

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
Suit No.585 of 1995

Date	Order with signature of Judge
------	-------------------------------

1. For hearing of Official Assignees Reference No.3/2018

24.03.2019.

Mr. Zahid Hamid, Advocate, for the Plaintiffs.

Mr. Mushtaq A. Memon, Advocate, for the Defendant No.3.

The Suit was brought seeking administration of the estate of the late Mian Muhammad Rasheed and Mian Muhammad Latif (collectively referred to as the “**Deceased**”). On 06.10.1999, an Order had been made for a preliminary decree to be drawn up and the preliminary decree dated 16.10.1999 that came to be prepared in the matter in pursuance thereof included various immovable properties on the basis that they had either been claimed by the Plaintiffs as being the properties left by the Deceased as per paragraph 9 of the Plaint, or were those additional properties that had been disclosed by the Defendants Nos. 1 to 6 in their Written Statement.

One of the properties reflected in the Preliminary Decree as having been included on the basis of it having been mentioned in the Written Statement is the property that is the subject of the Official Assignee’s Reference No.3 of 2018, being Bungalow No. 5 Block-G, Gulberg-II Lahore (the “**Subject Property**”), which reflects that as per inquiries conducted by him in pursuance of his appointment as Administrator, it transpires that the Subject Property does not form a part of the estate of the Deceased, but is instead the property of the Defendant No.3.

Placing reliance on the aforementioned Reference as well as the preceding Reference No.2 of 2018 submitted in the matter, learned counsel for the Defendant No.3 submitted that the Subject Property had mistakenly been brought within the ambit and purview of the preliminary decree on the misconception that it had been mentioned in the Written Statement, and that in view of the content of the aforementioned References it was evident that the Subject Property was liable to be excluded from the scope of the Suit.

He invited attention to the Preliminary Decree wherein the Subject Property was arrayed at Page 5 thereof at Serial No. III under the head of the additional properties that had been disclosed by the Defendants Nos. 1 to 6 in their Written Statement and then pointed out that the Written Statement did not in fact contain any reference thereto. He pointed out further that in terms of the Order of 06.10.1999 Mr. Abdul Aziz Memon, retired District and Sessions Judge, had been appointed as Commissioner to ascertain the properties left by the Deceased and submit his report, and that on 12.07.2000, during the course of evidence recorded by the Commissioner in the matter, the Plaintiff's witness, namely Mian Ali Akbar (i.e. the Plaintiff No. 3), had admitted during the course of his Cross-examination that he did not know who the owner of the Subject Property and had conceded that the same had been wrongly mentioned in Para 9 of his Affidavit-in-Evidence. He pointed out from Reference No.2 of the Official Assignee that no document whatsoever had been brought on record by the Plaintiffs or otherwise produced before the Official Assignee so as to link the Subject Property to the Deceased, whereas the inquiries undertaken by the Official Assignee revealed that

the Subject Property has belonged to one Mst. Mubarak Khatoon, who had then gifted the same to her sons, namely Dr. Jawed Ahmed Shaikh and Farooq Bashir (i.e. the Defendants Nos. 2 and 3 respectively), following which the Defendant No.2 had then further gifted his share to the Defendant No. 3. As per Reference No.3 that had then been forthcoming, the documents that reflected such ownership had then apparently been submitted for verification to the concerned Sub Registrar, and the response received in the matter was that the documents were shown to be registered in the official record.

Learned counsel for the Defendants submitted that the very basis on which the Subject Property had initially been brought within the framework of the preliminary decree was flawed in as much as the Written Statement filed by the Defendants Nos. 1 to 6 contained no mention thereto. He submitted that in view of the subsequent inquiries conducted in the matter by the Official Assignee it was apparent that the Subject Property was not that of the Deceased, and the earlier error as to its inclusion ought to be rectified accordingly.

In the face of the Official Assignee's Reference and the foregoing submissions made in reliance thereon, learned counsel for the Plaintiff was unable to point out any reference to the Subject Property in the Written Statement or explain the inclusion thereof in the Preliminary Decree in view of the testimony of the Plaintiff No.3. He merely fell back on the plea that the same had been mentioned in some document filed with the Written Statement, however, was unable to point to any such document upon being called upon to do so or to otherwise refer to any

material that served to link the title of the Subject Property to the Deceased. Nonetheless, he reiterated the stance taken by him earlier as to the Subject Property forming part of the estate and contended that the Preliminary Decree had attained finality and was not amenable to modification, hence the Subject Property could not be excluded from the estate. He pointed out that an earlier Application moved by the Defendant No.3, being CMA No. 17703/15, had been dismissed vide the Order made on 18.02.2016.

Having considered the submissions advanced by counsel and perused the References of the Official Assignee in light of the record, it is manifest that the inclusion of the Subject Property within the Preliminary Decree was predicated on a misconception, there being no reference thereto in either the Plaint or Written Statement, nor any material having been produced warranting its mention. As to the dismissal of CMA No. 17703/15, seeking deletion of the Subject Property from the Preliminary Decree, it merits consideration that the Order made in respect thereof on 18.02.2016 turns on the aspect of delay between the preparation of the Preliminary Decree and the filing of such Application and does not preclude the prospect of the inclusion of the Subject Property being remedied in absolute terms. On the contrary, it is evident from a plain reading of the aforementioned Order that the matter was specifically left open for consideration on the basis of the enquiries that were then yet to be conducted by the Official Assignee, and the relevant concluding passage thereof reads as follows:

“I have heard all the learned counsel and perused the record. It appears that preliminary decree was passed on 6.10.1999 by appointing a Commissioner, whereas, parties were directed to present before the Commissioner the list of properties which according to them have been left behind by the deceased. It further appears that thereafter a preliminary decree was prepared in which the property in question was also mentioned on the basis that such list of properties has been disclosed by Defendants No.1 to 6 in their written statement. Thereafter vide order dated 26.10.2000 two of the properties (other than the present one) were excluded from the preliminary decree on an application by interveners under Section 152 read with Order 47 Rule 1 CPC. The Commissioner who was appointed through the preliminary decree completed the exercise of evidence and placed his report on record whereafter on 30.1.2014 it was observed by the Court that the learned Commissioner had though recorded the evidence but did not do anything in furtherance of the decree and in the circumstances, Official Assignee was appointed as Administrator to execute the preliminary decree in accordance with law. It further appears that Official Assignee after passing of this order has started investigation in respect of the properties in question and has furnished preliminary report dated 7.11.2015 however, his final report is yet to be prepared. The stance taken by Defendant No.3 on the basis of evidence recorded so far may be of assistance, either before the Official Assignee who is now administering the properties in question, or before the Court while passing of a final decree. However, the prayer being sought through listed application cannot be granted by the Court at this stage of the proceedings as the preliminary decree dated 6.10.1999 is still intact, whereas, the Defendant No.3 despite having due knowledge about the same has never challenged it. Even when the preliminary decree was being amended through order dated 26.10.2000; no effort was made by him in this regard.

In the circumstances, I am of the view that the application at this stage of the proceedings is misconceived and is therefore dismissed. However, the Defendant No.3 would be at liberty to agitate its claim before the Official Assignee or the Court as may be advised.” (Underlining added).

Under such circumstances, the Official Assignee's Reference No.3 of 2018 is taken on record, and in view of the contents thereof it is Ordered that the Official Assignee need not take any further steps in relation to or as against the Subject Property in his capacity as Administrator.

JUDGE

MUBASHIR