JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

R.S.A.No.15 of 2016
Muhammad Sohail Kiyani and others
Versus
Raja Muhammad Anwar and others

Date of Hearing:	08.02.2017
Appellants by:	Mr. Wasim Ahmed Abbasi, Advocate
Respondents by:	Mr. Sharafat Ali Ch. and Mr. Umar Sajjad Chaven, Advocates for respondent No.1, Mr. Hassan Mehmood, Advocate for respondents No.2(iii), 5(i, ii), 6(i, iii, iv, vi, vii, viii), and 7(v).

MIANGUL HASSAN AURANGZEB J:- Through the instant regular second appeal, the appellants, impugn the judgment and decree dated 22.03.2016, passed by the Court of the learned Additional District Judge (East), Islamabad, whereby respondent No.1's appeal against the judgment and decree dated 21.02.2015, passed by the Court of the learned Civil Judge, Islamabad, was allowed. Vide the said judgment and decree dated 21.02.2015, the learned Civil Court had decreed respondent No.1's suit for declaration and permanent injunction.

2. The sole question that warrants determination in this appeal is whether the estate of Raja Muhammad Muzaffar Khan ("Muzaffar Khan"), who went missing in 1973 and has not been heard of since then, would devolve on all his legal heirs who were living in 1980 (i.e. seven years after Muzaffar Khan went missing) or only on his brother (respondent No.1) who was Muzaffar Khan's only living legal heir on 21.09.2013, when the suit for declaration and permanent injunction was instituted by respondent No.1 seeking *inter alia* a declaration to the effect that Muzaffar Khan was dead having gone missing since 1973.

3. The facts essential for the disposal of this appeal are that Sarwar Khan, the predecessor of the appellants and respondents No.1 to 9, is said to have died in 1965-66. His legal heirs were as follows:-

(i) Raja Muhammad Anwar – son (respondent No.1/plaintiff)
(ii) Muzaffar Khan – son (missing since 1973)
(iii) Raja Khuda Dad Khan - son (died on 15.05.2004)
(iv) Mushtaq Begum – daughter (died on 16.07.2003)
(v) Almas Begum – daughter (died on 08.05.2001)
(vi) Khujasta Begum – daughter (died on 25.11.2001)
(vii) Sadiqa Begum – daughter (died on 08.01.2012)
(viii) Fatima Begum – widow (died in 1988).

4. Respondent No.1's brother, Muzaffar Khan, is said to have gone missing in 1973. Muzaffar Khan was unmarried at the time of his disappearance. Muzaffar Khan owns 160 *kanals* and 3 *marlas* of immovable property in various Khasra numbers in Revenue Estate Kot Hathiyal, Tehsil and District Islamabad, ("the suit property").

5. On 21.09.2013, respondent No.1 instituted a suit for declaration and permanent injunction before the Court of the learned Civil Judge, Islamabad. By the time, the suit was filed Muzaffar Khan's mother and siblings, except respondent No.1, had died. The private defendants in the suit were the successors/legal heirs of Muzaffar Khan and respondent No.1's siblings. Respondent No.1's stance in his suit was that since Muzaffar Khan had gone missing and was not heard of since the past forty years, he was liable to be declared as dead, and the suit property was liable to be transferred to his legal heirs. The cause of action is said to have accrued when the Land Revenue Department did not transfer the suit property to Muzaffar Khan's legal heirs. In the said suit, it was *inter alia* prayed that Muzaffar Khan be declared as dead, and the plaintiff along with the private defendants in the suit, be declared as his legal heirs according to Hanafi Sharia Law. Respondent No.1 had also prayed for a direction to the Revenue Department to transfer the ownership of Muzaffar Khan's property along with possession to his legal heirs. As a consequential relief, respondent No.1 had sought a decree for permanent injunction restraining the defendants in the suit from claiming any right on Muzaffar Khan's property and from alienating, transferring or changing the nature of the said property.

6. A few defendants in the suit appeared and recorded their statements to the effect that they had no objection if the suit was decreed and Muzaffar Khan's property devolved on all his legal heirs.

