**SUPREME COURT OF PAKISTAN**
(Appellate Jurisdiction)

**Present:**
Justice Shahid Waheed
Justice Shakeel Ahmad
Justice Aamer Farooq

**C.A No. 184/2013 IN C.P.L.A.1297/2012**
*(Against the judgment dated 17.05.2012, passed by the Lahore High Court, Rawalpindi Bench, Rawalpindi in C.R No.53-2002)*

Ehsan-ul-Haq and others **...Appellant(s)**

***Versus***

Muhammad Nawaz and others **...Respondent(s)**

For the Appellant(s) : Mr. Sohail Mehmood, ASC

For the Respondent(s) : Sh. Zamir Hussain, ASC
*(For respondents No.1 to 3)*

Date of Hearing : 20.02.2025

**JUDGMENT**

**AAMER FAROOQ, J.-** This appeal arises out of leave granted by this Court, vide order dated 21.01.2013, in Civil Petition No.1297/2012.

2. The appellants are aggrieved of the attestation of mutation No.1616 dated 20.05.1990, by the revenue staff, whereby the property owned by Mst. Ghulam Zohra with respect to two sets of land situated in village Chittan, Tehsil and District Jhelum as well as land situated in village Saeela, Tehsil and District Jhelum (hereinafter referred to as "**the Property**"), was mutated in favour of her husband and children. The factual aspect of the controversy is that the property was owned by Kala Khan, who died in 1934, leaving behind his wife, Mst. Jewani, and a daughter, Mst. Ghulam Zohra. The property was mutated in favour of Mst. Ghulam Zohra on the basis of Kala Khan's Will vide mutation No.2482, dated 12.05.1934 and mutation No.838 dated 11.05.1934. After the demise of Kala Khan, Mst. Jewani contracted second marriage with Muhammad Yousaf, who

was Kala Khan's nephew. Mst. Ghulam Zohra died in 1988, and as stated above, her property was mutated in favour of her husband and son(s). During life time she alienated 09 marlas of property through a sale deed. She also transferred, during her lifetime, 10 kanals and 04 marlas of property to the defendants/respondents**.** The appellants, being legal heirs of Muhamad Yousaf, asserted that since the property was left through a Will to Mst. Ghulam Zohra, who was a limited owner under customary law so after her death, half the property devolved upon Mst. Ghulam Zohra's legal heirs and the other half upon legal heirs of Mohammad Yousaf who was the sole male heir at the time of Kala Khan's demise**.** Appellants claim found success with the trial Court and their suit was decreed vide judgment and decree dated 28.09.2000. Appeal was preferred by the respondents, which was allowed on 22.10.2001 and the suit of the petitioners/appellants was dismissed. Civil Revision was preferred against the decision of the Appellate Court, which was dismissed vide judgment dated 17.05.2012.

3. Learned counsel for the appellants, *inter alia,* contended that the Appellate Court as well as the High Court lost sight of the evidence that Mst. Ghulam Zohra was only the limited owner and that, upon her death, the property devolved upon the last surviving male of Kala Khan i.e. Muhammad Yousaf and the petitioners, being the legal heirs of the Muhammad Yousaf, are entitled to half a share in the property. It was further contended that, as a limited owner, Mst. Ghulam Zohra could not have alienated the property during her lifetime and that the entire property does not automatically devolve upon the legal heirs of Mst. Ghulam Zohra.

4. Learned counsel for respondents No.1 to 3 submitted that the impugned judgment does not suffer from any error warranting interference, and that the Appellate Court as well as the High Court has taken into account all aspects in detail.

