JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

R.F.A.No.619 of 2021
Shehnaz Akhtar and another
Versus
Mst. Zeenat Tariq and others

Date of Hearing:	23.06.2022
Appellant by:	Mr. Asif Naseem Abassi, Advocate
Respondents by:	Mr. Asad Hussain Ghalib, Advocate for respondents No.1 & 2. Mr. M. Muzammil Hussain Shah, Advocate for respondents No.3 to 7, 7a(i) to (iv) & 7(c), Mr. Daniyal Hassan, Advocate for respondent No.8.

MIANGUL HASSAN AURANGZEB, J:- Through the instant regular first appeal, the appellants, Mst. Shehnaz Akhtar (defendant No.1) and her son Junaid Tariq (defendant No.2), impugn the judgment and preliminary decree dated 30.06.2021 passed by the Court of the learned Civil Judge, West-Islamabad, whereby the suit for declaration, partition, rendition of accounts, recovery of *mesne* profits, and permanent injunction instituted by respondents No.1 and 2 was partially decreed and a local commission was appointed with the direction to visit House No.887, Sector I-10/4, Islamabad (**"the suit house"**) and determine whether the same is partitionable, and, if so, what would be the mode of partition. The local commission was also required to determine the current market value of the suit house if the same was not partitionable.

2. The record shows that the suit house was owned by Major (Retd.) Raja Tariq Mehmood Abbasi (**"Major Abbasi"**), who died on 05.08.1992. Major Abbasi was survived by his mother, Mst. Maroof Sultana, two widows, Mst. Zeenat Tariq (plaintiff No.1) and Mst. Shehnaz Akhtar (defendant No.1), two sons, Raja Arsham Tariq (plaintiff No.2) and Junaid Tariq (defendant No.2). Plaintiff No.2 is the son of plaintiff No.1 whereas defendant No.2 is the son of defendant No.1. Major Abbasi had pre-deceased his mother, Mst. Maroof Sultana, who died on 26.04.2011.

3. Defendants No.3 to 7 are the legal heirs of Raja Sajid Mehmood Abbasi (late), who was Major Abbasi's brother. Defendants No.7(a) to 7(c) are Mst. Maroof Sultana's children i.e., the siblings of Major Abbasi and Raja Sajid Mehmood Abbasi. Mst. Maroof Sultana's third son, namely Mehmood Abbasi (defendant No.7(a)), had died during the pendency of the suit after which his legal heirs were impleaded as respondents No.7(a)(i) to (v).

4. On 27.08.2016, the plaintiffs (Mst. Zeenat Tariq and Raja Arsham Tariq) instituted a suit for declaration, partition, rendition of accounts, recovery of *mesne* profits and permanent injunction against defendants No.1 and 2 and the legal heirs of Raja Sajid Mehmood Abbasi, who were impleaded as defendants No.3 to 7, before the Court of the learned Civil Judge, Islamabad. In the said suit, it was pleaded *inter alia* that possession of the suit house was with defendants No.1 and 2, who had rented out a portion of it to the legal heirs of Raja Sajid Mehmood Abbasi *i.e.,* defendants No.3 to 7. The plaintiffs in the said suit had *inter alia* sought a declaration to the effect that the plaintiffs and defendants No.1 and 2, as the legal heirs of Major Abbasi, were entitled to inherit their respective shares in the suit house. The plaintiffs had also sought rendition of accounts so that they could be paid their shares out of the rent paid by defendants No.3 to 7 to defendants No.1 and 2.

5. The said suit was contested by the defendants by filing written statements. From the divergent pleadings of the contesting parties, the learned Trial Court framed the following issues:-

> ***"1. Whether the plaintiffs are entitled to get a decree for declaration, recovery of possession, mesne profit, partition of the suit property and permanent injunction as prayed for? OPP***
> ***2. Whether the suit of the plaintiffs is not maintainable in its present form? OPD***
> ***3. Whether the plaintiffs have not come to the court with clean hands? OPD***
> ***4. Whether the suit of the plaintiffs is time barred? OPD***
> ***5. Whether the suit of the plaintiffs is false, frivolous and vexatious hence, liable to be dismissed? OPD***
> ***6. Whether the suit of the plaintiffs is bad for mis-joinder and mon-joinder of parties? OPD***
> ***7. Relief."***

6. The defendants, before the learned Trial Court, admitted that the plaintiffs were amongst the legal heirs of Major Abbasi but took

the position that the plaintiffs had relinquished their shares in the suit house in lieu of a plot in the Defence Housing Authority which was allotted to plaintiff No.1 on account of being Major Abbasi's widow. In the proceedings before the learned Trial Court, the defendants had not been able to substantiate their claim as to the relinquishment of the plaintiffs' shares in the suit house. In the proceedings before this Court, the appellants abandoned their claim as to such relinquishment.

