# JUDGMENT SHEET
# IN THE ISLAMABAD HIGH COURT, ISLAMABAD

**CASE NO. : RFA NO.281-2020**
**Hassan Aziz etc.**
**Vs.**
**Meraj-ud-Din etc.**

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| **Appellants by** | **:** | **Mr. Babar Mumtaz, Advocate** |
| **Respondents by** | **:** | **Malik Naseem Abbas Nasir, Advocate for respondents No.1 to 12.**<br>**Syed Zulfiqar Abbas Naqvi, Advocate and Mr. Mudassir Hussain Malik, Advocate for respondent No.13.**<br>**Mr. Muhammad Nazir Jawad, Advocate for CDA/respondent No.14.** |
| **Date of hearing** | **:** | **05.01.2021** |

**AAMER FAROOQ J.** The appellants and respondents No.1 to 13 are the legal heirs of Mrs. Tameez-un-Nisa w/o Sheikh Muhammad Azeem. Respondents No.1 to 3 are sons of referred Mrs. Tameez-un-Nisa; respondents No.4 & 5 are the daughters, whereas two sons of Mrs. Tameez-un-Nisa have predeceased her namely Sheikh Siraj-ud-Din and Sheikh Nawab-ud-Din. In this behalf, Sheikh Siraj-ud-Din was survived by respondents No.6 & 7 as sons and respondents 8 & 9 as daughters; Sheikh Nawab-ud-Din was survived by respondent No.10 and father of appellants namely Aziz-ur-Rehman as sons and respondents No.11 & 12 as daughters. Appellants' father died on 07.12.2005, whereas their grandfather namely Nawab-ud-Din died on 09.04.1992. Mrs. Tameez-un-Nisa was the owner of *inter alia* the property bearing House No.27, Street No.26, Sector F-6/2, Islamabad and after her demise, the heirs sold the referred property to respondent No.13 vide sale deed dated 22.01.2020, which was registered with

respondent No.15. The appellants, who are great grandchildren of Mrs. Tameez-un-Nisa, filed a suit for declaration of succession and administration to the effect that they, being legal heirs of Mrs. Tameez-un-Nisa, are entitled to the share in afore-noted property sold by respondents No.1 to 12 and that property has been sold at a lesser price hence deed be cancelled. The referred suit was dismissed by learned trial court vide judgment and decree dated 25.09.2020, hence the appeal.

2. Learned counsel for the appellants *inter alia* contended that under section 4 of Muslim Family Laws Ordinance, 1961, the appellants are entitled to share the inheritance of Mrs. Tameez-un-Nisa, who was the great grandmother. In this behalf, it was contended that bare reading of section 4 ibid shows that appellants are entitled to have share in the property. Reliance was placed on cases reported as 'Mst. Zainab Vs. Kamal Khan alias Kamla' (PLD 1990 Supreme Court 1051), 'Mst. Saabran Bibi and 9-others Vs. Muhammad Ibrahim and 12-others' (2005 CLC 1160), 'Jamroz Khan Vs. Aamir Khan and others' (2013 CLC 542), 'Mst. Fazeelat Jan and others Vs. Sikandar through his Legal Heirs and others' (PLD 2003 Supreme Court 475), 'Mst. Bhaggay Bibi and others Vs. Mst. Razia Bibi and others' (2005 SCMR 1595), 'Kamal Khan alias Kamla Vs. Mst. Zainab' (PLD 1983 Lahore 546) as well as Article titled 'Orphaned Grandchildren in Islamic Succession of Law' by Kemal Faruki. Learned counsel also placed reliance on a Report of the Commission on Marriage and Family Laws to substantiate that spirit of section 4 of Muslim Family Laws Ordinance, 1961 is that not only the grandchildren but also the great grandchildren are entitled to the proceeds of inheritance. Reliance was also placed on *Ahkam-ul-Quran* by

Imam Abu Bakr Ahmed Bin Ali Jassas Raazi translated by Moulana Abdul Qayyum at pages 218 to 223 as well as *Islamic Shariat Maqasid and Mutaliya* by Yousaf Hamid-ul-Alam.

3. Learned counsel for the respondents *inter alia* contended that section 4 of Muslim Family Laws Ordinance, 1961 is an exception, as such, to the general rule that grandchildren do not inherit from grandfather. It was contended that under the Islamic *Fiqh*, the children of predeceased sons and daughters are not entitled to inherit from grandfather. It was contended that Hon'ble Federal Shariat Court, in case reported as 'Allah Rakha and others Vs. Federation of Pakistan and others' (PLD 2000 Federal Shariat Court 1), struck down section 4 ibid but since the matter is pending before Hon'ble Supreme Court of Pakistan hence section 4 is a valid piece of legislation and in terms thereof, only the grandchildren are entitled to inherit from grandfather/grandmother.