7. The learned Civil Court noted one contradiction in the stance taken by respondent No.1 while tendering evidence to the one taken by him in his pleadings in the suit. During his cross-examination, respondent No.1 took the position that the learned Civil Court should pass a decree to the effect that respondent No.1 alone was the legal heir of Muzaffar Khan, whereas, in the suit, respondent No.1 had prayed for a decree in favour of the legal heirs of Muzaffar Khan. During respondent No.1's examination-in-chief, he produced evidence to establish that his brothers and sisters had died prior to the institution of the suit.

8. Vide judgment and decree dated 21.02.2015, the learned Civil Court decreed the said civil suit by declaring that respondent No.1/plaintiff, his mother, brother and four sisters were the legal heirs of Muzaffar Khan, and entitled to inherit all his estate. The share of each legal heir was specified n the said judgment and decree. Furthermore, it was held that Muzaffar Khan's inheritance would be considered to have opened in the year 1980 (i.e. seven years after the undisputed year of his disappearance); and that in 1980, Muzaffar Khan's mother, brothers and sisters were all alive and, therefore, entitled to inherit his property.

9. The said judgment and decree dated 21.02.2015, passed by the learned Civil Court, was assailed by respondent No.1 in an appeal before the Court of the learned Additional District Judge (East), Islamabad. Vide judgment and decree dated 26.06.2015, the said appeal was allowed, and the judgment and decree passed by the learned Civil Court was modified only to the extent that Muzaffar Khan was declared as dead with effect from the date of the institution of the suit, and his inheritance was also declared to have opened from the date of the institution of the suit.

10. On 06.01.2016, an application for re-hearing of the appeal was filed by two of the appellants herein and three others, on the ground that they were never served with summons or notices from the learned Appellate Court. In the said application, it was also pleaded that the judgment and decree dated 26.06.2015, passed by the learned appellant Court was not in accordance with law laid down by the Superior Courts. Vide order dated 16.02.2016, the learned Appellate Court allowed the said application, and set aside the said judgment and decree dated 26.06.2015. Furthermore, a date was fixed for arguments in the appeal. Vide judgment and decree dated 22.03.2016, the learned Appellate Court again allowed the appeal and set aside the judgment and decree passed by the learned Civil Court. Muzaffar Khan was declared as dead with effect from the date of the judgment and decree passed by the learned Civil Court. Only the legal heirs alive on the date when the said judgment and decree was passed, were considered entitled to inherit Muzaffar Khan's property. The said judgment and decree dated 22.03.2016, passed by the learned Appellate Court has been impugned by the appellants in the instant regular second appeal.

11. Learned counsel for the appellants submitted that it was not disputed that Muzaffar Khan had gone missing and was unheard of since 1973; that it was also not disputed that Muzaffar Khan had two brothers, four sisters and a mother, all of whom were alive upon expiry of seven years from 1973, but all of them except respondent No.1, had died prior to the institution of the suit; that it was a matter of record that respondent No.1 in his suit had prayed for a declaration that the plaintiff and the private defendants in the suit be declared as Muzaffar Khan's legal heirs; that respondent No.1 in his examination-in-chief, departed from his pleadings in the suit, by asserting that he alone should be declared as Muzaffar Khan's legal heir; that respondent No.1 was estopped from taking a position contrary to the one taken by him in the civil suit; that the learned Appellate Court erred by granting respondent No.1 relief that had not been prayed for in the suit; that respondent No.1 was trying to deprive the other

legal heirs of Muzaffar Khan from their lawful inheritance; that since Muzaffar Khan had admittedly gone missing in 1973, he would be deemed to have died in 1980, and that is when his inheritance opened; and that the impugned judgment and decree passed by learned Appellate Court is contrary to the law laid down by the Superior Courts in the cases of Lal Hussain Vs. Mst. Sadiq and another (2001 SCMR 1036) and State Life Insurance Company Vs. Faisal Tahir" (2011 CLD 1594). Learned counsel for the appellants prayed for the judgment and decree passed by the learned Appellate Court to be set aside, and the one passed by the learned civil Court to be restored.