7. On 30.06.2021, the learned Trial Court issued a preliminary decree to the effect that the children of Mst. Maroof Sultana's pre-deceased sons in addition to her third son and two daughters who had outlived her, to be her legal heirs with the right to inherit her 1/6th share in the suit house. It was also declared that the legal heirs of Mst. Maroof Sultana are entitled to be given possession of their respective shares in the suit house through partition. The children of Mst. Maroof Sultana's predeceased sons had been granted the right to inherit from her 1/6th share in the suit house in accordance with Section 4 of the Muslim Family Law Ordinance, 1961 ("MFLO").

8. The learned Trial Court also appointed a local commission with the direction to visit the suit house and submit a report on whether the suit house was partitionable and if so, what was to be the mode of partition. The local commission was also directed to determine the current market value of the suit house if the same was not partitionable. The said judgment and preliminary decree has been assailed by the appellants in the instant appeal.

9. Along with the instant appeal, the appellants filed an application for the suspension of the preliminary decree dated 30.06.2021. Vide interim order dated 21.10.2021, this Court did not interfere with the directions issued by the learned Trial Court to the local commission, but restrained the learned Trial Court from passing the final decree.

10. On 10.05.2022, learned counsel for respondents No.1 and 2 informed the Court that proceedings could not be conducted by the local commission since the record of this case had been requisitioned by this Court. Since this Court had not passed any

order requisitioning the record, the record was remitted back to the learned Trial Court vide order dated 10.05.2022.

11. Vide order dated 17.03.2022, this Court proceeded *ex-parte* against respondents No.3 to 7 since Office had reported that the said respondents had been served yet they did not tender appearance either personally or through counsel. As regards respondent No.7(a)(i) to (v), 7(b) and 7(c), this Court vide order dated 17.03.2022 directed notices to be issued to them through courier as well as registered A.D. Despite the issuance of such notices, no one appeared for the said respondents. Therefore, vide order dated 10.05.2022, this Court directed notices to be issued to the said respondents through publication in the *"Daily Jang."* The publication appeared in the newspaper was made and its copy has been brought on the record. Since respondents No.7(a)(v) and 7(b) did not appear after the said publication, they are proceeded against *ex-parte.*

12. Learned counsel for the appellants, after narrating the facts leading to the filing of the instant appeal, submitted that the learned trial Court has correctly given the benefit of Section 4 of the MFLO to the children of Mst. Maroof Sultana's two pre-deceased sons but such benefit should also have been given to all the widows of the pre-deceased sons; that the two widows of Major Abbasi (i.e., appellant No.1 and respondent No.1) as well as the widow of Raja Sajid Mehmood Abbasi should have been given inheritance rights out of Mst. Maroof Sultana's 1/6th share in the suit house; that appellant No.1, being the widow of Major Abbasi, was seeking inheritance rights in Mst. Maroof Sultana's 1/6th share in the suit house, which she inherited from Major Abbasi and not in any other property of Mst. Maroof Sultana; that Section 4 of the MFLO ought not to be literally interpreted so as to confine the benefit of inheritance to the sons and daughters of the pre-deceased child of the propositus; and that in the case of Mian Mazhar Ali Vs. Tahir Sarfraz (PLD 2011 Lahore 23), the Hon'ble Lahore High Court had interpreted Section 4 of the MFLO so as to give inheritance rights to the widower of the predeceased daughter to the propositus. Learned counsel for the appellants prayed for the instant appeal to

be allowed and for the matter to be remanded to the learned Trial Court with the direction to decide the matter after framing new issues.

13. On the other hand, learned counsel for respondents No.1 and 2 submitted that the said respondents filed the suit since the appellants had deprived them of their due shares in the suit house; that under Section 4 of the MFLO, only orphaned grandchildren had been granted the right to inherit from their grandparents; that Section 4 of the MFLO does not extend such benefit to the widow of a person who pre-deceases his / her parents; that respondents No.1 and 2 acknowledge the fact that Major Abbasi's mother, Mst. Maroof Sultana, inherited 1/6th share in the suit house and upon her demise, the children of her pre-deceased sons would inherit her estate along with her other legal heirs; that Mst. Maroof Sultana's two sons, namely Major Abbasi and Raja Sajid Mehmood Abbasi, had pre-deceased her and upon her demise, her estate would devolve on the children of her pre-deceased sons but not their widows; that respondent No.1 / plaintiff No.1 (Mst. Zeenat Tariq) acknowledges that she has no right of inheritance in the estate of her mother-in-law, Mst. Maroof Sultana; and that the instant appeal is vexatious and the same is liable to be dismissed with costs.

