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Court
SINDH HIGH COURT

Date
2016-10-29

Appeal No.
REVISION APPLN. NO. 01 OF 2006

Judge
SAHIHUDDIN AHMED, &MUHAMMAD MUJIBULLUH SIDDIQUI

Parties
MUHAMMAD NADIR KHAN & OTHERS (APPELLANTS) VERSUS GOVERNMENT OF SINDH THROUGH DCO SANGHAR (RESPONDENTS)

Lawyers
APPLICANT IN PERSONMR. ANAND P. KAMRANI, ADVOCATE FOR THE RESPONDENT.

Statutes
MUSLIM FAMILY LAWS ORDINANCE 1961 - SECTION-4

Judgment

MUHAMMAD MUJIBULLAH SIDDIQUI, J.- The relevant facts as alleged in the Revision Application are that Suleman Khan son of Renjeet Khan expired in the year 1960 leaving behind the following heirs:- 1. Aman Khan son of Suleman Khan.

2. Nisar Ahmed son of Suleman Khan.

3. Mst. Mubarik Sana D/o Suleman Khan.

4. Mst. Hameeda Bano D/o Suleman Khan.

2. Names of the above heirs were entered by the Mukhtiarkar Shahdadpur in the record of rights. Usman Khan father of Respondent No. 14 Jamil Ahmed and son of Suleman Khan had died in the year 1944 in India. The Respondent No. 14, Jamil Ahmed subsequently approached Mukhtiarkar Shahdadpur and got his name as well as, Rasheeda Begum's name, his sister entered in the record of rights, as legal heirs, thereby reducing the shares of the sons and daughters of deceased Suleman Khan who were alive at the time of his death. It is alleged that according to Sharia Law, prevailing before the promulgation of Muslim Family Laws Ordinance. 1961. the grand son daughter of predeceased son/daughter were not entitled to inherit any share in the properties left by their grand father mother. According to applicant the Muslim Family Laws Ordinance, 1961 is not retrospective in effect and therefore, is not applicable in this case, for the reason that Usman Khan son of Suleman Khan and father of respondent Jamil Ahmed predeceased Suleman Khan in the year 1944, and Suleman Khan also expired in the year 1960, before the promulgation of Muslim Family Laws Ordinance, 1961, Reliance in this behalf is placed on the following judgments:- 1. Yousuf Abbas V. Asmat Murtaza, P.L.D. 1968, Karachi 480.

2. Ibrahim V Nehmat Bi, P.L.D. 1988 Lah 186.

3. Sardar V. Nehmat Bi, 1992 S.C.M.R. 82 and 4. Nazir Ahmed V. Abdullah.

1997 S.C.M.R. 81.

3. It is alleged that the subsequent mutation made by Mukhtiarkar was set aside by Assistant Commissioner Shahdadpur and the appeal and revision, preferred before the Commissioner Mirpurkhas and Member (Judicial) Board of Revenue Sindh, were also dismissed. Respondent No. 14, Jamil Ahmed then filed suit for declaration and permanent injunction assailing the cancellation of subsequent entry in the record of rights, but the plaint was rejected under Order 7 Rule 11 CPC, for the reason that the relief was sought under Section 4 of the Muslim Family Laws Ordinance, 1961, which was promulgated in the year 1961 and has been subsequently declared to be repugnant to the injunctions of Islam. Respondent Jamil Ahmed preferred appeal against the rejection of plaint, which was heard by learned Additional District Judge Shahdadpur. It was alleged before the learned Additional District Judge that the agricultural land bearing Survey No. 192/1,2, admeasuring 2.37 acres belonged to grandfather of Jamil Ahmed. The grandfather Suleman Khan expired in the year 1960, while Usman father of Jamil Ahmed had expired during the life time of Suleman Khan. It was contended that the mutation was made in

