

Order Sheet

IN THE HIGH COURT OF SINDH, KARACHI

Suit No.133/2018

Date	Order with signature of Judge
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Mr. Rana Ikramullah, Advocate for Plaintiff No.1
 Mr. Zeeshan Abdullah, Advocate for Plaintiff No.2
 Mr. Ravi Pinjani, Advocate for Defendant.

Date of Hearing: 08.09.2020.

ARSHAD HUSSAIN KHAN, J:- This order will dispose of Application [CMA 4128/2020] filed on behalf of the plaintiffs under Order 151 CPC seeking appointment of Nazir of this Court for the purpose to ascertain the annual income of the agricultural property of the deceased and directions to the defendant to deposit the respective shares of the Plaintiffs with the Nazir with effect from 17.07.2015.

Briefly stated facts as narrated in the affidavit in support of the application are that the plaintiffs and the defendant are widow, sister and brother of deceased Abdul Rahim Dakhan who died on 17.07.2015 leaving behind the legal heirs viz. (i) Ms. Wieb Rosemarie Dakhan [widow], (ii) Ms. Firdous Mahmood Hussain [sister] and (iii) Mr. Shahnawaz Dakhan [brother] to inherit his estate as per *Sunni* Hanafi Law of Inheritance. It has been stated that the deceased, at the time of his death, left behind various properties including residential plot in Karachi, agricultural properties in district Shikarpur and a house in village Dakhan, Taluka Gari Yasin, District Shikarpur, Shindh. It has been further stated that after death of the deceased, the defendant being the brother started looking after the affairs of the deceased's properties and having possession and complete control over of the properties, has adopted brazen tactics to ostracize the other legal heirs (plaintiffs) from the affairs of said properties with the ulterior motives to deprive them from their lawful share of inheritance in the properties of the deceased. It has been also stated that the plaintiffs though consistently requested the defendant to disclose the accounts and details of the Deceased's assets to them being shareholders by virtue of inheritance, however, he refused to provide any detail of the accounts. It has been further stated that pursuant to the order passed by this Court, the concerned Revenue

Authorities have confirmed and duly verified that the deceased left behind 201 Acres of agricultural lands in District Shikarpur. The said land is in possession of the defendant and is under cultivation, which generates significant income and the defendant has failed to provide proper and accurate accounts since he took possession of the said lands. It has been stated that the plaintiffs are entitled to their respective shares in respect of the annual income from the agricultural lands left behind by the deceased and as such in order to ascertain the annual income of the agricultural properties, Nazir of this Court may be appointed and further the defendant may also be directed to deposit the respective shares of the plaintiffs with the Nazir.

2. The defendant in reply to the application has filed Counter Affidavit wherein while refuting the allegations has stated that the application is not maintainable being beyond the scope of above Suit. It has been stated that the deceased was a co-owner alongwith the defendant in respect of agricultural lands and plot in Clifton. Whereas the ownership of the village house solely vests with defendant. It has been also stated that the entire 201 acres of agricultural properties are not in possession of the defendant as a significant large portion thereof is in possession of various third parties who claim their title from various arrangements with the deceased. It has been further stated that any and/or all income, which may have been generated from the agricultural lands after the death of the deceased has been a result of the sole efforts and investments of the defendant and as such the plaintiffs are not entitled to any account of the income generated by the defendant from the agricultural lands. Furthermore, such income having been generated solely by the defendant through his personal efforts, cannot be considered as part of the estate of the deceased. It has been further stated that relief sought in the application is in the nature of a preliminary decree which is beyond the scope of Section 151 CPC and as such the application being not maintainable is liable to be dismissed.

3. The plaintiffs preferred not to file any rejoinder to the above counter affidavit.

4. Leaned counsel for the plaintiffs in support of the application while reiterating the contents of the application and its accompanying

affidavit has contended that the plaintiffs being the legal heirs of the deceased, under the law are entitled to the shares in the properties left by the deceased. However, since the defendant, who is in possession and control of the deceased's properties has continued to deprive the plaintiffs from their lawful rights and shares in the properties. It is also contended that pursuant to the order passed by this Court, the concerned Revenue Authorities have confirmed and duly verified that the deceased left behind 201 Acres of agricultural lands in District Shikarpur and as such the plaintiffs, till the court finally administers the estates of the deceased, are entitled to have shares in the income generated from the cultivation of the above agricultural lands of the deceased. Since the defendant despite requests has failed to either give any share in the said income and or any details of the income being generated from the agricultural properties, the plaintiffs have constrained to file the present application as such it would be just and proper to appoint Nazir of this court to ascertain the annual income of the agricultural property of the deceased.

