

Journal

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Court

PESHAWAR HIGH COURT

Date

2010-10-22

Appeal No.

CIVIL REVISION NO. 474 OF 2008

Judge

SYED SAJJAD HASSAN SHAH

PartiesLIAQAT ALI AND OTHERS PETITIONERS VERSUS MST. MEHAR SHEDA AND OTHERS—
RESPONDENTS**Lawyers**

ABDUL SATTAR KHAN FOR PETITIONERS. SAEEDULLAH KHAN KHALIL FOR RESPONDENTS.

Statutes

NORTH-WEST FRONTIER PROVINCE MUSLIM PERSONAL LAW (SHARIAT) APPLICATION ACT (VI OF 1935) - S. 2 WEST PAKISTAN MUSLIM PERSONAL LAW (SHARIAT) APPLICATION (V OF 1962) - SS. 2 AND 2-A SPECIFIC RELIEF ACT (I OF 1877) - S.42

Judgment

SYED SAJJAD HASSAN. SHAH, J.---Liaqat Ali Khan and fifteen others have called in question the legality and propriety of the judgment and decree dated 24-4-2008 of learned Additional District Judge, Mardan whereby appeal filed by the petitioners against the judgment and decree dated 31-10-2006 passed by learned Civil Judge Mardan was dismissed.

2. Precisely stated facts. are that the respondent No.1 filed a suit against the defendants - petitioners (hereinafter called the petitioners) seeking the declaration to the effect that she being the daughter of Noor Khan was entitled to the extent of her Shari share in his legacy, thus, the entries made in the Revenue Record depriving the plaintiff -respondent No.1 (hereinafter called the respondent No. 1) are incorrect against the facts and the result of fraud and collusion, therefore, ineffective and not binding upon the rights of the respondents and the Revenue Record is liable to be corrected in her favour to the extent of her share, as she is owner in possession of her share in the legacy of her father Noor Khan and sought for issuing of perpetual injunction, if could not prove his possession qua the suit property then sought the recovery of possession as well.

It was averred in the plaint that the defendants Nos.1 to 9 with the collusion of Revenue staff got transferred the entire suit -land at the back and without notice to the respondent No.1. Moreso, she being the sister of defendant No.1 (Kapoor) and the predecessor in interest of respondents Nos.2 to 9 (Faqeer) entitled for her Shari share, same to be recorded in the Revenue Record.

The suit was contested by the petitioners by filing their separate written statements. The learned trial Court in view of divergent pleas agitated in the pleadings of the parties framed issues and recorded the evidence pro and contra and after hearing the parties, decreed the suit of respondent No. 1. Feeling being aggrieved, the petitioners filed an appeal against the judgment and decree passed by learned trial court, same was dismissed, hence the present petition.

3. The learned Counsel ppearing on behalf of the petitioners contended that Noor Khan'the predecessor in interest of the parties was the owner of the suit property. After his demise, the suit property was devolved upon the petitioners according to the law prevailing by that time, thus, the inheritance Mutations Nos.381 and 575, attested on 23-5-1934 and 29-8-1937 respectively. As by that time the Riwaaj was the law of he land and the respondent No.1 was not entitled for the grant of share in legacy of her father Noor Khan, 'therefore, the mutation 'pertaining to the disputed inheritance was lawfully attested. By now the respondent No.1 has no locus standi to challenge the distribution of legacy of Noor Khan (deceased). Learned Counsel further contended that the'. suit of the petitioner barred by law of limitation, as in terms of section 2 of the Muslim Personal Law (Shafiat) Application Act, 1962, the claim preferred under the said law would be subject to the provisions of the enactments for the time being in force. Therefore, the suit of the respondent No.1 falls within the ambit of the provisions of Limitation Act, the suit of respondent No. 1 illegally and unlawfully decreed in her favour. Both the learned Courts below have failed to attend the important and deep rooted questions of law and committed -the gross illegality and irregularity, thus the judgments and decrees of both

the courts below, liable to be set aside.