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

5. Section 4 of Muslim Family Laws Ordinance, 1961 entitles children of predeceased sons and/or daughters to inherit from grandfather. The vires of section 4 of Muslim Family Laws Ordinance, 1961 came up for consideration before Hon'ble Federal Shariat Court in case reported as 'Allah Rakha and others Vs. Federation of Pakistan and others' (PLD 2000 Federal Shariat Court 1). The Hon'ble Court, while striking down section 4 ibid, placed reliance on various *Ayaats* from the Holy Quran which are as follows: -

38. Before we analyse the submissions made by the opponents and supporters of section 4 of the Ordinance as recapitulated above, it would be desirable to reproduce section 4 of the Ordinance hereinbelow for facility of reference: --

> "Section 4. Succession: --In the event of the death of any son or daughter of the propositus before the opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stripes receive a share equivalent to the share which such son or daughter, as the case may be, would have received, if alive. "

We would also like to reproduce the Verses of Holy Qur'an governing the subject alongwith the English translation for the immediate facility of reference. The relevant Ayat-e-Qur'ani are: --

Sura Al-Nisa (S.IV.)

(4:7) From what is left by parents
And those nearest related
There is a share for men
And a share for women,
Whether the property be small
or large--a determinate share)

(4:11) Allah (thus) directs you
As regards your children's
(Inheritance): to the male
A portion equal to that
Of two females; if only
Daughters, two or more,
Their share is two-thirds
Of the inheritance;
If only one, her share
Is a half
For parents, a sixth share
Of the inheritance to each,
If the deceased left children;
If no children, and the parents
Are the (only) heirs, the mother
Has a third; if the deceased
Left brothers (or sisters),
The mother has a sixth.
(The distribution in all cases
Is) after the payment
Of legacies and debts.

Ye know not whether
Your parents or your children
Are nearest to you
In benefit. These are
Settled portions ordained
By Allah and Allah is
4:12) In what your wives leave,
Your share is a half,
If they leave no child:
But if they leave a child,
Ye. get a fourth; after payment
Of legacies and debts.
In what ye leave,
Their share is a fourth,
If ye leave no child;
But if ye leave a child,
They get an eighth; after payment
Of legacies and debts.
If the man or woman
Whose inheritance is in question
Has left neither ascendants nor descendants,
But has left a brother
Or a sister, each one of the two
Gets a Sixth; but if more
Than two, they share in a third
After payment of legacies
And debts; so that no loss
Is caused (to anyone).
Thus is it ordained by Allah,
And Allah is All-knowing
Most Forbearing
(4:13) Those are limits
Set by Allah: those who
Obey Allah and His Apostle
Will be admitted to Gardens
With rivers flowing beneath,

To abide therein (for ever)

And that will be

The Supreme achievement.

(4:14) But those who disobey

Allah and His Apostle

And transgress His limits

Will be admitted

To a Fire, to abide therein

and they shall have

A humiliating punishment.

(4:33) To (benefit) everyone,

We have appointed Shares and heirs

To property left

By parents and relatives.

To those also, to whom

Your right hand was pledged,

Give their due portion:

For truly Allah is witness

To all things.

(4:177) They ask thee

For a legal decision

Say: Allah directs (thus)

About those who leave

No descendants or ascendants

As heirs, If it is a man

That dies, leaving a sister

But no child, she shall

Have half the inheritance;

If (such a deceased was)

A woman, who left no child

Her brother takes her inheritance:

If there are two sisters,

They shall have two-thirds

Of the inheritance

(Between them): If there are

Brothers and sisters, (they share),

The male having twice

The share of the female.

Thus, doth Allah make clear

To you (His law), lest

Ye err. And Allah

Hath knowledge of all things.