14. 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 appeal have been set out in sufficient detail in paragraphs 2 to 9 above and need not be recapitulated.

15. Learned counsel for respondents No.1 and 2 raised an objection to the maintainability of the instant appeal on the ground that the same was time barred by fifteen days. The impugned preliminary decree was passed on 30.06.2021. The certified copy of the said preliminary decree was applied for by the appellants and the same was prepared on the same day *i.e.,* 11.10.2021. It was not until 15.10.2021 that the instant appeal was filed. The appellants, in their application for condonation of delay, have taken the ground that due to the COVID-19 pandemic, the appellants should be given

benefit under Section 12 of the Limitation Act, 1908 (**"the 1908 Act"**) and the delay in filing of the appeal ought to be condoned.

16. Due to the COVID-19 pandemic coupled with the lockdown policy of the Federal Government, this Court, vide office order No.181/IHC/2020 dated 24.03.2020, directed that owing to the then prevailing emergency situation in the country, the period of limitation prescribed by laws for filing appeals / petitions etc. in this Court as well as in the Civil and District Courts, Islamabad shall be deemed to be condoned and the Courts shall be presumed to be closed during the period in the public interest, within the meaning of Section 4 of the 1908 Act. Since the Federal Government lifted certain restrictions earlier imposed by it, this Court directed that the said office order dated 24.03.2020 shall cease to have effect from 30.09.2021 and the period from 24.03.2020 to 30.09.2021 shall be excluded for the purpose of computing the limitation in terms of Section 12 of the 1908 Act for filing of any suit, petition and appeal. Since the period between 24.03.2020 and 30.09.2021 is to be excluded from the limitation period for filing a regular first appeal, and since the office order dated 24.03.2020 was recalled vide notification dated 30.09.2021, the delay with which this appeal was filed is liable to be condoned. Hence, the application for condonation of delay is allowed. I shall now proceed to decide the appeal on merits.

17. Allotment letter dated 10.11.1976 (**Exh.D1**) shows that the suit house had been allotted to Major Abbasi whereas the family registration certificate (**Exh.P2**) shows that Major Abbasi was survived by his mother, two widows and two sons. Since Major Abbasi's mother, Mst. Maroof Sultana, had 1/6th share in the inheritance from her son, she became owner of 1/6th share in the suit house.

18. Two of Mst. Maroof Sultana's sons, namely Major Abbasi and Raja Sajid Mehmood Abbasi, had pre-deceased her. Major Abbasi had died on 05.08.1992 and his brother Raja Sajid Mehmood had died on 30.09.2010, whereas Mst. Maroof Sultana died on 26.04.2011.

19. As mentioned above vide judgment and preliminary decree dated 30.06.2021, the learned Trial Court declared *inter alia* that the children of Mst. Maroof Sultana's two pre-deceased sons in addition to Mst. Maroof Sultana's third son namely, Babar Mehmood Abbasi / defendant No.7(a) and two daughters namely, Mst. Khalida Fiaz / defendant No.7(b) and Mst. Abida Zaib / defendant No.7(c) would inherit Mst. Maroof Sultana's 1/6th share in the suit house. The children of Mst. Maroof Sultana's two pre-deceased sons had been given the benefit under Section 4 of the MFLO by the learned Trial Court.

20. The appellants' case is that the learned Trial Court ought to have given the two widows of Major Abbasi and the widow of Raja Sajid Mehmood Abbasi the benefit to inherit from Mst. Maroof Sultana's 1/6th share in the suit house.

21. The vital question that needs to be answered is whether the widows of the pre-deceased children of the propositus could be extended benefit under Section 4 of the MFLO by granting them rights of inheritance from the estate of the parents of their pre-deceased spouses.