4. Learned counsel appearing on behalf of the respondents contended that under the existing law relating to the controversy in hand, the rights of legal heirs regarding the legacy of their propositus protected and the remedy provided to an aggrieved persons which is given effect from the date of death of propositus, and to be deemed that the propositus died under the domain of the Muslim Personal Law (Shariat) Application Act. Therefore, the instant petition being without any merit is liable to be dismissed.

5. Viewing the arguments in the light of the record of the case and judgments passed by the learned courts below, the controversy being agitated revolves around the Muslim Law of Inheritance and its application to the rights of the female heirs, who have preferred the claim, pertaining to the period, when the Islamic Law of inheritance was not made applicable to the devolution of inheritance amongst the heirs of a Muslim owner. Moreso, the custom (Rawaj) was the law of the land and inheritance devolved as per the provisions of the custom, thus, the mutation of inheritance attested prior to the enforcement. of Muslim Personal Law Shariat Application Act (VI of 1935). Besides, the suit would be considered as within the period of limitation none the less, filed much after the passage of. a sufficient long time after the devolution of the property vide mutation of inheritance in the year 1934 and 1937.

6. Admittedly, the propositus of the parties died in the year 1934, whereafter, the mutations were attested in favour of his male heirs thus, deprived the female heirs from the legacy of their father Noor Khan. The controversy can be resolved in the light of the provisions of law existed in the year 1935 i.e. the Muslim Personal Law Shariat Application Act, 1935, same was extended vide N.-W.F.P. Act No.VI of 1935 as received the assent of the Governor-General on the 6th of December, 1935, thereafter, called as the North West Frontier Province, Muslim Personal Law (Shariat) Application Act, 1935. Section 2 of the Act ibid, captioned as:--

"Decision in certain cases to be according to Muslim Personal Law.--In questions regarding succession, special property of females, betrothal, marriage, divorce, dower, guardianship, minority, bastardy, family relations, wills, legacies, gifts or any religious usage of institution including waqaf (trust and trust property), the rule of decision shall be the Muslim Personal Law (Shariat), in cases where the parties are Muslims.

Except insofar as such law has been altered or abolished by legislative enactments or is opposed to the provisions of the North-West. Frontier Province Law and Justice Regulation, 1901."

7. By enactment of section 3 of the said Act, the provision of previous law embodied in section 27 of the North-West Frontier Province Law and Justice Regulation (No.VH of 1901) repealed in so far as Muslims are concerned. Subsection (2) of the above noted section" reads:

"Whenever a question relating to the succession upon the death of a Muslim arises in any Court, the rule of decision shall be according to Muslim Personal Law (Shariat) as if that law had been applicable at the time of such death".

8. Afore -stated law, seems to be free of the embargo contained in the law of limitation. However, later on in the year, 1962 the Act *ibid*, was repealed by section 7 of Repealing Act i.e. Muslim Personal Law (Shariat) Application Act (V of 1962). Section 2 of the said Act, reads: -

Application of the Muslim Personal Law:---Notwithstanding any custom or usage, in all questions regarding succession (whether testate or intestate), special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, legitimacy or bastardly, family relations, wills, legacies, gifts, religious usages or institutions, including waqfs, trusts and trust properties the rule of decision, subject to the provisions of any enactment for the time being In force, shall be the Muslim Personal Law (Shariat) in cases where the parties are Muslims".

9. The provision of the above noted section, wherein, seeking the enforcement of rights under the Act *ibid* was given but controlled through a rider, reproduced as follows: -

"subject to the provisions of any enactment for the time being enforced"

shall be the Muslim Personal Law (Shariat) in cases where the parties are Muslims.

10. By virtue of the above provision. of law, the law of limitation being in force made applicable to the claim preferred under the said Act. Thus, the remedy provided in the repealed Act of 1935 by introducing, above noted, subsection (2) of section 2, whereby the remedy set out can be sought from the date of the death of the Muslim owner. By amending Act, decisions of such a matter would be made subject to the provisions of the laws in force for the time being. The Shariat Appellate Bench of august Supreme Court, examined the provisions of section 2 of the Act, *ibid* at the touchstone of law contained in Qur'an and Sunnah, eventually declared as against the injunction of Islam, the portion so declared is reproduced as under:--

"Subject to the provisions of any enactment for the time being in force"

11. The reference made of the case titled "The Federation of the Pakistan through Secretary Law and Parliamentary Affairs Islamabad v.