39. The important Ahadith of the Holy Prophet (peace be upon him) as culled out from the various books of traditions regarding the issue under discussion may also be reproduced hereinbelow: --

> Narrated Ibn-e-Abbas the Holy Prophet said: give the shares of the inheritance as prescribed in the Holy Qur'an to those who are entitled to receive it, than whatever remains, should be given to the closest male relative of the deceased. (Sahih Bukhari, Hadith No.724, Vol. 8, p. 477).
>
> The grandchildren are to be considered as one's children (in the distribution of inheritance) in case none of one's own children are still alive a grandson is as son, a granddaughter it as a daughter, inherit (their grandparents) property as their own parents would (where they are alive) and they prevent the sharing of the inheritance with all those relatives who would have been prevented from the same, where their parents are alive. So, one's grandson does not share the inheritance with one's own son (if the son is alive)" (Sahih Bukhari, English, Vol. 8, p.479).
>
> "Distribute the appointed portion to those entitled to them according to book of Allah. Then whatever remains is for the nearest male. While explaining this tradition Allama Nuvvi writes: the word (بِاَوْلٰی رَجُلٍ) as appearing in the above-quoted tradition, means nearest male' and their is consensus of opinion among the jurists on it." (Sharh Sahih Muslim, Vol. 11, p.53).

The Shia'a Ithna Asharia also support this contention on the authority of a tradition reported by Abi Jafar al-Sadiq which is as follows: --

> (While distributing the property of the deceased person)
>
> "Your real son shall be preferred over your grandson and your grandson shall be preferred over your brother". (Wasail-ul-Shai'a, Vol. 17, p.452, Print Beruit).

40. Ayaat 7, 11 and 12 of Surah Nisa directly govern the law of inheritance of Muslims. From these Ayaat the salient features that can be culled out may be enumerated as under: --

> (1) From the parents there is a share for men and a share for women. No matter the property may be small or large, determinate share.
>
> (2) By Ayat 11 the shares of all those who are to inherit in a given situation are succinctly prescribed.
>
> (3) Similarly in Ayat 12 the inheritance from spouses and the shares devolving on the heirs have been prescribed.
>
> (4) In the same Ayah 12 the inheritance of the man or woman who has left neither ascendants nor descendants but has left other relations has been described and the shares of the persons who are to inherit shave also been given.
>
> (5) In all cases the inheritance is to devolve on the death of the propositus and the distribution is to take place after payment of legacies and debts. This has been ordained to avoid any loss to anyone.

(6) In Ayat 11 it is also very clearly ordained that the portions to be given to the heirs are settled by Allah Almighty and He is all knowing---all wise.

(7) Similarly in Ayat 12 the mandate is that the prescribed shares and the manner of devolution is ordained by Allah Almighty who is all knowing and most forbearing.

41. In order to emphasize that the devolution of inheritance has to be carried out in the manner prescribed in the aforementioned Ayat of Surah Nisa, in Ayat 13 it has been very categorically stated that the limits prescribed for the purpose of inheritance are set by Allah Almighty and those who obey Allah ands his Apostle will be rewarded by admittance to gardens with rivers flowing beneath to live therein forever and that will be the supreme achievement.

42. Again in Ayat 14 a warning to those who disobey Allah and his Apostle and transgress the limits prescribed by Him has been administered with the punishment to follow for the disobedience which is admittance to a fire and to abide therein and they shall have a humiliating punishment.

43. Ayat 33 of Surah Nisa is also relevant to the subject to inheritance. It reiterates that Allah has appointed shares and heirs to property left by parents and relatives and also it is stated therein that Allah is witness to all things.

44. In Ayat 177 of Surah Nisa, Prophet, (s.a.w.) has been addressed to, that when the faithful ask you for a legal decision in certain situations regarding inheritance and as guidance for meeting such situations the heirs have been detailed with the shares to be allowed to them in the given situations. At the end of this Ayat it has been ordained that Allah has made the law clear so that none should err and He has knowledge of all things

45. Keeping the above principles governing the law of inheritance which give the manner, mode and persons to inherit and their shares as well in background we have to now see whether any 'Ijtihad' was/is called for in this respect. The principle of 'Ijtehad' as acknowledged by all the schools of thought is that it is permissible only where there is no Qur'anic Injunction (نص صریح) and if there is any ambiguity to be cleared or clarification needed then resort shall have to be made to Sunnah first.

46. From the contents of Ayaat referred to above it is manifest that there is neither any ambiguity nor any clarification needed as regards devolution of inheritance and persons to inherit as also about their sfikres. In the line of inheritance prescribed by Qur'an in the presence of son, the children of the predeceased children have been excluded as heirs and this position has been aptly taken care of by .the Sunnah of our Holy Prophet Muhammad (peace be upon him) in the above-quoted Ahadith in which the precise position of the j grandchildren has been elucidated that the grandchildren are to be considered as one's children in the distribution of inheritance in case none of one's own children are still alive and grandson has been excluded from inheritance simultaneously with the son of the propositus. This Haidth has been followed by all schools including Fiqa-e-Jafria.

