibrahim Khalil)
- vii. **PLD 2012 S.C 247**
(Haji Abdul Karim and others ..Vs.. Messrs Florida Builders Ltd.)

3. The learned counsel for the Plaintiff in rebuttal contends that this being a suit for administration of the estate of the deceased husband of Plaintiff No.1 and father of other Plaintiffs namely Muhammad Aqeel who had survived his father deceased Muhammad Ismail but during lifetime of Muhammad Aqeel, the properties and estate of Muhammad Ismail were not distributed / partition amongst the legal heirs i.e. Defendants No.1 to 10 and deceased Muhammad Aqeel, the predecessor-in-interest of the Plaintiff. Therefore, they are entitled to inheritance from the share

devolved on the deceased Muhammad Aqeel on the death of his parents. He, however, agreed that plaintiffs are not legal heirs of deceased Muhammad Ismail and Khadija. But he contends that it is admitted by the Defendants that the plaintiffs are legal heirs of deceased Muhammad Aqeel and his share in the estate of Muhammad Ismail was inheritable by the Plaintiffs. The Defendants have asserted in the application that share of deceased Mohammad Aqeel has been paid to the Plaintiffs and he has referred to the Annexure 'A' and 'A-1' to the application.

4. I have heard learned counsel for the Plaintiffs and the Defendants. Also perused record and examined the case law.

5. In most of the case law relied upon by the learned counsel the Defendants, the suits were for declaration and injunction under Section 39, 42 and 54 etc. of the Specific Relief Act, 1877 and plaints were rejected on the grounds that the suits were time barred and / or no cause of action was shown in the plaint. These are general principle for rejection of plaint. Every case has to be decided on its own merit. None of the case law relates to the issue of administration of the estate of a deceased by and between the legal heirs of the deceased, therefore, these case laws are not relevant to the facts of the case in hand. The Plaintiff's counsel contends that there is no limitation for filing a suit for administration of the properties of the deceased by the legal heirs. He has placed reliance on the case law reported in **2005 SCMR**

1217 (Muhammad Zubair and others ..Vs.. Muhammad Sharif). In this case the Hon'ble Supreme Court has held as under:-

There is no cavil to the proposition of law that on the enforcement of Muslim Personal Law (Shariat) Application Act, 1962 as amended by Act XIII of 1983, the property of last male owner subject-matter of limited interest would be deemed to have devolved upon his legal heirs on his death, and the right of succession would not be defeated by the law of limitation or the principle of res judicata as no law or judgment can override the law of Sharia which is superior law.

6. The case of the Plaintiff is that the properties of the deceased Muhammad Ismail remained un-partitioned and undivided as long as Muhammad Aqeel was alive till June 1996 and it was much after the death of Muhammad Aqeel that the Defendants fraudulently got the said properties transferred into the names of some of the legal heirs of Muhammad Ismail and Khadija and they illegally excluded the name of Muhammad Aqeel as one of the legal heir of deceased Muhammad Ismail and thereby they have deprived the Plaintiffs from their right of inheritance from the share of their deceased predecessor-in-interest in the estate of his deceased father. The present suit is for administration of the properties of deceased Muhammad Aqeel in respect of the "vested inheritance" in terms of **para 56** of the Muhammadan Law, which from F.D. Mulla's Principals of Mohammadan Law is reproduced as under:-

56. Vested inheritance.—A "vested inheritance" is the share which, vests in an heir at the moment of the ancestor's death. If the heir dies before distribution, the share of the inheritance which has vested in him

will pass to such persons as are his heirs at the time of his death.

The Defendants in the very application under Order VII Rule 11 CPC by asserting that Plaintiff No.1 Rukhsana has realized a sum of Rs.9,80,000/- or some other cash (annexure 'A' and A/1 to the plaint) has created a controversy of facts whether such payments, if at all made, were made towards share of the deceased Muhammad Aqeel by way of his inheritance in the estate of his deceased father. Such averment of the defendants has rendered their application under Order VII Rule 11 CPC not maintainable as the factual controversy whether deceased Muhammad Aqeel's share in the estate of his father stand paid/given to his legal heirs according to Shariah. Such controversy cannot be decided without recording evidence of the respective parties.

7. It is pertinent to mention here that before hearing of this application by order dated 28.10.2014 on CMA No.7036/2014 under Order XXVI Rule 9 read with Order 18 Rule 18 CPC. Official Assignee was appointed to examine the registered lease deed file by the Defendants with their application under Order VII Rule 11 CPC in respect of the properties of the deceased Muhammad Ismail to ascertain that how the properties of deceased were disposed of by some of the legal heir on the basis of heirship certificate wherein admittedly all of the legal heirs were not mentioned. The documents filed by the Defendants themselves with the application clearly establish that the properties of Muhammad Ismail

continued to be undivided or unpartitioned amongst his legal heirs during the life time of late Muhammad Aqeel and therefore, he had a joint ownership to the extent of his share till his death in accordance with Muhammadan Law, in the said properties.

8. In view of above legal and factual position, this application was dismissed on 14.1.2015 and these are the reasons for the same.

Karachi
Dated:_____

J U D G E