5. Heard. The background leading to filing of the instant appeal has already been mentioned hereinabove.

6. The appellants, in their plaint, have mentioned pedigree-table, which does not mention Faqeer, son of Qasim and cousin of Kala Khan. No evidence to corroborate the pedigree table was produced before the Court. There is ample case law on the subject that pedigree table alone has little or no probative value and has to be corroborated through independent cogent evidence. Faqeer was admittedly alive at the time of the death of Kala in 1934 and the first Appellate Court discussed this issue in detail, holding that in the presence of Faqeer, Muhammad Yousaf could not get any share in the property at the time when Kala Khan died and succession opened. Learned counsel for the petitioners/appellants was at a loss in explaining the position, showing that Faqeer was alive, the proof whereof by way of pedigrees table was tendered in evidence as Ex.P-16 and Ex.D-6. It is also an admitted position that customary law applies only to ancestral property and not acquired land. However, the appellants did not plead that the land in question was ancestral and evidence was led and documentary evidence was duly exhibited to show that the property was acquired by Kala Khan during his lifetime and, under custom, a daughter could have taken the property. The property was left to Mst. Ghulam Zohra through a Will and mutations of the Will were duly attested, however, it contained a condition that she will be a limited owner till her death. A Muslim may

make a gift of his property; similarly, he also has the right of testamentary disposition of his property or, in other words, he may dispose of his property by making a Will, but this testamentary power is limited to the disposal of only one third of property (the details of the said restriction are explained infra). The leading authority, on the law of Wills in Islam, is Hadaya, which was translated from original Arabic into Persian by four Muslim scholars and then into English by Charles Hamilton by the order of Warren Hastings, when he was the Governor General of India[1]. The background regarding compilation of Hadaya is provided in Mullah's Principles of Mohammaden Law in the following words: -

> ***"The Hidaya was composed by Shaikh Burhan-ud-Din Ali who flourished in the twelfth century. The author of the Hidaya belonged to the Hanafi School, and it is the doctrine of that school that he has principally recorded in that word".***

Another authoritative work on Islamic principles, as per 'Principles of Mohammaden Law by Hidayatullah', is Fatawa Alamgiri which was compiled in the seventeenth century by the command of Emperor Aurangzeb Alamgir. It is a collection of most authoritative fatwas or expositions of law on all points that had been decided till the time of its preparation. Both the works expound law on the Hanafi sect. According to M. Santariya quoted by Ameer Ali:

> ***"A will from Muslim point of view is a divine institution since its right is regulated by Holy Quran....."***

The Will under the Hanafi Muslim Law may either be verbal or in writing, however a Muslim cannot, by Will, dispose of more than 3rd of surplus of his estate after payment of funeral expenses and debt. In this regard, origin of

[1] Mullah's Principles of Mohammaden Law by Mr. Justice Hidayatullah

the rule is provided in Hedaya 671; Baillie 625, wherein it has been mentioned that Wills are declared to be lawful in the Holy Quran and the traditions; but the limit of one-third is not laid down in the Holy Quran. This limit derives sanction from a tradition reported by Hazrat Abee Vekass (R.A.). It is said that the Prophet (Peace Be Upon Him) paid a visit to Hazrat Abee Vekass (R.A.) while the latter was ill and his life was despaired of. Hazrat Abee Vekass (R.A.) had no heirs except a daughter, and he asked the Prophet (Peace Be Upon Him) whether he could dispose of the whole of his property by Will to which the Prophet (Peace Be Upon Him) replied saying that he could not dispose of the whole, nor even two-thirds, nor one-half, but only one-third (Hedaya, 671). But though the limit of one-third is not prescribed by the Holy Quran, there are indications in the Holy Quran that a Muslim may not so dispose of his property by Will as to leave his heirs destitute. According to Mohammaden Law by Hidayat Ullah, the only case in which a testamentary disposition is binding upon the heirs is where the bequest does not exceed the legal third and it is made to a person who is not an heir; but a bequest in excess of the legal third may be validated by the consent of the heirs. In case, the heirs do not consent, the remaining two-thirds must go to the heirs in the shares prescribed by the law. The consent once given by the heirs to a legacy exceeding the legal third, cannot be rescinded. Similarly, a bequest with a condition which derogates from the completeness of the grant takes effect as if no condition was attached to it, for the condition is void. (Mohammaden Law by Hidayatullah). However, according to Dr. Tanzil-ur-Rehman, Will may be made dependant on some condition; in such an event, the condition must be valid, otherwise the condition shall be void and the Will shall be

effective (Dr. Tanzil-ur-Rehman, A Code of Muslim Personal Law, Volume II, page 196).