12. On the other hand, learned counsel for respondent No.1 submitted that there was no legal infirmity with the judgment and decree dated 22.03.2016, passed by the learned Appellate Court; that respondent No.1 had simply sought a declaration that his brother, Muzaffar Khan, was dead on account of being missing since 1973; that respondent No.1 had prayed for the estate of Muzaffar Khan to be devolved upon his surviving legal heirs according to the Hanafi Law of Inheritance; that Section 2 of the West Pakistan Muslim Personal Law (Shariah Application) Act, 1962, provided that all questions regarding succession shall be decided according to Muslim Personal Law (Shariah) in cases where the parties are Muslim; that the explanation to Article 227 of the Constitution provides that the expression " Quran and Sunnah" in the said Article 227 means Quran and Sunnah as interpreted by the sect; that all the private parties to the suit belonged to the Hanafi School of thought and, therefore, the matter had to be decided in accordance with the Hanafi Law of Inheritance; that Article 124 of the *Qanoon-e-Shahadat* Order, 1984, *inter alia* provides that when a question arises as to whether a Muslim is dead or alive, and it is proved that he has not been heard of for seven years, the burden of proving that he is alive, is on the person who affirms it; that among Hanafis, a missing person is considered to be alive until a declaration as to his death is made by a Qazi, and the right to succeed to his estate will accrue from the date of such a declaration and not

from the date when he disappeared; that the learned Civil Court had erred by not appreciating that a Muslim is considered to be alive until a declaration is made by a Qazi as to his death; and that there is a presumption of continuity of life even after the expiry of seven years from the date of a Muslim's disappearance. The learned counsel for respondent No.1 made reference to *Tarazi Sharah Saraji* by Maulana Ishtiaq Ahmed Sahib Darbhangvi (Dar-ul-Uloom Hyderabad) and Hazrat Maulana Mufti Saeed Ahmed Sahib Palanpuri (Dar-ul-Uloom Deoband) in support of his contention that a missing Muslim's inheritance opens when a Court gives a declaration (that a Muslim having gone missing for more than seven years was considered to have died), and not upon the expiry of seven years after the date when such a Muslim goes missing; and that the estate of a such a Muslim/missing person will devolve only on the legal heirs who were alive when such a declaration was made by a Court, and not on the ones who had died prior to such a declaration.

13. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant regular second appeal have been set out in sufficient detail in paragraphs 03 to 10 above and need not be recapitulated.

14. Indeed the admitted position is that Muzaffar Khan went missing in the year 1973, and was not heard of by anyone ever since then. Muzaffar Khan was married. It is also admitted that upon the expiry of seven years from the date when Muzaffar Khan went missing, his mother and all his brothers and sisters were alive. Muzaffar Khan's mother and siblings, except respondent No.1, had died prior to the institution of the civil suit.

15. Now, respondent No.1 in addition to praying for his brother, Muzaffar Khan, who had gone missing for more than forty years, to be declared as dead, also sought a declaration to the effect that respondent No.1/plaintiff and the other private defendants in the suit be declared as Muzaffar Khan's legal heirs. In this regard, paragraphs (ii) and (iii) of the prayer clause are reproduced herein below:-

"(ii) That plaintiff (and/or other private Defendants according to Hanfi Sharaih) be declared legal heir of Raja Muhammad Muzaffar Khan.

(iii) That the land revenue department (D 7 & 8) be directed to transfer the ownership of the suit property to the legal heirs of Raja Muhammad Muzaffar Khan according to Hanfi Sharaih and also the possession be delivered."

16. Furthermore in paragraph 11 of the said suit, it has been pleaded that the Muzaffar Khan's legal heirs were bound by the Hanafi Law of Inheritance. For respondent No.1 to take a volte-face during the evidence stage and assert that he alone should be declared entitled to inherit Muzaffar Khan's property, is not permissible.

17. The learned Civil Court had declared Muzaffar Khan to have been dead since 1980 (i.e. upon the expiry of seven years from the date when he went missing and was unheard of), whereas, the learned Appellate Court declared him to have been dead from the date of the judgment and decree passed by the learned Civil Court. Since the judgments of the learned Courts below are at variance, it is necessary to analyze Articles 123 and 124 of the *Qanoon-e-Shahadat* Order, 1984, which are reproduced herein below:-

> *"123. **Burden of proving death of person known to have been alive within thirty years.** Subject to Article 124, when the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.*
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> *124. **Burden of proving that person is alive who has not been heard of for seven years.** When the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive the burden of proving that he is alive is shifted to the person who affirms it."*

18. Articles 123 and 124 of the *Qanoon-e-Shahadat* Order, 1984, replaced Sections 107 and 108 of the Evidence Act, 1872, which were in the following terms:-

> *"107. **Burden of proving death of person known to have been alive within thirty years.** When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years, the burden of proving that he is dead is on the person who affirms it.*
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> *108. **Burden of proving that person is alive who has not been heard of for seven years.** Provided that when the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would*

naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it."

