

**ORDER SHEET**  
IN THE HIGH COURT OF SINDH KARACHI

S.M.A. No. 252 of 2017

DATE	ORDER WITH SIGNATURE OF JUDGE
1. For orders on CMA No. 102/2018. 2. For orders on CMA No. 105/2018. 3. For orders on CMA No. 590/2018. 4. For hearing of Main Petition. <u>(DR (O.S) Diary dated 11.01.2018 Flag 'A')</u>	

**Date of hearing: 26.03.2018**

Barrister Abdur Rehman, Petitioner No.2, and Advocate for the other Petitioners.

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**Adnan Iqbal Chaudhry J.-**

CMA No.102/2018:

1. Barrister Abdur Rahman submitted that CMA No.s 1443/2017, 1444/2017 and 1446/2017 for renunciation of Executorship were listed for orders on 21-09-2017 along with CMA No.1445/2017 which was for permission to sell one of the properties of the Testator, but though the order dated 21-09-2017 was passed only on CMA No.1445/2017, the other CMAs were by a typographical error also stated to be disposed off. That does appear to be the case. The error is now corrected by taking up CMA No.s 1443/2017, 1444/2017 and 1446/2017 along with an identical CMA No.102/2018 and by addressing the said applications by this order.

2. This petition under section 276 of the Succession Act, 1925 is for a Probate of the Will of Vera Cowasjee Rustom Fakirjee Cowasjee (hereinafter 'the Testator'), a Parsi by faith. By a Will dated 04.06.2009 the Testator nominated the Petitioner No. 3, 4 and one other as Executors of the estate that she had held in her own right. Right thereafter, by a Codicil dated 05.06.2009 the Testator nominated the Petitioners 1 and 2 as Executors of the estate that she had inherited from her brother. The Codicil reads that it *"is in addition to and not in substitution of an earlier Will that was executed by me on the 4<sup>th</sup> day of June 2009 at Karachi"*; and it also states that *"This Codicil is only connected with the bequests left to me by my*

*elder brother....., the remainder of my estate is to be distributed in terms of my earlier Will dated 4<sup>th</sup> June 2009".* Therefore, one interpretation of the said testamentary instruments could be that the Testator intended only the Petitioners 3, 4 and one other to act as Executors of the estate mentioned in the Will as separate from the one mentioned in the Codicil, for which the Testator intended only the Petitioners 1 and 2 to act as Executors. The intent of the Testator to that end becomes relevant in the circumstances that have now emerged and which are discussed *infra*.

3. This petition had been filed by 4 out of the 5 Executors jointly. Though the cause title arrays all 5 Executors as petitioners, the petition is signed only by 4 of them. Subsequently, except one all Executors, namely Darius Bejonji Kandawalla (petitioner No.3), Spenta Kandawalla (petitioner No.4), Kairas N. Kabraji and Hutoxy Cowasjee (petitioner No.1) have moved CMA No.s 1443/2017, 1444/2017, 1446/2017 and 102/2018 respectively praying for permission to renounce their executorship. The sole ground taken in these applications for renouncing the executorship is that due to their frequent travels from Pakistan they are unable to perform such functions. Thus of the 5 Executors nominated by the Testator, only 1 is willing to carry on i.e. Barrister Abdur Rahman who is the Petitioner No.2.

4. CMA No.s 1443/2017, 1444/2017, 1446/2017 and 102/2018 are wrongly cited under section 308 of the Succession Act, 1925. Renunciation of executorship of a Will is effected under section 230 of the Succession Act, 1925 which reads:

**"230. Form and effect of renunciation of executorship.** The renunciation may be made orally in the presence of the Judge, or by a writing signed by the person renouncing, and when made shall preclude him from ever thereafter applying for probate of the Will appointing him executor."

At first impression, section 230 of the Succession Act, 1925 appears to suggest that renunciation is automatic once made and the role of the Court is limited to recording the renunciation. However, that would have meant that an Executor who had partly dealt with the estate before renouncing, would go unchecked. While assisting the Court on this aspect, Barrister Abdur Rahman drew my attention to the case of *Swami*

*Turiananda v. Radha Kanta Pal* (PLD 1955 Federal Court 145) to submit that a renunciation under section 230 of the Succession Act, 1925 is subject to the rule that the Executor has not 'intermeddled' with the estate. In the case of *Swami Turiananda*, while discussing section 230 of the Succession Act, 1925 it was noted that in England the corresponding provision had been construed as prohibiting an executor from renouncing if he had once intermeddled with the estate. But the Court did not go on to expressly hold that section 230 of the Succession Act, 1925 was also to be construed likewise inasmuch as in *Swami Turiananda* the occasion did not call for such determination because the matter under discussion was a renunciation after the grant of the probate and the question there was whether such a renunciation can then be addressed as a revocation of the probate under section 263 of the Succession Act, 1925. However, what emerges clearly from the case of *Swami Turiananda* is that section 230 of the Succession Act, 1925 caters to a renunciation made prior to the grant of the probate, while a renunciation made after the grant of the probate can be dealt as a revocation under section 263 of the Succession Act, 1925.

5. After contemplating over section 230 of the Succession Act, 1925, its place in the scheme of the Succession Act, 1925, and the case of *Swami Turiananda* supra, I am of the following opinion:

- (a) section 230 of the Succession Act, 1925 caters to a renunciation made by an Executor prior to the grant of the Probate;
- (b) a renunciation under section 230 of the Succession Act, 1925 does not take effect automatically on the making of the renunciation, but it is subject to the order of the Court;
- (c) while invoking section 230 of the Succession Act, 1925 an Executor has, in the very least, to make a disclosure of the extent to which he has dealt with the estate and what part of the Will remains un-executed by him, so as to enable the Court to determine how the renunciation would affect the execution of the Will and to pass orders accordingly;

6. Having opined as above, I find that CMA No.s 1443/2017, 1444/2017, 1446/2017 and 102/2018 do not make any disclosure of the nature discussed in para 5(c) above. Instead of dismissing these applications, I deem it expedient to direct the applicants thereof to file

fresh affidavits giving disclosures required of para 5 (c) above. The office to list CMA No.s 1443/2017, 1444/2017, 1446/2017 and 102/2018 for hearing thereafter.

7. Adverting now to the scope of the two sets of Executors discussed in para 2 above, the questions that arises now are: (a) if the Executors nominated for and under the Will i.e. the Petitioners 3, 4 and one other are relieved as having renounced, can the willing Executor nominated for and under the Codicil be said to be Executor of the Will as well ?; and (b) where one of the two Executors of the Codicil is unable or unwilling to act as such, can the other Executor continue ?

From the text of the Will and the Codicil it appears that though the Testator intended a division of labor, she did not intend any member of the team to be excluded from any part of the assignment. That much is also reinforced by the fact that two Executors under the Will and both Executors under the Codicil had jointly filed this petition. Therefore, I am inclined to treat all Executors as several executors for the entire estate of the Testator. Consequently, any one of them acting singly would be competent to act as Executor of the Will and Codicil in terms of section 311 of the Succession Act, 1925 which reads:

“Section 311: Where there are several executors or administrators, the powers of all may, in the absence of any direction to the contrary, be exercised by any of them who has proved the Will or taken out administration.”

Therefore, in the event any Executor is allowed to renounce his executorship, the remaining Executors, as long as there remains one, can be granted probate of the Will and the Codicil subject of course to the proof of the said documents.

CMA No.105/2018 and CMA No.590/2018:

These applications are premature and will be considered on the hearing of the main petition. In view of the above, the hearing of the main petition is deferred.

**JUDGE**

DATE: \_\_\_\_-05-2018