JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT, MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)

C.R No.441-M/2019

Mst. Hayat Begum..... ***Petitioner.***

Versus

Rehman Malik and others..... ***Respondents.***

Present: *Syed Abdul Haq, Advocate for Petitioner.*

Date of hearing: **23.06.2022.**

JUDGMENT

MUHAMMAD NAEEM ANWAR, J.- This petition filed u/s 115 of the Code of Civil Procedure, 1908 (**C.P.C**) has been directed against judgment and decree dated 22.04.2019 of the learned Additional District Judge, *Samarbagh* Camp Court at Lal Qila, District Dir Lower, whereby appeal of the respondents was allowed, consequently judgment & decree dated 30.05.2018 of the learned Civil Judge/Ilaqa Qazi, Lal Qila, District Dir Lower partially decreeing suit of the petitioner was set aside and her suit was dismissed.

2. Relevant facts of the matter are that petitioner Mst. Hayat Begum widow of Momin Khan filed a suit for declaration to the effect that she being the widow of Momin Khan, predeceased son of Kamin Malik, is entitled in the legacy of her father-in-law namely Kamin Malik, being the widow of his predeceased son. Suit

was contested by the respondents through their written statement on various legal and factual objections. After completion of evidence, the petitioner was held entitled to the extent of 1/4th share in the legacy of her husband Momin Khan, however, in the property of her father-in-law Kamin Malik, she was not held entitled, being the widow of his predeceased son, within the parameters of section 4 of Muslim Family Laws Ordinance, 1961 (**the Ordinance of 1961**) vide judgment & decree of the learned trial Court dated 30.05.2018. To the extent of dismissal of her suit, the petitioner filed an appeal, however, her appeal was dismissed by the learned Appellate Court while appeal of the respondents was allowed through judgment & decree dated 22.04.2019 and consequently suit of the petitioner was dismissed, hence, this petition.

3. On previous date i.e., 16.06.2022, learned counsel for the petitioner was directed to argue the instant petition and to assist this Court as to whether the widow of a predeceased son can also get any benefit u/s 4 of the Ordinance of 1961? Learned counsel for the petitioner, while relying on the cases of "***Mst. Bhaggay Bibi and others Vs. Mst. Razia Bibi and others***" (**2005 SCMR 1595**) and ***Mian Mazhar Ali and others Vs. Tahir Sarfraz and others***" (**PLD 2011 Lahore 23**), contended that in view of the principle laid down by the Hon'ble Supreme Court of Pakistan and learned Lahore High Court, the petitioner being the widow of predeceased son is entitled in the legacy of her father-in-law Kamin Malik.

4. I have considered the submissions of learned counsel for the petitioner and gone through from the principle enunciated in the cases relied upon by learned counsel for the petitioner alongwith record of the case.

5. Section 4 of the Ordinance of 1961, notwithstanding the fact that it has been declared repugnant to the injunctions of Islam by the Hon'ble Federal Shariat Court in the case of "***Allah Rakha and others Vs. Federation of Pakistan and others***" **(PLD 2000 Federal Shairat Court 1)** as it still holds the field in view of proviso to Article 203-D (2) of the Constitution of Islamic Republic of Pakistan, 1973, which reads as under:

> **203D. Powers, Jurisdiction and Functions of the Court.** (1)
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> (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: -
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> (a) the reasons for its holding that opinion; and
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> (b) the extent to which such law or provision is so repugnant; and specify the day on which the decision shall take effect:
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> **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.**

The decision of the Hon'ble Federal Shairat Court was assailed before the Hon'ble Supreme Court of Pakistan in appeal

and same is still pending adjudication, thus, in accordance with the proviso to the referred to above Article, the decision of the Hon'ble Federal Shairat Court before disposal of the appeal by the Hon'ble Supreme Court is not effective as held by the apex Court in the case of "***Mst. Fazeelat Jan and others Vs. Sikandar through his legal heirs and others***" (**PLD 2003 SC 475**) wherein it was observed that:

> "Section 4 of the Muslim Family Laws Ordinance, 1961, clearly entitles the grandson for receiving the share which his father would have inherited, had he been alive. No doubt, the theory of Mahjub-ul-Irs has been revived by the Federal Shariat Court and section 4 of Muslim Family Laws Ordinance has been declared as repugnant to the Islamic Sharia yet such verdict has been challenged. before the Supreme Court of Pakistan and thereby the operation of the verdict stands suspended automatically till the disposal of the appeal as provided under Article 203D of the Constitution of the Islamic Republic of Pakistan, 1973. The grandson, therefore can inherit the share of his predeceased father from his grandfather."

This Court in a reported judgment in the case of "***Muhammad Khan and others Vs. Muhammad Ishaq and others***" "**2005 CLC 1240)** has held that provision of section 4 of Muslim Family Laws Ordinance, 1961 would remain operative until the appeal was disposed by august Supreme Court.