19. Article 123 has been made 'subject to' Article, 124 by the *Qanoon-e-Shahadat* Order, 1984. The presumption embodied in Section 108 was an exception or a proviso to the rule in Section 107 of the Evidence Act, 1872, and therefore, overrode Section 107. Either way it can safely be held that Article 124 *Qanoon-e-Shahadat* Order, 1984, is in *pari materia* to Section 108 of the Evidence Act, 1872.

20. If a person has not been heard of for seven years, there is a presumption at law that he is dead and the burden of proving that he is alive is shifted to the other side. Under Article 124 it is not required that the Court should hold that a person is dead after the expiration of seven years but it only provides for the shifting of burden to the person who asserts that the person is alive. In the case at hand, none of the defendants in the suit asserted that Muzaffar Khan was heard of after 1973, hence, the question of shifting of the burden envisaged under Article 124 did not arise. However, before a presumption under Article 124 is raised, it has to be found by making an appropriate enquiry that the person has not been heard of for seven years. Unless it is established that the whereabouts of a person are not known and he has not been heard of for the past seven years before the date of the suit, the presumption would be that he is alive. In the instant case, there was sufficient evidence to show that Muzaffar Khan went missing and was not heard of since 1973. As Muzaffar Khan was unheard of for seven years since 1973, he can be deemed to have met with a civil death and not a death occasioned on his last breath.

21. The presumption raised under Article 124 is a limited presumption confined only to presuming the factum of death of the person. It is well settled that the presumption of death does not extend to the date of death. No presumption can be drawn as to the date or time of the death of a person who has not been heard of for seven years, but it can be inferred on the basis of

evidence, factual or circumstantial. Onus of proving that a person was dead on a particular date lies on the person who asserts it. In the case of Mst. Sardar Bibi Vs. Maula Dad and others (PLD 1962 (W. P.) Lahore 137), the Division Bench of the Hon'ble Lahore High Court, after making reference to Section 108 of the Evidence Act, 1872, held as follows:-

> ***"It is a rule of presumption that, in the absence of evidence to the contrary, a person shall be taken to be dead when he has been absent for seven years and has not been heard of, it has to be presumed that he is dead. While dealing with section 108 of the Evidence Act, their Lordships of the Privy Council in Lal Chand Marwari v. Mahant Ramrup Gir (AIR 1926 P.C. 9) held: -***
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> > ***"Now upon this question there is, their Lordships are satisfied, no difference between the law of India as declared in the Evidence Act and the law of England (Rango Balaji v. Mudiyappa I L R 23 Bom. 296) and searching for an explanation of this very persistent heresay, their Lordships find it in the words in which the rule both in India and in England is usually expressed. These words taken originally from In re Phene's Trusts (L R 5 Ch. 189) run as follows:-***
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> > > ***"If a person has not been heard of for seven years, there is a presumption of law that he is dead, but at what time within that period he died is not a matter of presumption but of evidence, and the onus of proving that the death took place at any particular time within the seven years lies upon the person who claims a right to the establishment of which that fact is essential.""***

22. There is plenty of case law to the effect that Section 108 of the Evidence Act, 1872 raised a presumption that at the institution of the suit a certain person was dead but no presumption of the date of his death could or did arise under the said Section, and the date of his death had to be proved by the plaintiff in the same way as any other relevant fact in the case. In a case of Muhammad Sarwar and another Vs. Fazal Ahmed and another (PLD 1987 SC 1), it has been held that Section 108 of the Evidence Act merely creates a presumption that the person who has not been heard for seven years, is dead, on the date of suit, and does not refer in any way as to the date of his death which has to be proved in the same way as any other relevant fact in the case. Earlier, in the case of Khudadad Vs. Mst. Resham Jan and others (PLD 1968 Peshawar 172), it was held that in case of a

person not heard of for seven years a presumption attaches that he is dead but a further presumption about time of death cannot be raised. The onus of proving that he died at particular time shifts on the person asserting the same.