47. At this stage it might also be appropriate to observe that bringing of section 4 on the statute book viz. Muslim Family Laws Ordinance, 1961 was the result of the recommendations of the Commission on Marriage and Family Laws appointed by the Government of Pakistan in 1956 which Commission gave its report referred to in the earlier portion of this judgment. The recommendations of the Commission based on the "so-called Ijtehad" was a futile exercise which has caused confusion in the law of inheritance envisaged for the Muslim Society by mandate of the Holy Qur' an.

The Commission in this respect framed a question as under: --

"Is there any sanction in the Holy Qur'an or any authoritative Hadith whereby the children of a predeceased son or daughter are excluded from inheriting property?"

There is a very short discussion on this issue in the Commission Report. At page 1222 of the Gazette it has been stated: --

"It was admitted by all the members of the Commission that there is no sanction in the Holy Qur'an or any authoritative Hadith whereby the children of a predeceased son or daughter could be excluded from inheriting property from their grandfather. It appears that during ( زمانہ جاھلیت ) this custom prevailed amongst the Arabs, and the same custom has been made the basis of the exclusion of deceased children's children from inheriting property of their grandfather. It may be mentioned that if a person leaves a great deal of property and his father has predeceased him, the grandfather gets the share that the father of the deceased would have got. This means that the right of representation is recognized by Muslim law amongst the ascendants. It does not, therefore, seem to be logical or just that the right of representation should not be recognized among the lineal discendants. If a person has five sons and four of his sons predeceased him, leaving several grandchildren alive, is there any reason in logic or equity whereby the entire property of the grandfather should be inherited by one son only and a large numbers of orphans left by the other sons should be deprived of inheritance altogether. The Islamic law of inheritance entails a grandfather to inherit the property of his grandsons even though the father of the testator has predeceased him, why can the same principle be not applied to the lineal descendants, permitting the children of a predeceased son or daughter to inherit property from their grandfather. There are numerous injunctions in the Holy Qur'an expressing great solicitude for the protection and welfare of the orphans and their property. Any law depriving children of a predeceased son from inheriting the property of their grandfather would go entirely against the spirit of the Holy Qur'an.

> It was stated by Maulana Ehteshamul Hag that all the four Imams are agreed that the son of a predeceased son or daughter shall be', excluded from inheritance. The Maulana Sahib was not prepared to re-open this question in view of the unanimous opinion of all the Imams. The views of the Maulana Sahib would be elaborated by him in his note of dissent. (Underlining is by us).
>
> It has been suggested in some of the replies that the` grandfather can, by will, leave one--third of his property to his grandchildren. This provision does not do full justice to the orphans as is evident from the example given above. We, therefore, recommend that legislation should be undertaken to do justice to the orphans in respect of the property of their grandfathers."

On this point the only Alam Member had disagreed as is apparent from the last but one para of the above quotation. As regards the opening sentence of the above quotation where admitted position of all the members has been given out Maulana Ehtishamul Haq, the Alain Member in his note has recorded that this does not reflect the correct position.

49. Be that as it may, we are of the view that the above formulation of the question in the manner framed misdirected the proceedings of the E Commission. In the presence of the Ayaat of Surah Nisa quoted above the question to be framed required a positive frame and not negative as was done by the Commission. We are certain that if the question had been framed so as to solicit views on the subject in the following form, the result may have been different:

> "Are the children of a predeceased son or daughter entitled to inherit from the grandfather in the presence of a son of a propositus according to Qur'an and Sunnah?"
>
> Unfortunately this was not done. Obviously in the presence of a positive direction that inheritance under the Islamic Law as derived from Qur'anic Verses being based on the principle of " قُرُبُ" and "بُعمَ " and son being the "قَرِيبُ " if the grandson was to be included .in the list of heirs the "father" would be equated with the "nearer" which would amount to interpolation in the Qur'anic Verses. This principle of Qur'anic Verse has been explained by the Hadith also which is in the following words: --

(Gazette of Pakistan, Extraordinary., August 30, 1965, pages 1557 1558)

50. In the presence of the above clear position regarding inheritance to devolve upon nearer (son) to the exclusion of farther (grandson) no verse was specifically required in Qur'an to exclude an orphan grandson from inheritance.

