

IN THE HIGH COURT OF SINDH AT KARACHI

**Miscellaneous Appeal No.43 of 2016**

***Present: Mr. Justice Nazar Akbar, J.***

Appellant : M/s Iddara-e-Noor-e-Haq  
through Mr. Abdul Samad Khattak, advocate

***Versus***

Respondents : Public at large and others. (Nemo).

Date of hearing **11.03.2020**

**JUDGMENT**

**NAZAR AKBAR, J---** Through instant Miscellaneous Appeal, the appellant has challenged an order dated **16.08.2016** whereby II-Additional District Judge, Central Karachi has been pleased to dismiss SMA No.Nil/2016 filed by the appellant.

2. To be very precise the facts of the case are that the appellant has filed Succession Miscellaneous Petition No.Nil/2016 before the IInd Additional District Judge, Central Karachi for grant of probate under **Section 272** of the Succession Act, 1925 in respect of Wasiat/Will purportedly made by deceased Masood Ahmed Khan about his Flat No.56, Second Floor, KDA Staff Flats, ST-1/1, Sector 14-A, North Karachi (the subject property) in favour of appellant society. The learned ADJ after hearing learned counsel for the appellant, dismissed the said SMA. The appellant against the order has filed the instant Miscellaneous Appeal.

3. I have heard learned counsel for the appellant and perused the record.

4. The perusal of impugned order of the trial Court clearly reflects that the Wasiat/Will has not been executed by the deceased/owner of

the subject property himself and, therefore, the trial Court in its order of dismissal of SMA has observed that:-

*“The perusal of contents of petition and documents produced with it reveals that the said **Will has not been executed by the deceased himself and even no any single document has been produced by the petitioner showing that he made any Wasiat of his flat in favour of above society. The petitioner has filed a copy of Wasiat allegedly executed by one Faisal ur Rehman who is neither owner of the alleged flat nor was authorized by the deceased to execute any Wasiat on his behalf after his death** therefore such Wasiat has no legal effect and on its basis probate cannot be granted to the petitioner. -----.”*

The case-law relied upon by the learned counsel for the appellant i.e **1993 CLC 1552** is distinguishable from the facts and circumstances of the present case as in the said case-law Will was executed by the deceased himself but in the present petition the so-called Will/ Wasiat has been executed four months after the death of the owner of the subject property by a person who is stranger both to the subject property and the deceased owner. The appellant even otherwise has no locus standi to file an application for probate since in the so-called Will/ Wasyat, the appellant was not nominated as Executor as defined under **Section 2(c)** of the Succession Act, 1925. He is not even aware of actual death of the owner of the subject property. The beneficiary of the Will/Wasyat is not supposed to be the Executor of the Will of the Testator. This fact creates further suspicion on the very existence of Will which has not been established independently. Further scrutiny of record shows that the appellant has neither filed death certificate issued from any hospital or Union Council nor even the name and place of graveyard has been disclosed where the body of the deceased was buried.

5. In the peculiar facts and circumstances of this case, it is duty of the Court to ensure that nobody should be allowed to meddle with the subject property or for that matter with any other immoveable property when the whereabouts of actual owner are not available and the property is abandoned or unclaimed. The Court cannot be oblivion of the present state of affairs in the society which at times compels owners of immoveable properties to temporarily settle outside Pakistan without making proper arrangement for protection of their properties back in Pakistan and they either fell terminally ill while in exile and later on die and their legal heirs keeping in view the law and order situation and corruption do not immediately come forward to lay their hand to such properties. I am of the considered opinion that once it is found that none is available to claim ownership of immoveable property in his own right or by way of inheritance such property should be treated as an ownerless property. And once the Court is satisfied that the property is rendered ownerless, it is duty of the Court to protect it from being misappropriated or wasted or damaged. In this context under **Section 195** of the Succession Act, 1925 the Court can appoint **CURATOR** to takeover possession of the property pending final determination of fate of proceedings. The other Section enabling the Court to take prompt action to interfere for protection of property is **Section 269** of the Succession Act, 1925. And jurisdiction of High Court under **Section 300** of the Succession Act, 1925 is concurrent with the District Judge in exercise of power under the Succession Act, 1925. These enabling Sections of the Succession Act, 1925 are reproduced below:-

**195. Appointment of curator pending determination Proceeding.** If it further appears upon such inquiry as aforesaid that danger is to be apprehended of the misappropriation or waste

of the property before the summary proceeding can be determined, and that the delay in obtaining security from the party in possession or the insufficiency thereof is likely to expose the party out of possession to considerable risk, provided he is the lawful owner, the District Judge may appoint one or more curators whose authority shall continue according to the terms of his or their respective appointments, and in no case beyond the determination of the summary proceeding and the confirmation or delivery of possession in consequence thereof.