23. Respondent No.1's wanted the entire estate of his brother, Muzaffar Khan, to devolve on him on the ground that he alone out of all the legal heirs of Muzaffar Khan was alive when the suit for declaration as to the Mazaffar Khan's death was instituted. Therefore, the onus was on respondent No.1, who was the plaintiff in the suit, to have proved that Muzaffar Khan had died after the death of mother and siblings (save respondent No.1) in order to exclude the private defendants in the suit from inheriting their respective shares in Muzaffar Khan's estate. This onus respondent No.1 did not discharge. There is no evidence on the record to suggest that Muzaffar Khan died on a date after all his legal heirs, except respondent No.1, had died. There is not even any pleading in respondent No.1's suit to the effect that Muzaffar Khan died after the death of his mother and siblings, save respondent No.1. In the absence of any specific pleading as to the date and time of Muzaffar Khan's death, respondent No.1 could not seek to deprive the other legal heirs of Muzaffar Khan from their inheritance, by claiming to be his sole legal heir on account of being alive on the date of the institution of the suit. In the suit, respondent No.1 had not even prayed for Muzaffar Khan's inheritance to open with effect from the date of the institution of the suit.

24. As mentioned above, in the case at hand, there is no dispute between the contesting parties on the point that Muzaffar Khan has not been heard of since 1973. It is also not respondent No.1's case that Muzaffar Khan had died after the death of his mother and other siblings. Respondent No.1's case essentially is that Muzaffar Khan's inheritance would open from the date of the decree of the learned Civil Court declaring him dead, and not on the date of the expiry of the seven years from the date when he went missing. Although, the contention of the learned counsel for respondent No.1 that the presumption of death would be on the

date on which the question is raised (i.e. the when the suit or claim is filed before a Court) is supported by treaties he relied on and the judgments in the cases of Ramabai and others Vs. Saraswathi and others (AIR 1953 Travancore Cochin 114), Sarojini Vs. Sivanandan (AIR 1956 Travancore Cochin 129), Bhagat Vs. Life Insurance Company of India Madras (AIR 1965 Madras 440), Smt. Narbada and another Vs. Ram Dayal (AIR 1968 Rajasthan 48), Har Nand Vs. The Commissioner Ambala Division, Ambala Cantt and others (AIR 1972 Punjab & Haryana 14), Chandi Charan Vs. Bhagyadhar (AIR 1976 Calcutta 356), etc., but a different view has been taken by the Hon'ble Supreme Court of Pakistan in the case of Lal Hussain Vs. Mst. Sadiq and another (2001 SCMR 1036).

25. In the said case of Lal Hussain Vs. Mst. Sadiq and another (Supra), Roshan Din was presumed to have died having not been heard of since 1947. Roshan Din had two brothers, namely, Lal Hussain (the plaintiff/petitioner) and Hassan Din (who had died in 1974). In 1985, Lal Hussain instituted a suit praying for his brother, Roshan Din to be declared as dead, having gone missing for more than seven years since 1947. The learned Trial Court declared that Roshan Din's inheritance had opened from the date of the institution of the suit, and not from the expiry of seven years from the date when he had gone missing. It was also held that the legal heirs of Hassan Din were not entitled to get any share out of Roshan Din's estate, as Hassan Din had died prior to the institution of the suit. The revision petition filed by the legal heirs of Hassan Din was allowed by the Honourable Lahore High Court holding *inter alia* as follows:-

> ***"If the respondent wanted an exclusive share in the inheritance of Roshan Din, then it was incumbent upon him to prove by positive evidence that Roshan Din had died after the death of Hassan Din which as mentioned above occurred on 1-11-1974. This evidence is conspicuously missing in the present case with the consequences that in order to determine the inheritance of the parties, the presumption of Article 124 would be relevant and Roshan Din would be presumed to have died on the lapse of seven years from 1947, admittedly when Hassan Din, the predecessor-in-interest of the respondent was alive. Resultantly on the lapse of above period, the respondent and Hassan Din became entitled to the inheritance of estate of Roshan Din and after the death of Hassan Din, the petitioners***

were equally entitled to half share which have devolved upon their father. "

