PLD 1990 Supreme Court 1051/ PLD 1990 SC 1051

JUDGE: Present: Muhammad Afzal Zullah, CJ. and Abdul Qadeer Chaudhry J

Mst. ZAINAB---Appellant versus KAMAL KHAN alias KAMLA Respondent

Case No: Civil Appeal No. 679 of 1988, decided on 12th July, 1990.

(Against the judgment and order of the Lahore High Court, Multan Bench, dated 31-5-1983 in Civil Revision No. 164-D of 1981).

JUDGMENT

ABDUL QADEER CHAUDHRY, J.---Leave to appeal was granted to consider "whether it was not the intention of law-maker in section 4 of the Family Laws Ordinance, 1961, to provide an opportunity of obtaining only Islamic Law shares, to the children of pre-deceased son or daughter of prepositus and that intention was not to increase their Islamic Law shares".

2. The facts, in brief, are that the suit property was owned by Sufaid Khan. Hedied in 1972. On 21-11-1977, Mutation No. 432 regarding his inheritance was sanctioned and his entire estate was transferred to Mst. Zainab, his only surviving grand-daughter being the daughter of Raju, the predeceased son of Sufaid Khan who died in the life-time of Sufaid Khan.

3. The respondent Kamal Khan filed a suit for declaration that he is owner inpossession of the suit property; that the deceased Sufaid Khan left behind him only Kamal Khan being the nephew of the deceased.

4. The pleadings of the parties gave rise to 9 issues. The suit was dismissed bytrial Court on the ground that Mst. Zainab being the grand-daughter of Sufaid Khan, was entitled to the whole of property. This judgment was maintained in appeal by the Additional District Judge. The respondent then challenged the two orders in the High Court. The High Court reversed the finding of the two Courts and held that Mst. Zainab could inherit only to the extent of Islamic share in the estate of her father.

5. To properly understand the matter, the pedigree-table is given below:--

Kharut

Sufaid Khan Peru
(died in 1972)

Raiu
(died in 1953) Kamal Khan

According to this pedigree-table, Sufaid Khan had only one son Raju who died during his lifetime leaving behind daughter Mst. Zainab.

6. Learned counsel for the appellant submitted that the language of Section 4 ofthe Muslim Family Laws Ordinance (hereinafter referred to as the Ordinance) is quite clear. The appellant at the time of opening of succession was entitled to receive a share equivalent to the share of her father, predeceased son of Sufaid

Khan who would have received from his father. Section 4 reads as follows:--

"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:"

7. The High Court discussed the matter in paras. 7 and 8 of the judgment asfollows:--

"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 of 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 B 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 grandchild 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 I militates against the Islamic Law of Inheritance.

In my view Mst. Zainab can inherit only to the extent of Islamic share in the estate of her father, Rajoo notionally assuming that he was alive at the time of the death of Sufaid Khan the original propositus and that Rajoo's death occurred only subsequent to the death of Sufaid Khan. This means that Rajoo will inherit the entire estate of Sufaid Khan being the only son of Sufaid Khan and that Mst.Zainab will inherit only one- half of the estate of Rajoo, Rajoo having no son but only one daughter. The remaining half of Rajoo's estate will revert to his collaterals namely Kamal Khan petitioner. The judgments of the two Courts below are, therefore, partially reversed and Kamal Khan's suit is decreed to the extent of one-half share of the estate. There shall be no order as to costs."

8. The learned counsel for the appellant submitted that the interpretation madeby the High Court is incorrect. The literal meaning is to be given while construing the provisions of Section 4 of the Ordinance. He further submitted that the Ordinance is a special enactment therefore it has to be construed so as to be in harmony with the provisions of the Ordinance. As such, whatever the property was to be inherited by her father on the death of her grandfather, will be inherited in toto by the appellant. The learned counsel in support of his contentions has referred to Mst.Zarina Jan v. Mst-Akbar Jan P L D 1975 Pesh. 252; Yusuf Abbas v. Ismat Mustafa P L D 1968 Kar. 480 and Ibrahim v. Ncmat Bi P L D 1988 Lah. 186.

9. We have considered the respective contentions of the learned counsel for theparties and have come to the conclusion that the finding of the High Court C impugned in this appeal, is based on correct interpretation of Section 4 of the Ordinance. The law presupposes that legislature presumes that enactment will operate fairly, justly and equitably and not unreasonably, therefore, a construction has to be made which would be beneficial to the widest maximum extent. Learned D counsel for the respondents has referred to 1qbal Mai v. Falak Sher P L D 1986 S C 228; and Muhammad Fikree v. Fikree Development Corporation Ltd. P L D 1988 Kar. 446. In the case of Iqbal Mai, it has been observed as hereunder:-

"Firstly, whether the amendment in Act V of 1962 by the West Pakistan Muslim Personal Law (Shariat) Act Amendment Ordinance (No.XIII of 1983), promulgated in pursuance of the judgments of the Federal Shariat Court and the Shariat Appellate Bench of this Court would make Act V of 1962 into a selfcontained Code of Law of Inheritance in Pakistan and that being so, the non obstante clause in section 2-A which provided that the said law shall operate notwithstanding anything to the contrary contained in any other law for the time being in force, would nullify the effect of Section 4 of the Muslim Family Laws Ordinance; despite its own non obstante clause in a part of subsection (1) of Section 3 thereof which provides that the provisions of the Ordinance shall have effect notwithstanding any law, custom or usage. If that were so, the petitioners might not be able to inherit any property at a11.

The second question is whether it was not the intention of the law maker in Section 4 of the Muslim Family Laws Ordinance to provide an opportunity, of obtaining only Islamic Law shares, to the children of predeceased son or daughter of propositus and that the intention was not to increase their Islamic Law shares. This view, contrary to what the learned counsel thought, was taken in the latest case cited by him from Lahore Kamal Khan alias Kamla which thus goes against him. If this view is ultimately upheld the petitioners might have to shed off a part of the inheritance they have already obtained."

That question was left open but we have now rendered the answer as above.

10. In Muhammad Fikree's case, it has been observed that:-

"I am, therefore, of the view that section 4 of the Muslim Family Laws Ordinance will be applicable only in those cases where the son and daughter of a predeceased son or daughter are sought to be excluded on account of existence of other heirs of same category to which the predeceased son or daughter belonged. As in the present case the grandson and the granddaughter of the predeceased son of late Ibrahim Muhammad Aqil Fikree are otherwise entitled to inheritance under the normal law of Shariat, they will take their shares accordingly. I accordingly direct that each daughter of deceased Ibrahim Muhammad Aqil Fikree will be entitled to get 1/9th of the total number of shares held by Ibrahim Muhammad Aqil Fikree while the grand-son will get
2/9th and grand-daughter 1 /9th of these shares."

11. Much emphasis has been made by the learned counsel on the words "perstripes" in Section 4 of the Ordinance. According to Black's Law Dictionary, Fifth Edition (page 1030), it 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 would have been entitled to, taking thus by their right of representing such ancestor, and not as to many individuals. It is the anti-thesis of per capita:"

12. It means that the distribution has to be made to a group of shareholderstaking the share of their ascendants. 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.

13. The succession in the present case opened on the death of Sufaid Khan in1973. 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 G 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 otherheirs 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.

16. In the result, this appeal fails and is dismissed leaving the parties to beartheir own costs.

Appeal Dismissed