6. Furthermore, referred to above provision i.e., section 4 of the Ordinance of 1961 clearly reflects the intention of the legislature

that in order to cater the suffering of sons or daughters of predeceased son, they could get their share as if the predeceased son or daughter was alive at the time of death of his/her propositus. The question as to whether other legal heirs of predeceased son or daughter could also be benefited from the provisions of section 4 of the Ordinance of 1961, remained controversial, however, section 4 *ibid* cannot be interpreted other than as it is and for whose benefit it was promulgated. In fact, the benefit was provided to the sons and daughters of a predeceased in the legacy of their propositus whereas the other legal heirs of a predeceased son/daughter may not be the legal heirs of grandfather or grandmother either in accordance with the text of the Holy Quran or tables provided by Muhammadan Law, especially the widow of predeceased son with relation to the legacy of her father-in-law or mother-in-law, has got no concerned, whatsoever. Neither she is sharer nor residuary. Thus, could not be held entitled in the legacy of her father-in-law or mother-in-law, in the event of the death of her husband in the lifetime of his father/mother, being predeceased son.

7. The Lahore High Court in the case of "***Haji Muhammad Hanif Vs. Muhammad Ibrahim and others"*** (**2005 MLD 1**) where the dispute was with regard to the entitlement of widow it was held that "*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 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. Thus, only the petitioner as son of Muhammad Shafi was entitled to receive the share". Finally, this controversy has been put to rest by the Hon'ble Supreme Court of Pakistan in the case of "***Saif-ur-Rahman and another Vs. Sher Muhammad through L.Rs***" (**2007 SCMR 387**), wherein it was held that "*widow of predeceased son of last male owner is not entitled from property left by such owner*". In view of this principle enunciated by the apex Court, there is no force in the submissions of learned counsel for the petitioner while relying upon the cases of "***Mian Mazhar Ali and others Vs. Tahir Sarfraz and others***" (**PLD 2011 Lahore**

23) and "*Mst. Bhaggay Bibi and others Vs. Mst. Razia Bibi and others*" (2005 SCMR 1595).

8. More-so, in ***Mst. Bhaggay Bibi and others'*** case *(supra), a* review was dismissed by the apex Court against the judgment dated 13.04.2002 in Civil Appeal No.679 of 2002, arising out of Civil Petition No.436-L of 1999, which was dismissed with the following observations:

> "We find that the petitioners and respondents Nos.4 & 5 have already got, a rightly, one half share of the property of Mughla as inherited by his son late Khizar Hayat. They are also entitled, under the Shariat Law, to get an additional 1/3rd share of the property out of remaining one half of Maula Dad being legal heirs of his brother Khizar Hayat deceased and the respondents Nos. 1 to 3 being daughters of late Maula Dad predeceased son of Mughla deceased are entitled to the inheritance of his property to the extent of 2/3rd share thereof instead of one-half share."

Review was sought through Civil Review Petition No.62 of 2004, which was dismissed, therefore, the question as to whether the widow of a predeceased son would be entitled on the strength of section 4 of the Ordinance of 1961 in the property of her father-in-law or mother-in-law has not been decided by the Hon'ble Supreme Court of Pakistan in the case law relied upon by the learned counsel for the petitioner.

9. Apart from the above, section 4 of the Ordinance of 1961 has been enacted to remove the difficulties and sufferings of grandchildren but it cannot be interpreted so as to decrease the shares of the other descendants of the propositus. Section 4 of the

Ordinance of 1961 in spite of non obstante clause, has to be interpreted in the light of section 2 of the Muslim Personal Law (Shariat) Application Act, 1962 and both the statutes can stand together, as held by the apex Court in case titled "***Mst. Zainab Vs. Kamal Khan alias Kamala***" (**PLD 1990 Supreme Court 1051**).

10. The son/ daughter of a predeceased son could get their share in the property of their grandfather, but it would be subject to the shares as provided in the Holy Quran and if the distribution of share under the provisions of section 4 of the Ordinance of 1961 is overlapping or inconsistent then *Shariat* would prevail. This question has also been resolved in the case of "***Mst. Aqsa Sabir and another Vs. Dr. Sajjad Hussain and others***" (**2015 MLD 652, Peshawar**), wherein this Court, while relying upon the case law reported as **PLD 1990 SC 1051** (*supra*) has held that notwithstanding the entitlement of a son/daughter in the event of death of their father who had predeceased in the property of his propositus, they would not get more than as provided by Shariah in accordance with the injunctions of Islam. In fact, this principle was enunciated in the judgment, in which, the review was sought as relied upon by learned counsel for the petitioner.

11. Likewise, the decision in **Mian Mazhar Ali and others'** case (*supra*) relied upon by learned counsel for the petitioner is also not applicable in the matter in hand and thus is not helpful to the petitioner.

12. Thus, for the reasons discussed above, the instant petition, being devoid of merits, stands dismissed in *limine*.

Announced
23.06.2022

JUDGE

Sabz Ali/* (S.B) HON'BLE MR. JUSTICE MUHAMMAD NAEEM ANWAR