Muhammad Ishaque and another", reported as PLD 1983 Supreme Court 273 (Shariat Bench), relevant para at page 275, reproduced as under:--

Another important enactment promulgated in this connection is the West Pakistan Muslim Personal Law (Shariat) Application Act 1962, which came into force on 31-12-1962, although the provisions of this enactment greatly extended the scope of the application of Shariat Laws in the Punjab but under section 2 successions opening before 16-3-1948 still continued to carry the limitations of the Customary Law with respect to alienations. Section 2 of the Act, 1962, as referred above: subject to the provisions of any enactment for the time being in force shall be the Muslim Personal Law (Shariat) in cases where the parties are Muslims".

The words underlined above Were interpreted to mean that the estates inherited before 16-3-1948, to which the rules of Customary Law continued to apply by virtue of the

provisions of section 5 of the Punjab Laws Act, would not be governed by Muslim Law notwithstanding the promulgation of the Act of 1962.

The case of Muhammad Ishaque, respondent, before the Federal Shariat Court was that the Customary Law in the Punjab, according to which the system of agnatic succession was followed, was the rule of law followed amongst the Hindus, while Islam negated the agnatic theory of succession, because the estate of a deceased person under Muslim Law devolved on agnates and cognates including widow and distant kindred. Consequently, the restraints of the Customary Law in questions of the alienations of the land inherited before 16-3-1948, was against the injunctions of the Holy Quran and Sunnah and, therefore, was liable to be declared as void.

The Federal Shariat Court in its judgment dated 19-5-1981 upheld this contention observing that a customary estate differs from an estate under Islam, insofar as the absolute property is conferred under Islam to the heirs, both male and female and, consequently, Islam does not recognize the difference between ancestral or non-ancestral property or between male and female heirs. Each heir gets the portion of the inheritance fixed by Shariat and gets an absolute right to it including the right to dispose it off according to his free-will. Reliance was placed for this view on the following passage from Muslim Law by Syed Amir Ali Volume II, page 20: -

"There is no distinction between the ancestral and self-acquired property. The owner for the time being has absolute dominion over all property in his possession whether he has acquired it himself, or whether it has devolved upon him by inheritance. He can sell or dispose of it in any way he likes, provided operation is given to it during his lifetime. It is only with regard to dispositions intended to take effect after the donor's death or made in extremis that his power of disposition is limited by the right of his heirs. He cannot by a testamentary disposition reduce or enlarge the shares of those, who by law are entitled to inherit".

The Principal, above-enunciated, was recognized by the Privy Council in *Ranee Kajoor Unnissa v. Mst. Roshan Jehan*

Reliance was also placed by the Federal Shariat Court on Chapter 4, Verses 11, 12 and 176 of the Holy Qur'an to show that there is absolute vesting in the ownership with right to spend it in any manner one likes, like a heir and such ownership is not used in a restrictive sense. In the result, it was held by the Federal Shariat Court that the custom impugned in the petition and continued in force by section 5 of the Punjab Laws Act in the Punjab was included in the definition of law, given in Article 203-B of the Constitution and that it was repugnant to the Holy Qur'an and Sunnah declaration was, therefore, given that the custom allowing challenge by collaterals to the alienation of the property inherited under Custom by a full owner is repugnant to the injunctions of Islam and a direction was issued that the necessary amendment in the West Pakistan Muslim Personal Law (Shariat) Application Act, 1962, be made by the 30th of June, 1981. Hence this appeal.

12. The August Shariat Appellate Bench while deciding the appeal with reference to the *Queanie* injunctions observed at page 279:—

"As rightly pointed out by Aftab Hussain J, (now Chief Justice) who delivered the judgment of Federal Shariat Court that "all these words have (Waris) as their root which connotes according to Majjam-i-Alfas-i-Quran-i-Hakeem Vol.2, p.838-840 absolute, vesting in the ownership with right to spend it any manner one likes, like A heir. Such ownership is not used in a restrictive sense".

