

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

CASE NO. : C.R. NO.442-D-2003

Muhammad Tariq etc.

Vs.

Sabira Bibi etc.

Petitioners by : Malik Muzaffar Khan Awan, Advocate

Respondents by : Rai Tanveer Asghar, Advocate

Date of hearing : 26.02.2020

AAMER FAROOQ J. The dispute, in the present petition, pertains to the property, which is in nature of land measuring 14-kanals 16-marlas situated in village Darkala, Tehsil and District Islamabad. In this regards, one Mst. Ism Jan, who was daughter of Qaim Din, was married to Afsar Khan. The said Afsar Khan died and Mst. Ism Jan received her share from her husband. Mst. Ism Jan died on 14.11.1984 leaving behind her sister Resham Jan (sister) and nephew Muhammad Aslam (son of deceased brother). The property, owned by Mst. Ism Jan, was transferred in favour of Mst Resham Jan and Muhammad Aslam. The legal heirs

of Muhammad Siddique, predecessor-in-interest of respondents No.1 to 5, filed a Suit for Declaration to the effect that Muhammad Siddique, Abdur Razzaq and Muhammad Abbas, sons of Qaim Din hence are the legal heirs of Mst. Ism Jan and entitled to share in her property. In this behalf, challenge was made primarily to the share in the property received by Muhammad Aslam as son of deceased brother of Mst. Ism Jan. Learned trial court, vide judgment and decree dated 29.10.2001, dismissed the suit, however, respondents No.1 to 5, filed appeal which was allowed vide judgment dated 30.04.2003 and the suit was decreed in favour of plaintiffs.

2. Learned counsel for the petitioners, *inter alia*, contended that since Mst. Ism Jan had no issue, hence her property devolved upon her sister to the extent of $\frac{1}{2}$ share as a sharer; that remainder devolved upon Muhammad Aslam, the predecessor-in-interest of respondents No.6(a) to 6(h). It was contended that learned appellate court has wrongly decided the matter in favour of plaintiffs inasmuch as the step brothers (agnate brothers) are lower in the category of

residuary. In support of his contentions, learned counsel placed reliance on cases reported as 'Abdul Qadir and others Vs. Allah Daad and others' (1997 CLC 48), 'Kabir Hussain and 3-others Vs. Mst. Iqbal Bibi and 2-others' (1991 MLD 1681) and 'Lal and others Vs. Barkhurdar and others' (1996 SCMR 1964).

3. Learned counsel for respondents No.1 to 5, *inter alia*, contended that suit has rightly been decreed in favour of plaintiffs and impugned judgment does not suffer from any misreading or non-reading of evidence.

4. Arguments advanced by learned counsels for the parties have been heard and the documents, placed on record, examined with their able assistance.

5. Before proceeding to render findings, it is pertinent to mention that notices were issued to all the respondents, however, representation was made only on behalf of respondents No.1 to 5, whereas all other respondents were ordered to be proceeded ex parte vide order dated 14.09.2015.

6. As noted above, the suit was filed by predecessor-in-interest of respondents No.1 to 5, being the step brother of deceased Mst. Ism Jan. Respondents No.9 to 11 conceded the claim of the plaintiffs.

7. Learned trial court framed eight different issues, out of which, issue No.7 is the key issue, which is as follows:-

“Whether the plaintiff is entitled to get the decree for possession as prayed for? OPP”

The basis of prayer of the plaintiffs was that since the predecessor-in-interest of Muhammad Aslam namely Muhammad Sharif died before death of Mst. Ism Jan, hence Muhammad Aslam was not entitled to any share in the property of Mst. Ism Jan and as per Hanafi Sunni Law, the plaintiffs and respondents No.9 to 11 get the remainder share. According to ‘Principles of Muhammadan Law’ by D.F. Mulla under Hanafi Law of Inheritance, there are three classes of heirs, namely; i) sharers ii) residuaries and iii) distant kindred. The sharers and those who are entitled to a prescribed share of inheritance; residuaries are those who take no prescribed share, but

succeed to the residue after the claims of the sharers are satisfied and distant kindred are all those relatives by blood who are neither sharers nor residuaries. In case, if deceased has a sister as sole sharer; the heir inherits half of the estate and where there is more than one sister, the sisters cumulatively inherit $2/3^{\text{rd}}$ share; however, in both cases, the remainder goes to residuaries. It is pertinent to observe that sister or sisters, who are the heirs after inheriting as sharers, also inherit as residuaries.

8. The matter has been clinched by the Hon'ble Supreme Court of Pakistan in case reported as 'Saadullah and others Vs. Mst. Gulbanda and others' (2014 SCMR 1205). The Hon'ble Supreme Court of Pakistan, placing reliance on 'Principles of Muhammadan Law' by D.F. Mulla and reproducing the same, laid down the categories of residuaries. For the sake of brevity, relevant portion of the judgment is reproduced below:-

"In this regard, we have perused the table of residuaries in the form of a chart given in the book "Principles of Mahomedan Law" by D.F. Mulla, a renowned scholar, researcher and jurist, and seen that the real sisters being nearer in degree of relationship with the deceased stand at serial No.6, while the consanguine brother stands at serial No.7. For ease of reference, the said chart is reproduced as under:--

"TABLE OF RESIDUARIES IN ORDER OF SUCCESSION- Sunni Law

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I. DESCENDANTS:

- (1) SON.

Daughter takes as a residuary with the son, the son taking a double portion.