51. To re-explain the position the question for determination was and is whether the grandsons/daughters of a propositus whose parents have died during the lifetime of the propositus are included in the list of those entitled to inheritance under the Qur'anic Injunctions. Qur'anic Injunctions are of two types; directory and prohibitory. It is a matter of common sense otherwise also that in the presence of a mandatory injunction in respect of any matter no prohibitory provision would be required. The Ayaat of Quran e-Hakeem referred to above on the subject of inheritance are mandatory, clear, explicit and, therefore, needed no prohibitory provision for any explanation. The emphasis in the above Ayat of Surah Nisa that the directions contained therein as regards inheritance in all respects have to be followed in letter and spirit and any deviation therefrom entails punishment of severe nature establishes the absolute mandatory nature thereof.

52. Another factor which had been weighing with the learned members of the Commission and obviously with the framers of section 4 (ibfd) appears to be humane and compassionate consideration qua the orphans. The inheritance principles of Islam are not based on financial positions but as already stated above are essentially based on nearness and close proximity of relations- with the deceased whose estate is to be distributed. The above considerations of humane aspects and compassion, though of great importance, cannot be incorporated in it on account of immense complications and the various discriminatory positions that may emerge therefrom. For example if the orphan children of the predeceased children are to be included in the list of persons to inherit why not include the widows of the predeceased children or for that matter the children of the predeceased brothers and sisters etc. and if it be so done there will be no end to the inclusions. Again in the matter of compassion an orphan grandchild without any tangible asset with him should not be equated with another orphan grandchild who in his own right may be much better placed financially than even the direct heir i.e. a son of the propositus. In the context of the above position that can emerge and do exist in the ground realities, the human wisdom which, without any doubt cannot equate with the wisdom of the K Creator, should not be allowed to muddle up the scheme of inheritance laid down by the Holy Qur'an as it is bound to create confusion and choas rather than be of any comfort or solace to the fiber of the Muslim Society. On the plane of pure worldly considerations even, section 4 cannot be sustained. In order to meet situations of financial inequality in the society it is not merely the law of inheritance ordained through Qur'an which should be tampered with but attempt should be made to create a social order which takes care of all the deprived members of the society. Will it not be better to cater for the needs of all the orphans in a respectable manner rather than care for only such orphans who are being allowed to inherit from propositus by virtue of section 4 alone?

53. The inclusion of the grandchildren in the inheritance from the grandfather in the presence of the sons or daughters at the time the succession opens and to have per stripes a share equivalent to the share which such predeceased son or daughter would have received if alive is, therefore, nugatory to the scheme of inheritance envisaged by Qur'an. It may be observed in this regard that the children of predeceased son or daughter appear to have been purposely excluded and there appears to be a justification therefor that they are not to share the burdens and responsibilities which a son as an heir would have to undertake on the demise of his father.

54. Examining the above aspect on the principles of other jurisprudences as well it may be observed that it is well-settled even as regards the man-made law that if in any such law there is manner and mode prescribed for doing anything in a particular manner it has to be done in the same manner only and in no other manner. It is also well-settled that doing of anything in a manner other than specifically provided for will be wholly illegal and will have no effect whatsoever. If this principle is being adhered r to as regards the man-made law how can one think of deviating from the law of Allah which law is the base of all laws and there can be no other law better than that. Although there is no need to derive support from principles of any other jurisprudence to

interpret law as contained in Qur'an but nevertheless the above view has been expressed just to satisfy those minds which are over influenced by philosophies of law other than that of Islam. It I is also intended to bring home to all such thinkers that the philosophy of law I contained in Qur' an is the most just and in consonance with all equitable principles that could possibly be conceived.

55. The next question to be examined is as to what would be the solution for the socio-economic problem with which the orphan grandchildren may be confronted with on the demise of a grandparent, who may have loft estate from which Uncles and Aunts would inherit but they would not, and thus, may have a sense of deprivation or for that matter confronted with economic problems.

56. As already observed above Qur'an-e-Hakeem is the word of Allah Almighty who is the Creator of the Universe and who knoweth everything which none else can know and is the wisest. It will be presently shown that the solution for this problem is also available in the Holy Qur'an.