22. Section 4 of the MFLO is reproduced herein below:-

> **"*4. Succession.--- In the event of 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."***
> **(Emphasis added)**

23. Although the Hon'ble Federal Shariat Court in the case of Allah Rakha Vs. Federation of Pakistan (PLD 2000 FSC 1) had declared Section 4 of the MFLO to be repugnant to the injunctions of Islam and a direction had been issued to 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, the said judgment is yet to take effect. This is because under the proviso to Article 203D(2)(b) of the Constitution, a decision of a Federal Shariat Court declaring a law or any provision thereof to be repugnant to the injunctions of Islam does not take effect before the disposal of an appeal preferred before the Hon'ble Supreme Court

against the decision. For the purposes of clarity, Article 203D(2) of the Constitution is reproduced herein below:-

> ***"(2) If the Court decides that any law or provision of law is repugnant to the Injunctions of Islam, it shall set out in its decision --***
>
> ***(a) the reason for its holding that opinion; and***
> ***(b) the extent to which such law or provision is so repugnant; and specify the day on which the decision shall take effect:***
> ***Provided that no such decision shall be deemed to take effect before the expiration of the period within which an appeal therefrom may be preferred to the Supreme Court or, where an appeal has been so preferred, before the disposal of such appeal."***
> **(Emphasis added)**

24. Learned counsel for the contesting parties were in unison on their submission that the appeal preferred against the decision of the Federal Shariat Court in the case of Allah Rakah Vs. Federation of Pakistan *(supra)* has till date not been disposed of by the Hon'ble Shariat Appellate Bench of the Supreme Court. Hence, it would be safe to hold that in the present circumstances Section 4 of the MFLO, which has till date not been amended by the legislature, is to be enforced.

25. Had the legislature intended for benefit under Section 4 of the MFLO not to be confined to the children / offspring of the pre-deceased children of the propositus but also to the widow or any other legal heir of such pre-deceased children, the legislature would have employed the words *"legal heirs of such son or daughter"* instead of *"the children of such son or daughter"* in the said Section. Since Section 4 of the MFLO creates an exception by altering the Islamic laws of inheritance applicable to orphaned grandchildren, the same is to be construed strictly. The meaning of the word *"children"* cannot be stretched to include *"widows"* or *"any other legal heir"* of the pre-deceased child of the propositus no matter which canon of statutory interpretation is adopted. Therefore, I find the contention of the learned counsel for the appellants that under Section 4 of the MFLO, the children (i.e., sons and daughters only) in addition to the widows or any other legal heir of a predeceased child of the propositus would also inherit, to be bereft of substance. In holding so, reliance is placed on the following case law:-

(i) **In the case of Saifur Rehman Vs. Sher Muhammad (2007 SCMR 387), the Hon'ble Supreme Court, after making reference to Section 4 of the MFLO, held that a daughter-in-law was not entitled to any share from the property left by her father-in-law as her husband had died before the death of her father-in-law.**

(ii) **In the case of Maqbool Begum Vs. Taj Begum (PLD 1973 Note 128), the Hon'ble High Court of Sindh held that the rule of inheritance of Muslim Personal Law as altered by Section 4 of the MFLO makes only the children of a pre-deceased son or daughter of the propositus entitled to receive per stripes a share equivalent to the share which such pre-deceased son or daughter, as the case may be, would have received if alive. The widow or the husband of a pre-deceased son or daughter, as the case may be, does not come within the purview of Section 4 of the MFLO.**

(iii) **In the case of Ghulam Haider Vs. Nizam Khatoon (2002 YLR 3245), the Hon'ble Lahore High Court held as follows:-**

> ***"6. The precise question which falls for determination in this civil revision is whether upon the text of section 4, a widow of predeceased son could also inherit alongwith children of the pre-deceased son. This matter was first considered in Kamal Khan alias Kamala v. Mst. Zainab (PLD 1983 Lah. 546), wherein it was held that it is only the children of the pre-deceased, son or predeceased daughter of propositus who would inherit in accordance with the Muslim Law sharer and that the widow of predeceased son would be excluded on the strength of the provisions of section 4 (ibid). The remaining share of pre-deceased son would be distributed amongst the residuaries. The judgment in the case of Kamal Khan (Supra) was challenged in the Supreme Court wherein, it was ruled in case titled Mst. Zainab v. Kamal Khan (PLD 1990 SC 1051) that the true interpretation of section 4 of the Muslim Family Laws Ordinance, 1961 would be to entitle the children of the predeceased son or daughter to claim inheritance of the propositus and that the widow of the predeceased son is not so entitled..."***

(iv) **In the case of Muhammad Hanif Vs. Muhammad Ibrahim (2005 MLD 1), the Hon'ble Lahore High Court**

interpreted Section 4 of the MFLO in the following terms:-

> ***"This section relates to and deals with the right of inheritance of the issues of the predeceased son and daughter. It provides that if a person dies and leaves behind issues of such of his sons or daughters who were dead in his life time, the issues of the deceased sons and daughters will be entitled to inherit the shares that their father or the mother would have inherited had they been alive at the time of death of that person. The object and rationale behind this provision is to ameliorate the distress of those unfortunate children whose father and mother are snatched away by death in the life time of their grandfather. Such orphan grandchildren are sought to be compensated in such a way by giving the share in inheritance to which their father or the mother would have been entitled. The express and unambiguous phraseology and language of the provisions of law leaves no obscurity or doubt that the "children of such son" are only entitled to inherit and receive share which expression does not possibly within its ambit include the widow "of such son"."***