5. On the other hand, learned counsel for the defendant, while reiterating the contents of the counter of affidavit to the instant application has contended that instant application is not maintainable being frivolous and misconceived in nature and as such the same is liable to be dismissed. It is also contended that the plaintiffs are neither entitled to any accounts of the income realized from the agricultural lands nor the income generated therefrom, which income has been realized as a result of the sole efforts and expenses incurred by the defendant. Further contended that after the death of the deceased at all material times the defendant has been solely maintaining and looking after the agricultural lands in the defendant's possession without any assistance from the plaintiffs and the defendant has made his own personal investments towards cultivation of crops, payment of taxes and protecting the land from encroachment. Further contended that since parties herein have not formed any partnership arrangement and or joint venture in respect of the agricultural lands, as such the plaintiffs are not entitled to any of the portions of the income from the above agricultural lands. It is also contended that possession of the defendant over the deceased's agricultural land being co-shares, in absence of

proof of ouster or exclusion of other co-sharers could not be termed as wrongful possession and as such he is not accountable for the profits before partition of the property in question. Further since the defendant is not in wrongful possession of the property, the plaintiffs cannot raise any claim for mense profit. Lastly, it is contended that the relief sought in the application is in the nature of a preliminary decree which is beyond the scope of Section 151, CPC and as such the application being not maintainable is liable to be dismissed. Learned counsel in support of his arguments has relied upon the cases of Muhammad Zahid through Legal Heirs v. Ghazala Zakir and 7 others [PLD 2011 Karachi 83], Khair Muhammad Khatian and 5 others v. Liaquat Ali G. Kazi [2017 CLC Note 177], Shaukhat Zaib and 8 others v. Khuram Zaib and 3 others [2018 CLC 970], Mst. Azra Parvez and 3 other v. Sheikh Ashfaq Hussain and 7 others [2015 CLC1695], Ghulam Jilani and 10 others v. Abdul Kadir and 17 others [1996 CLC 1847], Mrs. Saadia Muzaffar through her Attorney v. Mrs. Khadija Manzur and another [2006 CLC 401] and Muhammad Rafique and others v. Bibi Asifa and others [2013 CLC 1446]

6. I have heard learned counsel for the parties, perused the contents of the application [CMA 4128/2020] and the counter affidavit filed in reply of the same as well as the case law relied upon by learned counsel for the defendant.

7. From the record, it appears that the present suit was filed for declaration, administration, partition, permanent injunction and mesne profit, in respect of estates, left by the deceased namely Abdul Rahim Dakhan. The stance of the plaintiffs in the case is that the deceased who died issueless leaving behind widow-Ms. Wieb Rosemarie Dakhan (plaintiff No.1), sister-Ms. Firdous Mahmood Hussain (plaintiff No.2) and brother-Mr. Shanawaz Dakhan (defendant) and the plaintiffs being legal heirs are entitled to their respective shares in the properties left by the deceased. It is alleged by the plaintiffs that the defendant is in possession and control of the properties in question who has been exclusively managing them and receiving profits thereof and has not given the plaintiffs the true and full accounts of such profits whereas the plaintiffs being the legal heirs of the deceased are entitled to the share in the profits as well.

8. Record further transpires that on 06.02.2019 this Court on the statement of the defendant's counsel that the defendant has no intention to create third party interest in any manner in the suit properties, disposed of the injunction application filed by the plaintiffs. Further in the same order by consent of the defendant's counsel a preliminary decree was also passed in respect of properties mentioned in sub-paras (b) to (q) and 50% un-disputed share in the property mentioned in sub-para (a) of para 3 of the plaint and Nazir of this Court was appointed as administrator to conduct the inquires in respect of the afore-mentioned properties. Whereas for remaining 50% disputed share in the Clifton property mentioned in sub-para (a) of para No.3 of the plaint, issues were framed and the parties were directed to lead evidence before Nazir of this Court.

9. On 12.09.2019 the Nazir was directed to verify the revenue record i.e., Deh Form VII in respect of deceased's agricultural lands from the concerned Mukhtiarkar. Pursuant thereto the Nazir submitted his report dated 04.10.2019, relevant portion whereof for the sake of ready reference is reproduced as under:

“2. It is respectfully submitted that on 01.10.2019 Mr. Rana Ikramullah, Advocate for the plaintiff, Mr. Tanvir Asraf, Advocate for Defendant and Mr. Abdul Haq, Mukhtiarkar Ghari Yasin appeared. However such Mukhtiarkar vide his letter dated 30.09.2019 alongwith Annexures as Annexed “A” has submitted details report and precisely it is submitted as per his office record, all land consisting 201-38 acres as mentioned in such letter is in the name of deceased Abdul Rahim Khan S/o Muhammad Hassan Khan.”