the year 1997. it was further contended before the First Appellate Court, that, the question of inheritance was opened in the year 1997 and all the legal heirs in accordance with the Sharia Laws read with Section 4 of the Muslim Family Laws Ordinance were entitled to inherit their respective shares. It was stated that no legal heir of the deceased Suleman Khan raised objection except Nadir Khan, the applicant in the present revision application and Respondent No.4 before the First Appellate Court, who was not a legal heir of deceased Suleman Khan as he was husband of Mst. Hameeda, daughter of Suleman Khan. It was further submitted that the learned Civil Judge has mis-directed in holding that the relief sought on the basis of Section 4 of the Muslim Family Laws Ordinance, 1961 was not available as it was declared repugnant to the injunctions of Islam. Reliance was placed in this behalf on the judgment of Hon'ble Supreme Court in the case of Fazeelat Jan V. Sikandar, P.L.D. 2003 S.C. 475, wherein it has been held as follows:- "Section 4 of the Muslim Family Laws Ordinance, 1961, clearly entitles the grand son for receiving the share which his father would have inherited if he been alive. No doubt the theory Mahjub-ul-Irs had been revived by the Federal Shariat Court and Section 4 of the 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 has been suspended automatically till the disposal of the appeal as provided under Article 203-D of the Constitution of Islamic Republic of Pakistan, 1973. The grand son, therefore, can inherit the share of his predeceased father from his grand father." 4. The learned Additional District Judge while placing reliance on the above judgment set aside the order rejecting the plaint and remanded the case back to the trial Court for disposal on merits.

5. Being aggrieved with the above judgment, the applicants filed this Revision Application.

6. The Revision Application was admitted to regular hearing to consider the question whether the son of predeceased son can inherit in a succession, which was opened in the year 1960, whereas Muslim Family Laws Ordinance, 1961 was enacted in the year 1961. In the admission order by learned Single Judge of this Court, it was observed that the learned Additional District Judge has mis-understood the dictum of Fazeelat Jan V. Sikandar case.

7. Subsequently when the matter came for regular hearing before the Hon'ble Chief Justice, on 4.9.2006, the applicant contended that the Respondent No. 14 was not entitled to any share in the property of Suleman Khan who died before the promulgation of Muslim Family Laws Ordinance, 1961 and the Ordinance has no retrospective Ordinance, 1961 and the Ordinance has no retrospective effect. Reliance was placed in this behalf on a Single Bench judgment of Lahore High Court, in the case of Muhammad Murad V. Allah Bux, 2006 M.L.D. 286.

8. On the other hand, learned counsel for Respondent Nos.l 1 and 14 contended that the claim of evacuee property was finalized in the year 1996 and the Muslim Family Laws Ordinance, 1961 was in force-at that time therefore, the Respondent No. 14 is entitled to inherit the property left by Suleman Khan in terms of Section 4 of the Muslim Family Laws Ordinance. In support of his contention he placed reliance on another Single Bench judgment of Lahore High Court in the case of Shah Alam V. Zafar Iqbal, 1986 Law Notes (Lah) (1176). The Hon'ble Chief Justice observed that an authoritative pronouncement of

this Court is required therefore, the matter was to be heard by a Division Bench.

9. We have heard the applicant Muhammad Nadir Khan in person and Mr. Ahand P. Kamrani, learned counsel for Respondent Nos.l 1 and 14.

10. The main contentions raised by the applicant are that Muslim Family Laws Ordinance, 1961 which was promulgated with effect from 15th July 1961 had no retrospective effect and consequently Section 4 thereof is not applicable to the facts of the present case. He contended that the admitted fact is that propositus Suleman Khan, expired in the year 1960 and his son Usman Khan father of Respondent No. 14 Jamil Ahmed died in India in the year 1944. He has submitted that the succession under the Islamic Law opens immediately on the death of propostius. The propostius Suleman Khan expired in the 1960 and at that time Respondent No. 14 Jamil Ahmed being son of predeceased son was excluded from inheritance in the property/estate left by grandfather Suleman Khan on account of the principle of Mahjub-ul-Irs.