13. While deciding the appeal, the following conclusion was made:—

"We would, accordingly, uphold the direction of the Federal Shariat Court that the necessary amendment should be carried out in the West Pakistan Muslim Personal Law (Shariat) Application Act, 1962. This was ordered to be done by the 30th of June, 1981. However, this direction was stayed by this Court pending the disposal of the appeal. Since the appeal has been dismissed the necessary amendment should now be carried out by the 30th of June, 1983".

14. In the light of above directions made by august Shariat Bench of Supreme Court, section 2-A was added by the West Pakistan Muslim Personal Law (Shariat) AO (Amendment) Ordinance XIII of 1983, same reads:-- "Section 2-A. Succession prior to Act IX of 1948:— Notwithstanding anything to the contrary contained in section 2 or any other law for the time being in force; or any custom or usage of decree, judgment or order or any Court, where before the commencement of the Punjab Muslim Personal Law (Shariat) Application Act, 1948, a male heir had acquired any agricultural land under custom from the person who at the time of such acquisition was a Muslim:--

(a) he shall be deemed to have become, upon such acquisition, an absolute owner of such land, as if such land had devolved on him under the Muslim Personal Law (Shariat);

(b) any decree, judgment or order of any Court affirming the right of any reversioner under custom or usage to call in question such an alienation or directing delivery or possession of agricultural land on such basis shall be void, in executable and of no legal effect to the extent it is contrary to the Muslim Personal Law (Shariat) Act;

(c) all suits or other proceedings of such a nature pending in any Court and all execution proceedings seeking possession of land under such decree shall abate forthwith:

Provided that nothing herein contained shall be applicable to transactions past and closed where possession of such land has already been delivered under such decree."

15. In this context reference made to a case reported as Mst.Fareeda and 2 others v. Rehmatullah and another PLD 1991 Supreme Court 213, leave to appeal was granted to examine whether West Pakistan Muslim Personal Law (Shariat) Application Act, 1962 could not be given retrospective effect in the light of Supreme Court's judgment in Muzaffar Khan's case reported as PLD 1984 Supreme Court 394. While deciding the instant appeal ratio laid down by the august Supreme Court paras. (a)(b) page 214, reads:—

"We with the help of learned counsel have carefully considered the law laid down by this Court in the case of Muzaffar Khan noted in leave grant order. It is true that the Government of N.-W.F.P. did not take any formal specific steps to enact a law in

pursuance of the decision of the Shariat Appellate Bench of this Court in the Federation of Pakistan v. Muhammad Siddique and another PLD 1983 Supreme Court 273; as it was done in the Punjab. There the relevant law was enacted in the form of West Pakistan Muslim Personal Law (Shariat) Act (Amendment) Ordinance XIII of 1983. It was held in the case of Muzaffar Khan that it would not make any difference. Insofar as the question of retrospectivity is concerned the position both in Punjab and N.-W.F.P. in this behalf would not be dissimilar. It was also held that as soon as the decision of this Court in its Shariat Appellate Bench took effect as from 30th June, 1983, the words "subject to the provisions of any enactment for the time being in force" in section 2 of the West Pakistan Muslim Personal Law (Shariat) Application Act, 1962, "ceased to have effect". As a result amongst others one consequence visualized and held in the case of Muzaffar Khan was that "the N.-W.F.P. Act of 1935" is to be given retrospective effect and that whenever a dispute comes before a Court of law with regard to succession to the estate of a Muslim deceased, he will be deemed to have died under the domain of Muslim Law, even if the death had taken place before coming into force of the West Pakistan Muslim Personal Law (Shariat) Application Act of 1935. Accordingly, in this case the fact that the Act of 1962 was not in force in the area concerned on 15-1-1976 would not make any difference because as observed above the Islamic dispensation contained therein read with the same dispensation contained in 1935 Act had taken over retrospectivity even prior to 15,1-1976 and even before the 1962 Act was formally applied to the area concerned. To what extent the law would be retrospective, as noticed above, it was held that the same would be definitely beyond 1935. Farthest limit we need not go into because in the present case Nadir Khan the last male holder admittedly died in 1972 or 1973. Therefore, the appellants being his daughters would get their share in his inheritance in accordance with Islamic Law. This appeal thus is allowed. The remaining share in addition to what was granted to them by the High Court shall now be allowed to them and the necessary changes would be made in all the relevant records including the record of rights".