57. The Islamic Ideological Council in one of its reports on the subject of inheritance has recommended that the Uncles and Aunts of orphan grandchildren are duty bound to take care of their orphan nephews and neices and provide for them. It has also been recommended that in the case of non -performance of this duty by Aunts and Uncles a legal obligation be cast upon them to abide by their duty. Probably the above recommendation is derived from Ayat 8 of Sura-e-Nisa which lays down that at the time of distribution of assets those next of kins and orphans and others, who are present, be also dealt with kindly. This is a direction for general application to all next of kins who are present at the time of distribution to be taken care of and not specifically for orphan grandchildren,

> 58. The above could be one of the solutions for the problem but we are of the view that this solution is not such which will be considered respectable in the social conditions of our country inasmuch as in doing such type of a thing it is usually given out by the performer of the duty that he is doing it as a charity and those who receive, anything under this arrangement have a feeling of inferiority and may have inhibition in' taking something as a matter of charity. If the piety which is a requisite of an Islamic Social Order had been prevalent it could well have been a good solution but in the situations in which we are placed, we are of the view that the better solution would be the making of a law for Mandatory will (وَصِيتہ واجبتہ) in favour of the orphan grandchildren. This view of ours finds support from a Qur'anic Verse as well. Qur'an-e-Hakeem through Ayat 180 of Surah Baqara has' ordained that it is prescribed that when death approaches near you, if he leaves any goods, that he makes a bequest to parents and next of kins according to reasonable usage; and this is due from the God-fearing. This Ayat starts with a mandate that a person, who sees death is approaching, has an obligation to create will. The importance of the above mandate of Qur'an has also been stressed by the following Hadith: Narrated 'Abdullah-bin-Umar Allah's Apostle (s.a.w.) said, "It is not permissible for any Muslim who has something to will, to stay for two nights without having his last will and testament written and K kept ready with him."

59. It was canvassed before us by some learned counsel and the Jurisconsults that this Ayat-e-Qur'ani has been abrogated on account of later revelation by which the parents had been included in the persons to inherit. We are unable to contribute to the above point of view. It is the cardinal principle of interpretation that where two provisions in a law are irreconcilable the latter shall prevail but all efforts should be made to keep both the provisions intact if a reconciliation of the two can be reached. We find that the direction of creating a will on account of latter revelation by including the parents as heirs is abridged to the extent of will in favour of the parents alone but the creation of the will as regards others including the next of kins who are not heirs remains intact in the mandatory form in which it was revealed. Obviously the grandchildren are the nearest next of kin and they having not been included as heirs will be entitled to have a will created in their favour within the limits prescribed for creating the will. The significance and limits of which can be found from the known traditions of Prophet (s.a.w.). We, therefore, are of the view that creation of a will in favour of orphan

grandchildren out of an estate of grandparents to the extent of 1/3rd would be another very plausible solution to meet the socio-economic problem in this regard.

60. It may also be observed that this measure has been resorted to in some Muslim countries and that the laws enforced in this respect in Egypt and Kuwait are being effectively made use of.

61. We would not dilate on this aspect of the matter in further details and leave it to the legislative domain of the country to deliberate on it and bring about the law which would safeguard the interest of the orphan grandchildren and exclude all possible complications of litigation that may crop up as a result of loose or un thought for provision of law. We are preferring the creation of a will in favour of the orphan grandchildren by the, grandparent over other solutions which may be available for the socio-economic problem, inter alia, for the following reasons: --

(a) That this derives strength from Qur'anic Injunctions as the orphan grandchildren being not heirs would be entitled to the will their favour as regards the estate of the propositus;

(b) that the orphan grandchildren would have fruits from the assets of their grandparent without any inhibition as they would be enjoying the same as of right in the same manner as their Uncles and Aunts as heirs would be enjoying benefits of the estate of their father; and

(c) that a provision can be made that in case a propositus dies without creating a will, the will, to the extent of 1/3rd in favour of the grandchildren out of the estate with a ceiling that it does not go beyond the share of their predecessor, shall be deemed to have been created by the grandparerus in their favour

62. From the above it squarely follows that in the presence of the direct mandatory injunctions of Holy Qur'an itself and also the Ahadith there was no occasion, and could possibly be none ever, to add anything thereto or subtract anything therefrom, in the matter of inheritance.

63. In view of the foregoing discussion we hold that the provision contained in section 4 of the Muslim Family Laws Ordinance, 1961, as presently in force, is repugnant to the Injunctions of Islam and direct the President of Pakistan to take steps to amend the law so as to bring the said provision in conformity with the Injunctions of Islam. We further direct that the said provision which has been held repugnant to the Injunctions of Islam shall cease to have effect from 31st day of March, 2000".