**269. When and how District Judge to interfere for protection of property.**-(1) Until probate is granted of the will of a deceased person, or an administrator of his estate is constituted, the District Judge, within whose jurisdiction any part of the property of the deceased person is situate, is authorized and required to interfere for the protection of such property at the instance of any person claiming to be interested therein, **and in all other cases where the Judge considers that the property incurs any risk of loss or damage; and for that purpose, if he thinks fit, to appoint an officer to take and keep possession of the property.** (Emphasis provided)

**300. Concurrent jurisdiction of High Court.**-(1) The High Court shall have concurrent jurisdiction with the District Judge in the exercise of all the powers hereby conferred upon the District Judge.

In the given facts of the case in hand, there is obvious apprehension of misappropriation of the subject property. The risk of incurring loss or damage to the subject property cannot be ruled out. Therefore, as an immediate measure to protect the subject property from further loss or damage the Nazir of this Court is appointed as Curator and directed to immediately takeover possession of the subject property, take photographs from inside the premises and make inventory to preserve the status of the fitting and fixtures. Nazir should also put up a note on the subject property stating that the subject property is in possession of the High Court and if anybody knows whereabouts of the owner or his legal heirs he/she may approach the Nazir of this Court. The area police should also be informed in advance so that if

police aid is needed, it should be available readily and no fresh order to break open the locks or police force to eject anybody from the subject property is required.

6. However, Nazir is not supposed to retain possession of the subject property of a missing owner or his legal heirs for an indefinite period. Therefore, Nazir is further directed to approach NADRA authorities for locating the actual owner namely **Masood Ahmed Khan** son of **Faiz Asghar Khan**, CNIC No.42101-0228933-1 and also try to locate his legal heirs through the B-form of the deceased and/or his parents with the help of NADRA. In case nobody turns up to claim title of the subject property within six months the subject property shall be deemed to have been escheated property and shall be dealt with in terms of **Article 24** read with **Article 172** of the Constitution of Pakistan, 1973. It is the duty of the State to protect property rights of its citizens in terms of **Article 24** of the constitution of Islamic Republic of Pakistan, 1973 and of course the Court is the custodian of fundamental rights of the citizen under the constitution. However, even the State under **Article 24 clause 3(d)** of the constitution of 1973 would retain possession of the subject property for a limited period to protect it for the benefit of its owner. Both the **Article 24(3)(d)** & **Article 172** of the Constitution are reproduced herein below:-

- Article 24. Protection of property rights.** (1). . . . .
- (2). . . . .
- (3) Nothing in this Article shall affect the validity of \_\_\_
- (a). . . . .
- (b). . . . .
- (c). . . . .

(d) any law providing for the **taking over** of the management of any property **by the State for a limited period**, either in the public interest or in order to secure the proper management of the property, or **for the benefit of its owner**, or

**Article 172. Ownerless property.** (1) Any property which has no rightful owner shall, if located in a Province, vest in the Government of that Province, and in every other case, in the Federal Government.

However, above stated situation is possible only when the Court is satisfied that none is known to the Court for having any right or entitlement in the said property. Therefore, the Nazir after making all efforts to locate the owner or his legal heirs, should handover possession of the subject property to the Deputy Commissioner (Central) Karachi in whose jurisdiction the property is situated under proper documentation to be dealt with it by the concerned Deputy Commissioner in accordance with law.

8. In view of the above facts, the trial Court has rightly dismissed the SMA filed by the appellant but the trial Court has fallen short in exercising its powers under the relevant provisions of the Succession Act, 1925 to protect the subject property from being misappropriated or wasted or damaged on account of absence of rightful owner and/or his legal heirs.

9. The instant Miscellaneous Appeal was dismissed by short order dated **11.03.2020** and above are the reasons of the same. The Nazir is directed to submit month's report for the steps taken by him in terms of direction contained in para-5 and 6 above for perusal in Chamber.

JUDGE

Karachi, Dated: 17.04.2020

Ayaz Gul