16 . It is the consistent view of the august Supreme Court that section 2-A as amended by West Pakistan Muslim Personal Law (Shariat) Application Act, (Amendment Ordinance XIII of 1983) being retrospective the devolution even took place in the year 1940 would not be deemed under custom and the deceased land owner would be deemed as to have died under the domain of Islamic Law and the property would devolve upon all the heirs of deceased under the law of Shariah. In support whereof reference made of a case titled Lal and 3 others v.

Rehmat Bibi and another PLD 1991 Supreme Court 582; while deciding the question of termination of limited interest in the property of last male owner with reference to sections 2, 2(A) of West Pakistan Muslim Personal Law Act ibid and Amended Ordinance (XIII of 1983) and with reference to section 11 of the C.P.C., it was observed that the question of res judicata not to apply the inheritance of a Muslim land owner.

Similarly, the creation of limited interest or devolution of property, cannot be saved as was made on the basis of custom or (Rawaj). The rights of heirs of the deceased land owner had never been adverted to, specially female heirs always deprived of their rights of inheritance in the property of their propositus as happened in the instant case. The law en -vogue would apply with its full force and pave way for the application of Muslim Personal law of inheritance. If we decline the legal remedy to the deprived and helpless

class of the society amounted the denial of the application of the Islamic injunctions ordained in, Quran and Sunnah in the wake of technicalities, therefore, neither limitation nor estoppel nor res judicata or any other bar limiting the restoration of the rights of female heirs or any other, similarly placed person. While interpreting the same, reliance placed upon the case titled Muhammad Zubair and others .v. Muhammad Shareef 2005 SCMR 1217, relevant para-6, reproduced as under: -

"There can be no cavil to the legal position that notwithstanding any judgment, decree or order on termination of limited interest, the property would be reverted to the legal heirs of the last male owner and his succession would be deemed to have opened on his death. The estate of Muslim deceased thus, would be deemed to have devolved on all those persons who were his heirs according to the law of Sharia on the date of his death and in case of death of any of them, his share was to be devolved on his heirs. The matter involving the interpretation of the above referred provision of law with reference to the succession of a deceased Muslim was discussed in Mst. Ghulam Janat and others v. Ghulam Janat through legal heirs and others 2003 SCMR 362; Ismail and another v. Ghulam Qadir and others 1990 SCMR 1667 and Muhammad Yousaf through Legal Heirs and 2 others v. Mst. Karam Khatoon through Legal Heirs and 2 others 2003 SCMR 1535 and it was consistently held that the above provision of law would operate accordingly".

17. In the same judgment in Paragraph No.7, further observed that "there is no cavil to proposition of law that on the enforcement of Muslim Personal Law (Shariat) Application Act, 1962 as amended by Act XIII of 1983, the property of last male owner subject -matter of limited interest would be deemed to have devolved upon his legal heirs on his death, and the right of succession would not be defeated by the law of limitation or the principle of res judicata as no law or judgment can override the law of Sharia which is superior law".

18. After comprehensive discussion regarding all the legal aspects of the matter in issue including the application of law, period of limitation and rest of the impediments falling in devolution of the rights to inheritance have been declared, that would not be applicable, the law of Sharia is the Superior Law and a person who is legally entitled for the legacy of his propositus cannot be deprived of the same in the wake of the technical objections. The view was founded on the strength of Islamic injunctions regarding devolution of inheritance that irrespective of the period of death of the land owner the legal heirs deemed to be entitled for Shari shares as specified under the law of Sharia. The right of inheritance legally considered as vested and absolute right to be accrued in favour of the heirs after the demise of the landowner. The heirs would be deemed as owners of the property left by their propositus, irrespective of the fact that they have not been recorded as owner in the revenue record; the same is used for fiscal purposes, but does not create title in whose favour, same has been attested. The questions raised in the instant case, discussed and answered in positive by honourable Judges of the Superior Courts. It is deducible from the judgments that much stress has been laid upon the devolution of hereditary rights of a rightful heir of the deceased Muslim owner regardless of obstruction and restraint. Thus, the interpretation of law in this respect vividly, shows all efforts made by the superior Courts that and lawful owner, whether female or male, would be deprived of her due rights devolved in the law of Sharia.