7. In the instant case, Kala Khan by virtue of a Will, transferred the property in favour of his daughter with the condition that she takes the property as life owner. The said condition, in light of principles provided in Islamic Law of Inheritance, especially pertaining to 'Will', is void; resultantly, Mst. Ghulam Zohra took the property, under Will, free of the condition and became the absolute owner of the same.

8. Since Mst. Ghulam Zohra did become absolute owner of the property upon her death, the property was inherited by her legal heirs, i.e. Respondents No.2 to 5. There is another aspect of the matter, before the Shariat Application Act, 1948 customary law was applicable in inheritance matters. The 1948 Act aimed to apply Islamic law in matters of inheritance, but it wasn't fully effective. Therefore, the Muslim Personal Law (Shariat) Application Act, 1962 was introduced, which established that Muslim Personal Law would govern the inheritance matters. Under this law, if a female held a limited estate under customary law, that estate would continue until it was legally terminated. After termination, inheritance would be based on Islamic law, opening on the date of the last male owner's death. However, limitations on male heir's powers to transfer land inherited under customary law persisted. To address these issues, section 2-A was added to the 1962 Act through an amendment in 1983. The referred provision provides that the male heirs who acquired agricultural land under the customary law from a Muslim before March 15, 1948, would be considered absolute owners of that land, as if it had been inherited under Islamic law. In a nut-shell, section 2-A clarifies that male heirs who

inherited land under customary law before 1948 are recognised as full owners under Islamic law, ensuring absolute rights to the entire property. The transition from customary to Islamic law of inheritance in Pakistan has been a complex process, which has been highlighted in various Supreme Court judgments. In *Haider versus Murad* (PLD 2012 Supreme Court 501) this court noted that prior to the Shariat Application Act of 1948, the customary law was followed, which did not fully apply Islamic law. The court emphasized that the enactment of the Muslim Personal Law (Shariat) Application Act, 1962 was a significant step towards applying Islamic law in matters of inheritance, particularly after the introduction of section 2-A through amending Ordinance, 1983, which aimed to ensure that male heirs were recognised as full owners of inherited property under Islamic law, rather than under the limitations of customary law. In *Mst. Farida Khatoon versus Dr. Masood Ahmed Butt* (2009 SCMR 464), this court while interpreting section 2-A ibid observed that before the enactments (1948 Act and then Section 2-A), life interests allowing for usufruct of a property of deceased owner was prevalent under customary law in Punjab and some other parts of subcontinent. As a consequence of the enactments, in question, settlement of inheritance and distribution of shares according to shariat were enforced thereby overriding any custom or usage. Consequently, the creation of life interests for enjoyments of usufruct of properties upon the death of a male holder were done away with and were subjected to Muslim Personal Laws (Shariat). This court, in the referred case, discussed the case law on the subject and distinguished the transactions which did not fell within the scope of section 2-A, ibid. In view of above position of the law by virtue of section 2 (A) of the West

Pakistan Muslim Personal Law (Shariat) Act, 1962, limited estates have been done away with retrospective application of the said provision, hence Mst. Ghulam Zohra became the absolute owner of the property in question.

9. In view of the above position of law and facts, we feel that the impugned judgment does take care of all aspects of the matter and does not suffer from any error of law or jurisdiction, resulting in miscarriage of justice, or warranting our interference.

10. In view of above, the instant appeal is without merit and is accordingly dismissed.

**Judge**

**Judge**

**Judge**

Islamabad
20.02.2025
***Approved for Reporting***
*Zawar*