

Stereo.HCJDA-38
JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

C.R. No. 1157 of 2011

Mafaiza Begum
v.
Ghazwana Perveen and others

J U D G M E N T

Date of Hearing	11.11.2022
Petitioner by	Mr. Zulfiqar Ahmad Mangat, Advocate.
Respondent No.1 by	Mr. Badar Munir, Advocate
Respondent Nos.2 to 5	Ex parte

Rasaal Hasan Syed, J. This civil revision calls into question judgments and decree dated 06.4.2010 and 12.2.2011 of the courts below whereby suit for declaration instituted by respondent No.1 was decreed and appeal thereagainst was dismissed.

2. Respondent No. 1 (Mst. Ghazwana Begum) instituted a suit for declaration to the effect that being daughter of Ehsan Ullah, predeceased son of Muhammad Yar, she was entitled to 1/3rd share in the estate of her grandfather (i.e. Muhammad Yar son of Rehmaan); that mutation No. 1679 dated 18.1.2006 and mutation No. 3825 dated 14.2.2006 reflecting her share as 1/6th instead of 1/3rd were illegal and without jurisdiction; and that she having inherited to the extent of 1/3rd share of the estate was entitled to be recorded as such. In the plaint petitioner (Mst. Mafaiza Begum daughter of late Muhammad Yar) was impleaded as defendant No.5 while the brother of Muhammad Yar (Muhammad Hayat) and legal heirs of Muhammad Inayat

(the other brother of Muhammad Yar) were defendant No.1 and defendant Nos.2 to 4 respectively. Petitioner along with said legal heirs of Muhammad Inayat filed a joint written-statement wherein they maintained that the mutations were correctly attested and that the plaintiff had no cause of action. Issues were framed in the suit and evidence was recorded whereafter learned Civil Judge vide impugned judgment dated 06.4.2010 decreed the suit of respondent No.1 and declared that she being the daughter of Ehsan Ullah, predeceased son of Muhammad Yar was entitled to 1/3rd share in the estate of late Muhammad Yar and that the mutations under challenge were illegal to this extent. Appeal was filed by the petitioner as defendant No. 5 in the suit which was dismissed by the learned Addl. District Judge Phalia, District Mandi Bahauddin vide impugned judgment dated 12.2.2011. Instant petition stems from the judgments of courts below.

3. Learned counsel for the petitioner submitted that the petitioner was entitled to inherit 1/3rd share as daughter of Muhammad Yar and that she would also get her 1/3rd residue share of her brother's share by excluding the brothers of Muhammad Yar who had been incorrectly allocated the residue 1/3rd share of her brother. Contrarily learned counsel for respondent No.1 supported the impugned judgment and also submitted that no such issue was ever raised in the written-statement or during the trial nor petitioner ever appeared in the witness-box and that in point of fact she had filed a joint written-statement with the legal heirs of Muhammad Inayat son of Muhammad Yar wherein she had supported the allocation of 1/3rd residue share of Ehsan Ullah to the brothers of Muhammad Yar and, as such, she could not at revisional stage be allowed to raise any new issue which was not raised in the pleadings or evidence.

4. Perusal of the pleadings, evidence of parties and also the findings recorded by the courts below reveals that the suit was instituted by respondent No.1 as daughter of Ehsan Ullah the predeceased son of Muhammad Yar wherein she challenged mutation No.1679 dated 18.1.2006 and mutation Nos. 3825 dated 14.2.2006 qua inheritance of Muhammad Yar and claimed that she was incorrectly reflected as a shareholder to the extent of $1/6^{\text{th}}$ instead of $1/3^{\text{rd}}$ share. Precise claim was that Muhammad Yar had one son Ehsan Ullah and one daughter Mst. Mafaiza Begum, the petitioner. Ehsan Ullah died during the lifetime of Muhammad Yar, therefore, respondent No.1 being his daughter stood to inherit from share of predeceased son of Muhammad Yar i.e., Ehsan Ullah. It was claimed that the share of Ehsan Ullah was $2/3^{\text{rd}}$ as son and that of the daughter Mst. Mafaiza Begum was $1/3^{\text{rd}}$ from the inheritance of Muhammad Yar and that the share of Ehsan Ullah the predeceased son devolved onto the children of the deceased in terms of section 4 of Muslim Family Laws Ordinance, 1961. It was the case of respondent No.1 that Ehsan Ullah having one daughter, she would be entitled to $1/2$ share from the $2/3^{\text{rd}}$ share of Ehsan Ullah in the estate of Muhammad Yar her grandfather; being so, her share in the property of Muhammad Yar was $1/3^{\text{rd}}$ but she was fraudulently allocated $1/6^{\text{th}}$ share. Petitioner, defendant No.5 in the suit, filed a joint written-statement along with respondent Nos.3 to 5 being defendant Nos.2 to 4 in the suit as legal heirs of Muhammad Inayat son of Muhammad Yar. In the joint written-statement it was claimed that respondent No.1 i.e., the plaintiff in the suit had no cause of action; that she had not come to the court with clean hands and was not entitled to any relief; that the claim was based on falsehood as the mutations were correctly attested and that the respondent had no legal right in the property which fell upon