19. In this regard, the other objection agitated on behalf of the petitioners that, the law of

limitation would be applicable while deciding the question of inheritance of deceased landowner, therefore, the suit of the respondent No.1 is barred by limitation as Noor Khan deceased owner died in the year, 1934. Therefore; after passage of such a long time the right to sue of the respondent has been foreclosed, thus, the suit was liable to be dismissed on this ground too. As per dictum referred to above no law would bar the remedy available to a person seeking his right to inheritance in the property of his father even if launched the proceeding after the passage of such a long period. In this regard reliance is placed upon a case titled Muhammad Iqbal and 5 others Allah Bachayh and 18 others; reported as 2005 SCMR 144, the relevant para. 5, is reproduced as under: -

"Learned counsel for the petitioners without pointing out any legal defect in the judgment vis-a-vis rights of respondents in the inheritance, attempted to argue that the suit was barred by time. This is settled principle of law that the bar of limitation is not applicable to right of inheritance which does not extinguish by efflux of time. The right of inheritance of a female, recognized in Shariah cannot be denied on the basis of oral assertion of surrender of such right by a female in favour of male member of family and in any case, there is no concept of estoppel to deprive a person from his right in the inheritance in Islam. The respondents have not been successful in showing us that Mst. Allah Wasai had surrendered her right in the property in favour of her brothers in a lawful manner of the suit involving right of inheritance could be dismissed on the ground of estoppel or limitation".

20. The view has been further subscribed by a case titled Muhammad Anwar and 2 others v. Khuda Yar and 25 others, reported as 2008 SCMR 905, the relevant para. 5, is reproduced as below:--

"There is no cavil with the proposition that section 2-A of the Act being retrospective in effect, last male holder had to be treated as one who at time of his death was governed by the Muslim Personal Law and resultantly his legacy will be devolved in accordance with Muslim Personal Law/Sharia. In this regard reference can be made to cases titled Hakim Ali v. Barkat Bibi 1988 SCMR 293, Muhammad Qasim Khan v.

Mehbooba 1991 SCMR 515, Fazal Nishan v. Ghulam Qadir 1992 SCMR 1773, Rattigan's Digest of Customary Law and Federation of Pakistan v. Muhammad Ihsaq PLD 1983 SC 273, Abdul Ghafoor v. Muhammad Shafi PLD 1985 SC 407, Isamil and another v. Ghulam Qadir 1990 SCMR 1667 and Lal and 3 others v. Rehmat Bibi and another PLD 1991 SC 582."

21. The question of limitation in filing suit has also been answered in paragraph 6 of the same judgment which reads: -

"We have also adverted to the objection of limitation which appears to be baseless as it does not run against co-sharer which needs no further elucidation in view of Exh.P.1 and Exh.P.2 showing that property had remained in possession of both Zulfiqar and Shah Nawaz who were admittedly sons of Mst. Faiz and their possession shall be deemed to be the possession of Mst. Faiz. In this regard we are fortified by the dictum laid down in case titled Muhammad Qasim Khan v. Mehbooba 1991 SCMR 515 and Ghulam Ali v. Ghulam Sarwar Naqvi PLD 1990 SC 1".

22. The learned counsel for the petitioner could not point out any defect in the

conclusion arrived at by the two Courts below by holding that the plaintiff -respondent No. 1 being the real daughter of Noor Khan the land owner entitled for her Shari share in the suit property and decreed her suit as prayed for. Thus, in consequence of the above discussion it is held that the findings of both the Courts below are lawful, not suffering from any legal defect, muchless jurisdictional error, thus maintained.

23. Resultantly this revision petition fails and dismissed as such with no order as to costs.

Revision dismissed.