6. For ease of convenience, section 4 ibid is reproduced below:-

"Section 4. Succession: --In the event of the death of any son or daughter of the propositus before the opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stripes receive a share equivalent to the share which such son or daughter, as the case may be, would have received, if alive. "

The key words in the above provision are 'children of such son or daughter'; 'living at the time of opening of succession'; 'shall per stripes receive a share'. The word 'children', in general connotation, is direct children; the words in section are children only and not grandchildren or great grandchildren. Succession opens when propositus dies and at that relevant time, whoever is entitled to inherit under the law gets share in

the estate of the deceased. The word ‘per stripes’ literally means by the branch. The word was interpreted in detail by the Hon’ble Supreme Court of Pakistan in case reported as ‘Mst. Zainab Vs. Kamal Khan alias Kamla’ (PLD 1990 Supreme Court 1051). It was observed as follows: -

> “The phrase "per stripes" means: By roots or stocks; by representation. This term, derived from the civil law, is much used in the law of descents and distribution, and denotes that method of dividing an intestate estate where a class or group of distributees take the share which their deceased ancestor would have been entitled to, taking thus by their right of representing such ancestor, and not as too many individuals. It is the anti-thesis of per capita.
>
> It means that the distribution has to be made to a group of share-holders taking the share of their ascendants.
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> Per stripes referred to in section 4 is the anti-thesis of per capita. This means a share according to the stock or the root or the family as against per capita which means share per head. This assumes greater importance only where the propositus leaves behind a number of grandchildren whose parents died during the lifetime of the propositus. The principle of succession in such cases will not be inheritance per capita but per stripes i.e. in accordance with the root or stock to which the grandchild belongs and will only get the share to which the grand-child is entitled through his parent. In the event of there being a single surviving grandchild the principle of per stripes is pushed to the background but cannot be employed to support a principle which militates against the Islamic Law of inheritance.
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> On the opening of succession each group of children of the deceased sons/daughters would inherit the share of their father/mother and each individual would not get the share in his/her individual capacity. Section 4 has been added to cater the needs of grandchildren and to remove their sufferings but it cannot be interpreted so as to decrease the share of the other descendants. According to section 4, share from the deceased grandfather's property has been bestowed upon the children of his predeceased son but this does not mean that the other heirs of the deceased would be excluded from their share of inheritance. Under section 2 of the Muslim Personal Law (Shariat) Application Act, 1962, the rule of decision shall be the Muslim Personal Law (Shariat) in cases where parties are Muslim. In spite of the non-obstante clause section 4. is to be interpreted in the light of section 2 of the Act, 1962. Both thus can stand together.

The interpretation made by the august Apex Court clearly elaborates that section 4 ibid is confined to grandchildren and not further and concept of ‘per stripes’ was laid down only to clarify that each grandchild shall not inherit the share as individual but the grandchildren shall inherit as group of what their father/mother was to inherit. Mohammedan Law by DF Mullah has further elaborated issues of inheritance under the Islamic Law. According to Hanafi Law of

Inheritance, there are three classes of heirs namely a) sharers b) residuaries and c) distant kindred:

a) Sharers are those who are entitled to prescribed share of the inheritance.
b) Residuaries are those who take no prescribed share, but succeed to the residue after the claims of sharers are satisfied.
c) Distant kindred are all those relations by blood who are neither sharers nor residuaries.

Person entitled to inheritance becomes a vested holder of due rights the moment succession opens [Dost Muhammad Vs. Ghulam Nabi 1990 MLD 164]. Under Islamic Law of Inheritance, after clearance of debts and general expenses, estate is distributed amongst sharers and if anything receives after it amongst residuaries. In case, there are no sharers, the residuaries inherit the entire estate. The distant kindred are not entitled to succeed so long as there is any heir belonging to the class of sharers or residuaries. However, there is an exception and that is where sharer is wife or husband of deceased.

7. The outcome of above discussion is that under the Islamic Law of Inheritance, there is no concept of grandchildren inheriting from grandfather and section 4 ibid is an exception to the said principle. The bare reading of section 4 ibid shows that only the sons and daughters (children of predeceased sons and daughters) shall inherit from grandfather/grandmother as per stripes i.e. the share which their father or mother was entitled to inherit.

