

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

SUIT NO.1404/2017

Date	Order with signature of Judge
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1. For hearing of CMA No.6136/2018
2. For hearing of CMA No.6137/2018
3. For hearing of CMA No.6356/2018

17.08.2018

Mr. Arshad H Lodhi Advocate for the Plaintiffs.
Mr. Imtiaz Ahmed Khan Advocate for defendants

Applications at Serial No.1 and 2 have been filed on behalf of defendants seeking recalling, review and stay of order dated 3.4.2018, whereby, in continuation of the preliminary decree dated 19.12.2017 certain directions have been given to the Nazir.

Learned Counsel has contended that the order under question has been passed without taking into consideration the WILL executed by the deceased in favor of the defendants; that no other legal heir except plaintiff wants to sell the property; that without prejudice, even otherwise the property could be partitioned, hence, without first making of a determination by the Court to that effect, no order could be passed; that inquiries are still to be made by the Nazir, hence order for sale / auction could not be passed at this stage; therefore the listed applications be allowed. In support he has relied upon the case reported as **Mst. Rehana Nasreen v Shahid Pervaiz (2006 MLD 1604)**

On the other hand learned Counsel for the plaintiffs has supported the orders passed by this Court and submits that the defendants being in possession have even failed to appear before the Court and it is only after notices were issued through Police that they

engaged a Counsel, whereas, this is Suit for Administration and a preliminary decree has been passed.

I have heard both the learned Counsel and perused the record. It is not in dispute that on 19.12.2017 a preliminary decree was passed by this Court, after defendants despite being served through concerned police station and seeking for time to assist the Court had failed to appear. The preliminary decree in fact has not been challenged, and while confronted, learned Counsel, submits that his clients are not aggrieved by such decree, and have therefore not appealed it; however, they are aggrieved by the order passed subsequently on 3.4.2018, whereby, Nazir has been directed to sell the property in question by way of Auction. This does not appear to be as simple as stated. In fact the time to challenge the preliminary decree has already lapsed, and it appears that in the garb of these applications, in fact practically, the defendants are seeking annulment of the preliminary decree. This is reflected from the contention that the property can be partitioned. It may be observed that this is not a Suit for partition but for Administration, and both are to be dealt with under separate law(s). The Suit for partition is to be adjudicated under the Partition Act, 1893, whereas, a Suit for Administration is recognized in Order XX of the Civil Procedure Code, and the relief in such a Suit which can be granted is that the estate of the deceased is to be administered under the decree of the Court. After passing of the preliminary decree, the Court has to administer the property, and for such purposes, any order could be passed, which includes an order of selling the property. There is no other dispute left in this matter, at least in respect of the fact that property is still in the name of the deceased. If the defendants are not aggrieved by the preliminary decree, then there is no adverse order in field against them, and sale of property would settle the account of all.

However, they intend to rely on a WILL as mentioned in the applications, but they have not sought any execution of the WILL through a Court probate; and have only come with this proposition once a preliminary decree has been passed. This seems to be a clear intention to deprive the plaintiffs from their due share, which has been inherited after demise of their father. It has come on record through Nazri's report after confirmation from KDA, that the property is still in the name of the deceased father of the parties, therefore, there is no other issue left in this matter to be decided, except auction of the property as already ordered. As to the argument, that instead of administering, partition of the property is to be done, it may be observed that this contention is misconceived, as it is settled by now that as the remedy of administration is permissible in law and in case of choice between a partition Suit and an administration Suit, latter is to be preferred. In the case reported as **Mst. Amir Bi v. Abdul Rehim** *A I R 1928 Mad. 760* the widow of one Abdul Razzak, who died in 1920, brought an administration suit and defendants contended that in substance this was a suit for partition; however, the learned judge after briefly examining the provisions of Order XX Rule 13 and all the forms of complaints and decrees in Appendices A and D observed that:-

“This, surely, is not a suit for partition, pure and simple. One of the reliefs claimed, no doubt, is that the property should ultimately be partitioned; but that does not make the suit a partition suit. Administration means management of the deceased's estate. The Court is requested to assume its management, to take upon itself the functions of an executor or administrator and administer the estate. The administration of a deceased's estate consists of collection and preservation of assets, payment of debts and legacies, sets in respect of adverse claims to assets, dealings with creditors or legatees and distribution finally among the heirs or next of kin. These are the functions of an administration and the object of an administration suit is to have the estate administered under a decree of Court, in other words, the Court itself assume the function of an administrator and administers the estate.”

It is thus perfectly clear that it is open to a litigant in India claiming a share of a deceased's estate to file an administration suit. As a result of the administration by the Court, it may ultimately direct the residue of the property to be given over, either to the sole heir (where there is only one), or to be distributed among several heirs (where there are several). Thus, partition may be an incident, but is not a necessary incident, of the administration of a deceased person's estate. In this particular case, as there are several heirs, it has become necessary for the plaintiff to ask for a partition; but this is a mere incident."

Further reliance in this regard may also be placed on the case of **Asghar Ali v Mrs. Zohrabi (2000 MLD 122)** and **Mahboob Alam v Razia Begum (PLD 1949 Lahore 263)**.

In view of hereinabove facts and circumstances of the case, on 17.8.2018 by means of a short order both these applications having no merits were dismissed and these are the reasons thereof.

JUDGE