According' to him the succession in respect of the suit property opened in the year 1960. The respective shares, of the legal heirs entitled to inherit the property of propositus at that time, devolved on them in the year 1960. It was a past and closed chapter on 15th July 1961 when Section 4 of the Muslim Family Laws Ordinance, 1961, was enacted and therefore, the Respondent No. 14 Jamil Ahmed shall not be entitled to inherit any property left by his grandfather Suleman Khan. Resultantly he had no cause of action to file the suit. He has maintained that the learned Senior Civil Judge Shahdadpur rightly rejected the plaint under Order 7 Rule 11 CPC, which was not open to any exception and the learned Additional District Judge Shahdadpur fell in error in setting aside the order and remanding the case back to the trial Court for disposal of the case merits. 1 were paid subsequently. He has submitted that the clearance certificate bearing No. 147 was issued on 29.6.1974 whereafter the suit property was finally transferred on 23.12.1996, under the orders of Additional Deputy Commissioner Sanghar and thereafter on 26.12.1996 the suit land was transferred from Central Government (being an evacuee property) to propitious Suleman Khan son of Ranjeet Khan and then only the succession opened. According to him, the suit property was not the estate of the propositus at the time of his death in the year 1960 and therefore, the succession in respect of suit property was to opened at the time of his death but was opened when the suit property became estate of the propositus after conferment of proprietary rights on transfer of suit land from Central Government to the propositus. Admittedly at that time Section 4 of the Muslim Family Laws Ordinance, 1961 was holding the filed, conferring the right of inheritance on Respondent No. 14, notwithstanding any other law for the time being in force.

12. Mr. Kamrani has conceded to the legal proposition that Muslim Family Laws Ordinance, 1961 has no retrospective effect but has submitted that in this case the question of retroactive application of Section 4 of the Muslim Family Laws Ordinance, 1961, is not involved. According to him the question for consideration is as to when the succession opened in respect of the suit property and the finding thereon shall be determining factor.

13. Before proceeding further, we would like to observe that the Muslim Family Laws Ordinance, 1961 was enforced with effect from 15th July 1961, Section 4 of the Muslim Family Laws Ordinance, 1961 was struck down by the Federal Shariat court having been

declared repugnant to Islamic Sharia, thereby reviving the theory of Mahjub-ul-Irs, but the verdict has been challenged before the Hon'ble Supreme Court of Pakistan. The appeal is still pending and the operation of the verdict stands suspended automatically till the disposal of the appeal as provided under Article 203-D of the Constitution of Islamic Republic of Pakistan, 1973. (Mst. Fazeelat Jan V. Sikandar, PLD 2003 S.C. 475). The Hon'ble Supreme Court has held that the grandson, therefore, can inherit the share of his predeceased father from his grandfather.

We would like to add with respect that the dictum is applicable in appropriate cases only on examination of facts and law in each case.

14. As is evidence, from the marshalling of facts, in the earlier part of this judgment, we fined that the learned two courts below have not decided the issues under consideration on merits. The learned trial Court rejected the plaint under Order 7 Rule 11 CPC mainly on the ground that Section 4 of the Muslim Family Laws Ordinance, 1961, was declared repugnant to injunctions of Islam and Islamic Law does not entitle the plaintiff/Respondent No. 14 to inherit property of his grandfather. The learned First Appellate Court set aside the order of rejection of plaint by placing reliance on the judgment of Hon'ble Supreme Court in the case of Mst. Fazeelat Jan (Supra). The Revision Application was initially admitted to regular hearing to consider two points whether son of predeceased son can inherit in succession, which was opened in the year 1960. When Section 4 of the Muslim Family Laws Ordinance, 1961 was enacted in the year 1961. The second point was whether learned Additional District Judge has mis-understood the dictum laid down by the Hon'ble Supreme Court in the case of Mst. Fazeelat Jan V. Sikandar.

15. At the very outset we would like to observe that the learned Additional District Judge has correctly understood and applied the law laid down by the Hon'ble Supreme Court in the case of Mst. Fazeelat Jan (Supra) as he has merely observed that the grandson can inherit share of his predeceased father from his grandfather as held by the Hon'ble Supreme Court in the case of Fazeelat Jan. The learned Additional District Judge has merely set aside the order, rejecting the plaint, and has remanded the case back order, rejecting the plaint, and has remanded the case back to the trial Court for disposal of the same on merits.