The defendant on the said report filed objection upon which on 24.12.2019 the Nazir was directed to obtain certified copy of Deh Form-VII of the land mentioned at Sr. Nos. 3 and 4 in the report of the Mukhtiarkar dated 04.12.2019. In compliance of the order, the Nazir through his report dated 22.08.2020 submitted CTC of Deh Form-VII. Relevant portion of the said report is reproduced as under:

“2. It is respectfully submitted that in response to notices to concerned Mukhtiarkar for providing the CTC in respect of deceased property, the Mukhtiarkar (Revenue), Garhi Yasin vide his letter dated 12.08.2020 submitted CTC of Deh VF-VIIB Entry No. 11 dated 28.02.2008, which are enclosed with such letter annexed as “A”.

The plaintiffs on the basis of the Nazir's report dated 04.10.2019 filed the present application.

10. The stance of the defendant is that he, besides being 50% of owner of the said land also holds shares in the remaining 50% of said land being one of the legal heirs of the deceased, is solely maintaining and looking after the agricultural lands in the defendant's possession without any assistance from the plaintiffs, as such the plaintiffs, who are only entitled to their shares in the land once the property is partitioned, cannot claim any right over the income generated from the said agricultural lands, as the income of the said land being generated as a result of the sole efforts and expenses incurred by him (the defendant).

Under the provisions of Muhammadan Law, on the death of a Muslim his property devolves on his legal heirs and they are entitled to inherit according to the shares prescribed by Muslim Law. No formal attestation of the mutation is necessary. In this regard Para 56 of D.F. Mullah's Principles of Muhammadan Law, third Edition 2012 by M. Mahmood, may be referred which reads as follows:---

"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."

A perusal of above referred para clearly shows that as soon as a Muslim dies the estate vests in his heirs and they become owners.

The Honourable Supreme Court of Pakistan in the case of *Ghulam Ali and 2 others v. Mst. Ghulam Sarwar Naqvi* [PLD 1990 SC 1], inter alia, has held as under:

"The main points, of the controversy in this behalf get resolved on the touchstone- of Islamic law of inheritance. As soon as an owner dies, succession to his, property opens. There is no State intervention or clergy's intervention needed for the passing of the title immediately, to the heirs. Thus it is obvious that a Muslim's estates legally and juridically vests immediately on his death in his or her heirs and their rights respectively come into separate existence forthwith. The theory of representation of the estate by an intermediary is unknown to Islamic Law of inheritance as compared to other systems. Thus there being no vesting of the estate of the deceased for an interregnum in any one like an executor or administrator, it devolves on the heirs automatically, and immediately in definite shares and fraction."

In the said case, the Honourable Supreme Court, also held as under:

“It is not for the first time that it is being, so held. Even earlier commentators on Islamic Law (its inheritance branch in particular) have indicated the same approach with reference to some decided cases. The heir in possession was considered to be in constructive possession of the property on behalf of all the heirs in Spite of his exclusive possession, e.g., the possession of the brothers would be taken to be the possession of their sisters, unless there was an express repudiation of the claims of the sisters by the brothers. Hyder Khan v. Chanda Khan (5011 C 691 (All)).” **[emphasis supplied]**

In another case the Honourable Supreme Court of Pakistan in the case of *Syed Mehdi Hussain Shah v. Mst. Shadoo Bibi* [PLD 1962 SC 291], inter alia, has observed as under:

“... In a suit for administration the relief to be granted is that the estate of the deceased is to be administered under the decree of Court. This means that the court will assume the functions of an administrator, it will realise the assets, will discharge the debts and legacies, will take an account of the income of the property and will distribute the assets amongst those entitled to it.”

11. Reverting to the case in hand, from the revenue record, i.e., Deh Form VII, produced by the concerned Mukhtiarkar through the Nazir, prima facie reflects that the agricultural lands mentioned in the said Deh Form VII are in the name of the deceased.

12. In the instant case since there is no dispute in respect of the legal heirs of the deceased and further by consent of the defendant a preliminary decree has already been passed and the Nazir has been appointed as administrator to conduct inquiries in respect of the estates of the deceased, therefore the plaintiffs being legal heirs of the deceased are within their rights to seek accounts of income in respect of agricultural lands of the deceased.

In the backdrop of the above discussion, the stance of the defendant appears to be misconceived, as such, the defendant who is admittedly in possession and control of the agricultural lands is liable to render the accounts of the income from the said agricultural lands to the plaintiffs.

13. The case laws cited by learned counsel for the defendant have been perused and considered with due care and caution but are found

distinguishable from the facts of the present case, and hence the same are not applicable to the present case.

14. In view of the above discussion, the application [CMA No. 4128/2020] is disposed of with direction to the Nazir to enquire and ascertain as to who is in possession of deceased's agricultural lands as well as about the annual income thereof from the date of death of deceased and submit his report within four weeks hereof. Once the report is filed, thereafter, plea of the plaintiffs about depositing of their respective shares in the income will be considered, subject to any objection.

JUDGE

Karachi
Dated: 17.11.2020