- (2) SON'S SON h.l.s.-the nearer in degree excluding the more remote. Two or more son's sons inherit in equal shares. Son's daughter h.l.s. takes as a residuary with an equal son's son.....

II. ASCENDANTS:

- (3) FATHER.

- (4) TRUE GRANDFATHER h.h.s.- the nearer in degree excluding the more remote.

III. DESCENDANTS OF FATHER:

- (5) FULL BROTHER.

FULL SISTER- takes as a residuary with full brother, the brother taking a double portion.

- (6) FULL SISTER- In default of full brother and the other residuaries above-named, the full sister takes the residue

- (7) CONSANGUINE BROTHERS.

CONSANGUINE SISTER.- takes a residuary with consanguine brother, the brother, taking a double portion.

- (8) CONSANGUINE SISTER.- In default of consanguine brother and the other residuaries above-named, the consanguine sister takes the residue,.....

- (9) FULL BROTHER'S SON.

- (10) CONSANGUINE BROTHER'S SON.

- (11) FULL BROTHER'S SON'S SON.

- (12) CONSANGUINE BROTHER'S SON'S SON.

Then come remoter male descendants of No.11 and No.12, that is, the son of No.11, then the son of No.12, then the son's son of No.11, then the son's son of No.12 and so on in like order.

IV. DESCENDANTS OF TRUE GRANDFATHER h.h.s.

- (13) FULL PATERNAL UNCLE.

- (14) CONSANGUINE PATERNAL UNCLE.

- (15) FULL PATERNAL UNCLE'S SON.

- (16) CONSANGUINE PATERNAL UNCLE'S SON.

- (17) FULL PATERNAL UNCLE'S SON'S SON.

- (18) CONSANGUINE PATERNAL UNCLE'S SON'S SON.

Then come remoter male descendants of Nos.17 and 18, in like order and manner as descendants of Nos.11 and 12. MALE DESCENDANTS OF MORE REMOTE TRUE GRANDFATHERS - in like order and manner as the deceased's paternal uncles and their

sons and son's sons."

7. This being the legal position, the only submission of the learned Advocate Supreme Court for the appellants that since 2/3rd share has been already inherited by the three real sisters of the deceased in their capacity as sharers, therefore, the remaining 16th share of the estate of the deceased would devolve on his consanguine brother, arrayed at serial No.7 of the residuary, is ill-founded and misconceived".

The Hon'ble Supreme Court of Pakistan approved the table of residuaries provided in 'Principles of Muhammadan Law' by D.F.

Mulla. In light of above, where deceased has no child and is survived by sisters and consanguine brothers and sisters, after ½

share is given to full sister as a sharer (2/3rd in case of more than one sister), the rest of the share goes to the residuaries. In the table

of residuaries, the order of succession as provided in 'Principles of Muhammadan Law' by D.F. Mulla and approved by the august Apex

Court, full sister ranks higher than consanguine brothers and sisters

and full brothers sons also ranks lower to the full sister and

consanguine brothers and sisters. In view of above, ½ share of the

estate of Mst. Ism Jan went rightly to Mst. Resham Jan who

inherited the same as a sharer; since there were no other sharers,

the remaining property was to devolve upon residuaries or distant

kindred. The list of residuaries, in the order of preferences, is

provided hereinabove, where full sister is at No.6 and consanguine brothers and sisters are at No.7 and son of deceased brother is at No.11. Muhammad Aslam is residuary to the estate of Mst. Ism Jan and so is Mst. Resham Jan as well as plaintiffs for consanguine brothers and sisters. In the order of preferences, after receiving her share as a sharer, the remainder estate also goes to Mst. Resham Jan, now survived by the petitioners in her category as residuary and being higher in preference in the above table than the plaintiffs or even Muhammad Aslam, the predecessor-in-interest of respondents No.6(a) to 6(h) was entitled to even remaining share of estate of Mst. Ism Jan.

9. It is pertinent to observe that Mst. Resham Jan never made a challenge to the transfer of property to Muhammad Aslam as residuary to the estate of Mst. Ism Jan, however, in any case, the plaintiffs were not entitled as residuaries inasmuch as they fell lower in preferences of residuaries to Mst. Resham Jan, but higher to Muhammad Aslam.

10. The dispute could have arose between Muhammad Aslam and Mst. Resham Jan, but as noted above, the latter never made a challenge hence it is inconsequential for the purposes of present civil revision. In any case, the plaintiffs were not entitled to inherit from the estate of Mst. Ism Jan inasmuch as Mst. Resham Jan was higher in preference of residuaries as mentioned above.

11. In light of above discussion of law and facts, the judgment handed down by learned appellate court does not depict the correct appreciation of legal position in terms of Islamic Law of Inheritance, hence is not sustainable. The learned appellate court committed material irregularity in exercise of jurisdiction by not appreciating the correct law propounded by Hon'ble Supreme Court of Pakistan on the basis of Hanafi Sunni Law of Inheritance.

12. It is observed that though learned trial court dismissed the suit filed by plaintiffs, but that was also on wrong proposition of law, however, in light of above position, fate of suit of plaintiffs, in any case, is dismissal.

13. For what has been discussed above, instant civil revision is allowed and the impugned judgment dated 30.04.2003 passed by learned appellate court is set aside; consequently, suit filed by Muhammad Siddique predecessor-in-interest of respondents No.1 to 5, stands dismissed.

(AAMER FAROOQ)
JUDGE

Announced in Open Court on 15.04.2020

JUDGE

Approved for reporting

Zawar