the petitioner and respondent Nos. 2 to 4. Issue No.1 framed from the pleadings which would be relevant is as under:

“Whether the mutation No. 1679 dated 18.1.2006 mutation No. 3825 dated 14.2.2006 are against law and facts and having no effect upon the rights of the plaintiff, therefore, liable to be set aside? OPP”

Respondent No.1 appeared as P.W.1 and recorded her statement wherein she deposed that her father's name was Ehsan Ullah and that of grandfather was Muhammad Yar; that her grandfather had properties in Mauza Ghuddu Kalan and Mauza Saadullah Pur; that her father Ehsan Ullah died in the lifetime of her grandfather Muhammad Yar; that on the demise of Muhammad Yar her grandfather she was entitled to 1/3rd share from his estate but the opposite side had fraudulently got her share recorded as 1/6th and that she was entitled to 1/3rd share. Muhammad Tufail P.W.2 and Muhammad Inayat P.W.3 supported the plaintiff/respondent No.1 and deposed that she was entitled 1/3rd share in the estate of her deceased grandfather. In defense Mehdi Khan appeared as D.W.1, Ghulam Rasool as D.W.2 and Shahid Nazeer as D.W.3. D.W.1 deposed that the deceased Muhammad Yar had properties in two villages; that the deceased had two brothers Muhammad Inayat and Muhammad Hayat; that the plaintiff (Mst. Ghazwana Parveen) was the granddaughter of Muhammad Yar father of Ehsan Ullah who had predeceased his father and that the brothers of Muhammad Yar were entitled to 1/3rd share while the daughter of the deceased i.e., the petitioner, was entitled 1/2 share and that the respondent No.1, the plaintiff, being granddaughter was entitled to 1/6th share and that the mutations were got correctly recorded. Petitioner did not appear in the witness-box either in person or through attorney.

5. The only issue raised by respondent No.1 in the plaint was about her own share which she claimed to be $\frac{1}{3}^{\text{rd}}$ instead of $\frac{1}{6}^{\text{th}}$ as allocated in the mutations of inheritance of Muhammad Yar. The learned Civil Judge after considering the pleadings of the parties and also the evidence on record observed that relationship of the plaintiff/respondent No.1 with the propositus Muhammad Yar was admitted one; that it was further admitted that she was sole legal heir as daughter of predeceased son Ehsan Ullah of the propositus Muhammad Yar; that it was an admitted fact on record that the propositus was survived by one daughter Mst. Mafaiza Begum and the plaintiff/respondent No.1, being the daughter of his predeceased son Ehsan Ullah. The findings of the court of first instance were that Muhammad Yar deceased had one son Ehsan and one daughter Mst. Mafaiza Begum i.e. the petitioner; that the share of predeceased son Ehsan Ullah was $\frac{2}{3}^{\text{rd}}$ while that of the petitioner as daughter was $\frac{1}{3}^{\text{rd}}$ and that under section 4 of the Ordinance *ibid.* the share of Ehsan Ullah as predeceased son of Muhammad Yar would devolve upon his children i.e., the plaintiff/respondent No.1 being daughter will get $\frac{1}{2}$ share from $\frac{2}{3}^{\text{rd}}$ share of Ehsan Ullah and she too would get $\frac{1}{3}^{\text{rd}}$ share in the property of her grandfather while the remaining $\frac{1}{3}^{\text{rd}}$ of the share will go to collaterals. In this way, the share of respondent No.1 was determined as $\frac{1}{3}^{\text{rd}}$ instead of $\frac{1}{6}^{\text{th}}$ and suit of respondent No.1 for declaration was decreed accordingly and mutations were set aside. The findings recorded by the learned Civil Judge and were affirmed by the appellate court in respect of the share of respondent No.1 as $\frac{1}{3}^{\text{rd}}$ from the properties of her grandfather Muhammad Yar which are in accordance with following observations made in “Mst. Zainab v. Kamal Khan alias Kamla” (PLD 1990 SC 1051):

