

ORDER SHEET  
IN THE HIGH COURT OF SINDH, KARACHI  
HCA NO. 234/ 2014

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Date	Order with signature of Judge
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- 1) For orders on CMA No. 2465/2014.
- 2) For katcha peshi.

26.8.2015.

Mr. S. Nasir Hussain Jafri Advocate for the Appellant.

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Through instant appeal, the appellant has impugned order dated 18.8.2014, whereby, Nazir's reference dated 9.8.2010 has been disposed of, through which the Nazir after recording of evidence had sought distribution of estate of the deceased amongst the legal heirs pursuant to passing of a preliminary decree dated 30.4.2007.

Counsel for the appellant submits that the impugned order has been passed without appreciating the facts as well as law, in as much as after closing the side of Respondent No.1 / Plaintiff to cross examine the appellant / defendant No.1 on 5.3.2009, the Nazir had no authority to reopen the side of Respondent No.1 / plaintiff for such cross examination. Counsel further submits that the order of reopening the side was passed by the Nazir without any notice to the appellant, whereas, the affidavit in evidence filed by the appellant has not been discredited, hence the contents whereof may be ordered to be accepted in favour of defendant No.1 / appellant.

We have heard the Counsel for the appellant at length and have perused the record. It appears that the Suit in question is for Administration and Accounts amongst the legal heirs of deceased K.R. Nazir Ahmed who expired on 3.12.1998. On 30.4.2007 a preliminary decree was passed and Nazir was appointed as administrator of the properties of the deceased to ascertain the estate left by the said deceased and in case of any dispute he was directed to record evidence and to submit his report. The Nazir after recording of the evidence submitted his report dated 9.8.2010 after ascertaining the assets of the deceased and made a reference to the Court for distribution of the same amongst the legal heirs as per Sharia. Since the Counsel for the appellant was unable to assist us as to the precise grievance of the appellant in the instant matter, compelling us to make effort on our own

to understand the controversy and for which we had to summon the R&P, perusal whereof reflects that it is only the reopening of the side of the plaintiff for cross examination of Appellant / Defendant No.1 by which the appellant is aggrieved. It further appears that the Nazir while submitting his reference dated 9.8.2010 has stated the appellant / defendant No.1 who had been cross examined on 14.3.2009 as attorney of defendant No.6 also wanted to place his affidavit in evidence as defendant No.1 on record as an Exhibit on the ground that since the side of plaintiff had been closed for such purposes on 5.3.2009, therefore no further cross examination could be carried on. The Nazir had also requested for distribution of the assets of the deceased through the said reference which has been taken on record through the impugned order.

On a minute examination of the record it appears that the appellant who is defendant No. 1 in the Suit is the husband of defendant No. 6 and had contested the Suit on his behalf as defendant No.1, as well as on behalf of defendant No. 6 as her attorney. The appellant had filed his affidavit in evidence on or about 16.5.2008 and on behalf of defendant No. 6, as her attorney, on or about 11.3.2009. The matter was fixed on 5.3.2009 at 12 P.M. before the Nazir for cross examination of appellant / defendant No.1, when nobody turned up on behalf of the Plaintiff / Respondent No.1 and the side was closed. However, on the same day at around 12.20 PM an application was moved by the Advocate for Plaintiff for recalling of the order, on the ground that the matter was regularly being fixed on the previous dates at 12.30 PM, whereas, on 5.3.2009 it was taken up at 12 PM, hence the absence was not wilful, whereafter, the Nazir with his handwritten order on the same date at 12.20 PM had granted the said application. We regret to observe that the Counsel for the appellant has deliberately not filed copy of such application before us which is very much available in R&P file and has even argued that no such application was on record on which the side of the Plaintiff / Respondent No.1 could have been opened. It is also a matter of record that the defendant No.1 acting as attorney of Defendant No.6, thereafter appeared before the Nazir on 14.3.2009 and was cross examined. The case as set up by the appellant is that since his affidavit in evidence was already on record, whereas, the side was already closed for his cross examination, the same has to be taken on record and therefore, after closing of plaintiff's side, no further cross examination can be done.

We are afraid such contention does not appear to be correct for the simple reason that the side of Plaintiff for appellant's cross examination was in fact re-opened by recalling the order on the same day i.e. 5.3.2009, whereas, thereafter the same person appeared as attorney of defendant No.6 and no objection whatsoever in that regard is available on record, neither in the evidence file nor on the Suit file, except the objections on the Nazir Reference dated 9.8.2010, and that too belatedly when the evidence had been completed. Therefore, even by conduct of the appellant it hardly reflects that any serious objection was taken in that regard. Further, if the appellant intends to rely upon both the affidavits in evidence then the plaintiff has to be given a right of cross examination in respect of both the affidavits including that of the appellant as well as defendant No. 6. The learned Single Judge while passing the impugned order has correctly observed *that though Nazir should have issued notice of the application to reopen the side, as a matter of principle, however, in the given facts and circumstances of the instant case, no prejudice has been caused to defendant No. 6 [Defendant No.1] as the rule of proprietary demands that the opposite party should be given reasonable opportunity to impeach the testimony of the witness.* We are respectfully in agreement with the observation of the learned Single Judge, and are of the view that instant appeal which has been filed in an administration Suit pending since 2003 in respect of properties of the deceased, who had expired on 3.12.1998, is meritless and misconceived. In our view it is an attempt to thwart the administration proceedings and appropriate distribution of the assets of the deceased, of which the majority appears to be in possession of the appellant. Accordingly, the same is dismissed in limine with cost of Rs. 25,000/- to be deposited with the Nazir of this Court within a period of 15 days from today, whereafter compliance report shall be placed before the Court.

Appeal stands dismissed with costs.

JUDGE

JUDGE