8. There is no cavil with the principles laid down in the case law cited by learned counsel for the appellants however same are not applicable in the facts and circumstances of instant case, as none of the case law deals with the situation whether the great grandchild is entitled

to inherit. The referred interpretation finds support from the decision of Hon'ble Lahore High Court reported as 'Hussain Bakhsh Vs. Mst. Razia Bibi' (2020 CLC 99) as well as 'Mukhtar Ahmad Vs. Mst. Rasheeda Bibi and another' (2003 SCMR 1664).

9. In case reported as 'Mst. Sarwar Jan and others Vs. Mukhtar Ahmad others' (PLD 2012 Supreme Court 217), the Hon'ble Supreme Court of Pakistan observed as follows: -

> "6. Heard. It is a settled law that the succession to the estate of a Muslim under the Mohammedan Law shall open the moment a person departs from this world. It is his legal heirs, as per the Shariah, who are alive at that time, shall be entitled to inherit his estate. Learned counsel for the respondents has not been able to argue, if under the Shariah, the legal heirs of a pre-deceased child would be entitled to inherit the estate of a deceased grandparent. He is also unable to controvert that except for Section 4 ibid there shall be no such right of inheritance vested in them. However, it is reiterated, that the respondents shall have the right of inheritance as per the principle of law enunciated by the judgment reported as Sardar v. Mst. Nehmat Bi and 8 others (1992 SCMR 82). As the entire case of the respondents is rested on this decision, therefore, it seems expedient to examine the proposition in hand, in the light of the facts and the ratio of Sardar's case. The relevant facts whereof are, that one Ilam Din died in 1947, agricultural land left by him as his estate was mutated in favour of his widow under the custom. On the promulgation of West Pakistan Muslim Personal Law (Shariat) Application Act, 1962 (hereinafter referred to as the Act) the limited estate of the widow terminated and the inheritance was awarded to the surviving legal heirs of Ilam Din, including the children of his pre-deceased daughter, namely, Fatima, who had died in 1942. A collateral of Ilam Din challenged this inheritance granted to Fatima's children. It is how the matter came up before this Court for the adjudication of inheritance entitlement of the said children. Thus, considering the effect of Section 4 ibid which at that time was in force along with certain provisions of the Act, it was held as under:--
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> > "Section 4 of the Muslim Family Laws Ordinance, 1961 allows inheritance to the children of the pre-deceased son or daughter to the extent that the son or daughter would have got. Section 3 of the latter Ordinance 1961 also provides that 'The provisions of this Ordinance shall have effect notwithstanding any law, custom or usage. Therefore, it appears to us that the learned Judge in the High Court was right in holding that by providing for devolution of the property under section 5 of the Muslim Personal Law (Shariat) Application Act, 1962 on termination of the life estate, the children of pre-deceased daughter of the last full owner will inherit the share which their mother would have got as if she were alive at the time of the opening of the succession, (emphasis supplied) that is to say, on the demise of her father Ilam Din in 1947.
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> (11) Finally if the statutory provisions i.e. section 5, section 2 and section 2-A of the Muslim Personal Law (Shariat) Application Act, 1962 and section 4 of the Muslim Family Law Ordinance, 1961 are read together and the rule of interpretation for harmonizing statutory provisions is applied, it is quite clear that on the termination of the life estate of Mst. Nehmat Bi, inheritance will open with reference to the full owner namely Ilam Din who died in 1947. He would be succeeded by his heirs the widow, sister and pre-deceased daughter's children (emphasis supplied). The claim of the appellant to exclude children of the pre-deceased daughter of Ilam Din is untenable."
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> From the above, it is absolutely clear that the question of inheritance in that case was

> determined and resolved by this Court not on the touchstone of section 4 ibid simpliciter, rather predominantly on the basis of the provisions of the Act. It has been categorically held that "on the termination of the life estate of Mst. Nehmat Bi, inheritance will open with reference to the full owner namely Ilam Din who died in 1947" obviously meaning that when the customary rights of the widow terminated in 1962 that the succession would open, though with reference to Ilam Din, considering the land as a estate left by him. The Ordinance was in force at the time of such termination, therefore, the retrospective application of section 4 was not an issue in the case. However, in the instant matter there is no element of any limited holding of the estate by a female under the custom which would terminate on the enforcement of Act, resultantly, the judgment supra has no relevance qua the present proposition".

10. The law does not support the claim of appellants; the judgment impugned does not suffer from any error of law or fact warranting interference.

11. For what has been stated above, instant appeal is without merit and is accordingly dismissed.

**(AAMER FAROOQ)**
**JUDGE**

Announced in Open Court on 19.02.2021

**JUDGE**

Approved for reporting

Zawar