“13. The succession in the present case opened on the death of Sufaid Khan in 1973. Rajoo, if alive, would have inherited the entire property of his father. Notionally, it would be presumed that Rajoo after inheriting the estate of his father, had died. Accordingly, the succession would re-open and all the legal heirs of the deceased would get their shares in accordance with the Muslim Law of Inheritance. The contention that the appellant would inherit the entire share of her father being the sole surviving child, is against the principle of Muslim Law of Inheritance. She would get whatever she would be entitled to get on the death of her father. The principle of Muslim Law of Inheritance was that the near in degree would exclude the remotest. Before the introduction of Section 4, the children of predeceased son were deprived of any share. The intention of Section 4 is to safeguard the interest of the children of predeceased son and not to deprive the other heirs of the prepositus of their due. Thus, section 4 cannot be interpreted in a way so as to exclude the other legal heirs of the deceased Sufaid Khan.

14. Section 4 could not, therefore, be construed against the interest of the other heirs of the deceased who were entitled to share the inheritance in accordance with the principles of Muslim Law of Inheritance.

15. As such, grand-child is not entitled to more share than what could be inherited from the parents according to Islamic Law. The estate would be divided in proportion of the respective shares of their parents. The heirs claiming through different line of descent would get their own shares as per stripes.”

Reference can also be made to “Mukhtar Ahmad v. Mst. Rasheeda Bibi and another” (2003 SCMR 1664) and “Mian Mazhar Ali and others v. Tahir Sarfraz and others” (PLD 2011 Lah. 23). In the cases supra the controversy arising out of the provisions of section 4 of the Ordinance *ibid.* was resolved by observing that according to Shariah the heirs of predeceased children would inherit what their father or mother would have inherited during their lifetime on the opening of succession and that as per section 4 of the Ordinance the share from the deceased grandfather would be endowed to children of the predeceased son but this would not mean that the other heirs of the deceased would be

excluded from their share of inheritance. In the light of the rule supra the conclusion drawn by the courts below was that respondent No.1 being granddaughter of Muhammad Yar and daughter of predeceased son Ehsan Ullah would be entitled to $1/3^{\text{rd}}$ share in the property left by late Muhammad Yar grandfather and the impugned mutations, as such, being contrary to the rule were illegal and untenable to this extent. The view taken by the courts below being in accordance with law and based on proper appreciation of evidence, does not suffer from any error of law nor the learned counsel for the petitioner raised any challenge to the findings of the courts below to this extent.

6. In so far as the contention of learned counsel that after giving $1/3^{\text{rd}}$ share of Ehsan Ullah to his real daughter i.e. the plaintiff/respondent No.1, the residue $1/3^{\text{rd}}$ share of Ehsan Ullah would devolve upon the petitioner being his real sister who will exclude the brothers of Muhammad Yar, it is observed that no such issue was raised in the pleadings. In the suit the only challenge to the mutations raised by the plaintiff/respondent No.1 was that she was entitled to $1/3^{\text{rd}}$ share of property of Muhammad Yar instead of $1/6^{\text{th}}$ as reflected in the disputed mutations which, as such, were illegal as against her rights. In response to the assertion in the plaint the petitioner joined hands with the children of her paternal uncle Muhammad Inayat and filed a joint written-statement with them in which she supported the mutations and confined her contest to the claim of respondent No.1 as granddaughter of Muhammad Yar. In the mutations under challenge the revenue authorities had allocated $1/3^{\text{rd}}$ share in the estate to the brothers of Muhammad Yar which the petitioner supported in her written-statement. The question as to whether she would exclude the brothers of Muhammad Yar or that she would also get $1/3^{\text{rd}}$ residue of Ehsan Ullah

predeceased son of Muhammad Yar was not raised in the written-statement, no issue was therefore framed nor any evidence was produced by the petitioner to raise or prove such plea. So much so that in the first appeal this question was not specifically raised as evident from the grounds of appeal and also the impugned judgment of the appellate court. In these circumstances learned counsel for respondent No.1 correctly submitted that the petitioner could not raise any new plea that was not initially raised in the pleadings or in the evidence, for the first time before this Court. Be that as it may, it is clarified that law has to take its own course, the 1/3rd residue of Ehsan Ullah after giving 1/3rd share to his daughter respondent No.1 shall be controlled by application of the rule that the *nearer in degree will exclude the more remote* as interpreted in the judgments *supra*. With these observations the instant revision petition is **dismissed**.

(RASAAL HASAN SYED)
JUDGE

Announced in open Court on 09.12.2022

JUDGE

Approved for reporting

JUDGE

Rabbani