26. The Honourable Supreme Court dismissed the petition for leave to appeal against the judgment passed by the Honourable Lahore High Court. Paragraph 7 of the judgment of the Honourable Supreme Court is reproduced herein below:-

> ***"7. It is common ground between the parties that Roshan Din is unheard of since 1947. The provisions of Article 124 of the Qanun-e-Shahadat Order are thus, fully attracted and there is a presumption of law that he is dead. However, the date of his death is not discernible from the record, therefore, the point for determination is whether his inheritance had opened seven years after 1947 or before the attestation of Mutation No. 2868 or. institution of the petitioner's suit. The point can be conveniently determined in the light of the provisions of Article 124 of the Qanun-e-Shahadat Order and its interpretation made in Muhammad Sarwar and another v. Fazal Ahmad and another PLD 1987 SC 1. Article 124 of Qanun-e-Shahadat Order clearly spells out that where a person has not been heard of for seven years by those who would naturally have heard of him if he had been alive the burden of proving that he is alive is on the person who affirms it. In the case of Muhammad Sarwar and another (supra) it was held that section 108 of the Evidence Act, 1872 (Article 124 of Qanun-e-Shahadat Order) merely creates a presumption that the person who has not been heard of for seven years is dead at the date of the filing of the suit and does not refer in any way as to the date of his death which was to be proved by positive evidence. Roshan Din was admittedly real brother of the petitioner and Hassan Din, predecessor-in-interest of the respondents. The petitioner's claim that he is the sole legal heir of Roshan Din goes a long way to suggest that Roshan Din was alive at the time of death of Hassan Din which occurred in the year 1974. He was thus obliged to prove by positive evidence that Roshan Din was alive in the year 1974 and had died after his brother Hassan Din but he singularly failed to do so. The evidence adduced by him consists of his solitary statement which is too bald and incoherent to be termed as positive evidence with regard to the date of death of Roshan Din. In the absence of positive evidence about the date of death of Roshan Din the period of seven years envisaged by Article 124 of the Qanun-e-Shahadat Order is to be reckoned from the undisputed year of disappearance of Roshan Din i.e, 1947. It would thus follow that the inheritance of Roshan Din had opened in the year 1954, when Hassan Din was alive, and devolved on the petitioner and Hassan Din (predecessor-in-interest of the respondents) in equal shares. The impugned judgment is, therefore, unexceptionable. Consequently, the petition is dismissed and leave declined."***
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> **(Emphasis added)**

27. Additionally, in the case of State Life Insurance Corporation of Pakistan through Zonal Head Vs. Faisal Tahir and others (2011 CLD 1594), the insured/missing person had been kidnapped on 28.03.1999, and had not been heard of for more

than seven years. It was held by the Honourable Lahore High Court as follows:-

> ***"18. The fact of death of insured is further confirmed from the fact that no insurance premium has been paid after the date of his abduction. This has not been denied by learned counsel for petitioner. The above said facts shows that after the elapse of 12 years no one has claimed that he has seen the insured person, further the petitioner is not claiming that they have the evidence about the fact that insured is alive and as such it is a proven fact that the insured is dead, the insurance policy is covered against the death of insured and as such petitioner is bound to pay the insurance claim to the legal heirs of insured in terms of Succession certificate issued by the competent court of law. In fact the insurance claim stand matured from the date of expiry of seven years which commenced from 28-3-1999."***

28. In the case of Muhammad Afsar and others Vs. Mst. Khatun and others (PLD 1957 Peshawar 1), Feroz had gone missing was not heard for more than seven years. Feroz had two wives. From his first wife, he had two daughters and four sons. From his second wife, he had one daughter and one son called Latif. Latif died on 10.10.1947 and was survived by one widow, one daughter and two sons. On 24.01.1951 a mutation was attested with regard to Feroz's property in favour of all his legal heirs including the legal heirs of Latif. On 03.04.1952, some of Feroz's children from his first wife filed a suit praying for Feroz to be declared as dead with effect from the date of the institution of the suit. The purpose behind seeking such a declaration was to consider Latif to have pre-deceased his father (Feroz), and consequently, to completely exclude Latif's legal heirs from inheriting their share in the estate of Feroz. The suit was contested by Latif's legal heirs *inter alia* on the ground that Latif had not pre-deceased his father. The learned Civil Court held that Feroz shall be taken to be dead on the date of the institution of the suit, and the plaintiffs were held entitled to get the decree prayed for. On appeal, the learned District Judge set aside the decree of the learned Civil Court, and held that it was for the plaintiffs to prove that Latif had pre-deceased Feroz and that they had failed to do so. The Hon'ble Peshawar High Court upheld the judgment of the learned Appellate Court. It was held that since there was no evidence on record that Feroz had been