(v) In the case of Qutab-ud-Din Vs. Zubaida Khatoon (2009 CLC 1273), the Hon'ble Lahore High Court upheld the preliminary and final decrees passed by the learned Trial Court whereby benefit of inheritance under Section 4 of the MFLO was given to the children of the pre-deceased son of the propositus but not to the widow of the pre-deceased son.

(vi) In the case of Shabi-ul-Hassan Khusro Vs. Asad Mustafa (2016 MLD 266), the Hon'ble High Court of Sindh explained the scope of Section 4 of the MFLO in the following terms:-

> ***"As far as provisions of Section 4 of Muslim Family Laws Ordinance, 1961 is concerned, it is quite clear that it relates to a specific category of class of legal heirs i.e. sons and daughters of deceased which is not the case here. Since the plaintiff claims to be son of predeceased sister of deceased and quite fairly learned Counsel submits that with all due diligence that he made the provisions of Section 4 of the Muslim Family Laws Ordinance, 1961 could not be applied. However considering another limb of the plaintiff's case as to whether any analogy of such principle of Section 4 of Muslim Family Laws Ordinance, 1961 could be applied, I am afraid that it is the wisdom of the legislature, who incorporated the predeceased sons and daughter. Had the words of legal heirs been***

incorporated such as "predeceased legal heirs" than the plaintiff's case could be looked into, however the plaintiff's case is confined to such that relates to the sons and daughters of predeceased words "sons and daughters" is used in section ibid and its horizon cannot be extended to predeceased sisters."

(vii) In the case of Hassan Aziz Vs. Meraj-ud-Din (2021 CLC 1821), this Court, after referring to several judicial precedents including the case of Allah Rakha Vs. Federation of Pakistan (PLD 2000 FSC 1), held as follows:-

"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."

26. Now, as mentioned above, after the preliminary decree was passed by the learned Trial Court, the local commission could not comply with the directions issued by the learned Trial Court due to the record of the case having been sent to this Court. I have gone through the order sheet and have confirmed that no order had been passed by this Court for requisitioning the record of the learned Trial Court. Where the record is requisitioned by the High Court, it operates as a stay of further proceedings before the learned Trial Court and/or the learned Executing Court. In the case at hand, only a preliminary decree was passed. This implies that the suit is still pending and the commission is supposed to discharge its obligations in accordance with the directions issued by the learned Trial Court in the preliminary decree. Due to the requisitioning of the record, the commission could not take further steps in compliance with the directions issued by the learned Trial Court. The requisitioning of the record without a specific order by this Court for doing so unnecessarily protracted the proceedings before the learned Trial Court. Therefore, Office is directed not to requisition records of cases pending before the learned Trial Court where no orders are passed by the Appellate Court for such a requisition.

27. In the prayer-clause of the instant appeal, the appellants have sought the setting-aside of the impugned judgment and preliminary decree and for the matter to be remanded to the learned Trial Court with the direction to decide the matter afresh after framing new issues. The desire of the appellants for fresh issues to be framed by the learned Trial Court is indicative of their intention to protract the litigation with respondents No.1 and 2 and also to deprive the respondents of possession of their respective shares in the suit house. It is the obligation of the Court to impose exemplary costs on parties who deprive persons of their due rights of inheritance in property. Inheritance, from the point of view of the heir, is not a matter of need but of right. It is an admitted position that ever since the demise of Major Abbasi, respondent No.1 and 2 have not been given possession of any portion in the suit house. This deprivation caused the respondents to invoke the jurisdiction of the learned Civil Court, and have been embroiled in the agony of litigation over the past six years. Therefore, this appeal is dismissed with costs throughout payable to respondent No.2. Additionally costs of Rs.1,00,000/- is imposed on each of the appellants in terms of Section 35(1)(iii) C.P.C. as amended by the Costs of Litigation Act, 2017. The said costs shall be deposited by the appellants in the National Treasury and the deposit receipt submitted to the Additional Registrar (Judicial) of this Court within a period of thirty days.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 26/07/2022

(JUDGE)

APPROVED FOR REPORTING

*Qamar Khan**