heard of after his son, Latif's death, Feroz would be presumed to be dead on the day when Latif died, because the statutory period of seven years had expired long before that date. It was also held that it would be *"a most unrealistic view"* if Feroz was presumed to be dead only on the date of the institution of the suit, and not on any date prior to it. Furthermore, it was held as follows:-

> ***"The presumption that Feroz died on the date when the suit is instituted, if raised, would complicate the matter to such an extent that it would be very difficult to solve it. In fact, in every case, if it is held that the presumption should be raised on the date when the suit is instituted, difficult situations are bound to arise. Supposing if after the disappearance of a certain person it is necessary for several persons to institute the suits, and they do so on different dates, the question would arise if the presumption of death would arise on the institution of the first suit, or differently on the different dates. In either case, the position shall become extremely ridiculous."***

29. Now, the learned Appellate Court was bound to follow the law laid down by the Honourable Supreme Court in the case of Lal Hussain Vs. Mst. Sadiq and another (Supra). Under Article 189 of the Constitution, the decisions of the Hon'ble Supreme Court enunciating principles of law are binding on all other Courts in Pakistan. Details regarding the case of Lal Hussain Vs. Mst. Sadiq and another (Supra), have been given hereinabove so as to appreciate that the judgment and decree dated 22.03.2016 passed by the learned Appellate Court is in stark contrast to the law laid down in the said case. A judgment passed by any Court, including a High Court, contrary to the dictum laid down by the Honourable Supreme Court was a judgment *per incuriam*. Reference in this regard may be made to the case of "Province of the Punjab through Secretary, Health Department Vs. Dr. S. Muhammad Zafar Bukhari" (PLD 1997 SC 351). In the case of "Ashiq Hussain alias Muhammad Ashraf Vs. the State" (PLD 1994 SC 879), the Honourable Supreme Court has deprecated the tendency in the sub-ordinate Courts to ignore the judgments of the Superior Courts, when cited before them. The Honourable Supreme Court has termed such a treatment to the judgments of the Superior Courts and the attitudes of the Presiding Officers to be contemptuous, contumacious and amounting to misconduct. However, the record is silent as to whether the above mentioned

judgment of the Hon'ble Supreme Court, was quoted by the appellants in the proceedings before the learned Appellate Court, I refrain from passing any remarks about the learned Presiding Officer, who is well known for his integrity, intellectual abilities and impeccable credentials.

30. In the instant case, respondent No.1 did not produce any evidence to show that Muzaffar Khan was heard of after 1980 or after his legal heirs had died. Additionally, the statutory period of seven years had expired in 1980 i.e. before any of Muzaffar Khan's legal heirs had died. Hence, Muzaffar Khan would be presumed to have died before any of his legal heirs died and not on the day of the institution of the suit by respondent No.1. The inheritance of Muzaffar Khan would be considered to have opened in 1980 (i.e. upon the lapse of seven years from the date when he went missing and was unheard of), when all his legal heirs were living. As such the successors of all of the legal heirs of Muzaffar Khan, including respondent No.1 would have a share in his estate/suit property. There is no impediment before the other legal heirs of Muzaffar Khan to gift or transfer their respective shares in the suit property to respondent No.1, should they so desire.

31. Since I find the judgment and decree dated 22.03.2016, passed by the learned Appellate Court to be contrary to law laid down in the case of Lal Hussain Vs. Mst. Sadiq and another (Supra), this regular second appeal is allowed; the said judgment and decree dated 22.03.2016 is set aside; and the judgment and decree dated 21.02.2015 passed by the learned Civil Court is restored. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2017

(JUDGE)

APPROVED FOR REPORTING

Sanaullah