16. We have been able to lay hand on an order of Hon'ble Supreme Court in the case of Manzoor Ahmed V. Abdul Khaliq, 1989 SCMR 1329(2), in which an identical question was raised in similar circumstances. In the precedent case suit regarding inheritance in a case of evacuee land was filed. The plaint was rejected by the trial Court under Order 7 Rule 11 CPC. First appeal was preferred before the Lahore High Court. The appeal was dismissed and the rejection of plaint was up-held. The matter was taken to the Hon'ble Supreme Court and the leave was granted to examine the following questions:- (a) Whether the property, being evacuee, the petitioner would not be entitled to the relief claimed, by virtue of Para 26 of Rehabilitation Scheme? (b) Whether Muslim Family Laws Ordinance. 1961 read with other connected laws would not be given such effect so as to entitle the petitioner in this case to inherit the estate left by Sardar Muhammad? 17. While granting leave the Hon'ble Supreme Court observed that in this context the question of retrospectively would also need re-examination.

18. However, when the appeal was finally argued, the Hon'ble Supreme Court did not deem fit to record authoritative pronouncement. All the questions of law pertaining to Section 4 of the Muslim Family Laws Ordinance were kept open. The Hon'ble Supreme Court observed that, "there was one area of agreement, namely as the matter now has emerged, it could not be said with certainty that the appellant has no cause of action at all for examination in a full-fledged trial. Even if it was to be on only legal issues and thus, it was not such a case in which the plaint should have been rejected under Order 7 Rule 11 CPC.

19. The Hon'ble Supreme Court further considered the question whether the controversy should be finally resolved or the case be remanded to High Court. Objection was raised that the facts and merits haven not been examined by the learned trial court and, therefore, the case be remanded to the trial Court. No finding was therefore, given on the controversy. The Hon'ble Supreme Court merely held that the plaint was not liable to reject under Order 7 Rule 11 CPC and directed the trial Court to afford full opportunity to the parties on all the issues in controversy. This judgment of Hon'ble Supreme Court is reported as Manzoor Ahmed V. Abdul Khaliq. 1990 SCMR 1677.

20. The above authority is sufficient to up-hold the impugned order passed by the learned Additional District .ludgc Shahdadpur.

21. However, since the case was referred to Division Bench for the reasons that there arc contradictory judgments of Single Benches and an authoritative pronouncement of this Court is required, therefore, we have considerec it appropriate and expedient to record an authoritative judgment on pure questions of law.

22. As already observed the learned two Courts below have not considered the issues on merits therefore, taking guidance from the judgment of llon'ble Supreme Court in the case of Manzoor Ahmed V. Abdul Kahliq. we would not like to resolve the controversy in this case. The simple reason being that after remand of the case to the trial Court as directed by the First Appellate Court, the parties shall be afforded full opportunity. They shall be at liberty to raise the questions of fact and law as deemed fit by them. The learned trial Court after framing of issue and recording of evidence shall decide all the question of facts and law.

23. With the clarification that the findings w'hich we propose to give on the legal controversy shall not amount to a finding in this case, we would like to decide the pure question of law, for the reason that, so far, we have not been able to lay hand on any authoritative pronouncement by any Superior Court in respect of the issue as to when the succession opens under the Islamic Sharia and more particularly the Hanafi School of Law, in respect of a property left by deceased in which he had no ownership right at the time of his death.

24. The issue pertaining to right of inheritance, from the estate of grandfather, in respect of grandsons, acquiring right through the predeceased son, came for consideration before a Single Judge of this Court in the case of Yousuf Abbas V. Mst. Asmat Mustafa, PLD 1968 Karachi 480. The relevant facts in this case were that the plaintiffs w-ere son and daughter of a predeceased daughter who died in the life time of her father in the year 1922. The propositus left several properties movable and immovable. The plaintiffs

claimed shares in the properties/assets left by propositus through their predeceased mother under the provision of Muslim Family Law Ordinance, 1961. The defendants took plea that the plaintiffs were not entitled to any share in the estate of propositus. A plea was taken that the Muslim Family Laws Ordinance, shall apply only in cases where the death of propositus and his predeceased son or daughter, both occurs after the promulgation of the Ordinance. The contention was repelled by. His lordship Noor-ul-Arfin, J. It was held that Section 4 of the Muslim Family Laws Ordinance, 1961, was applicable if the death of the son or daughter of the propositus occurs before the succession opens. It was further held that the words used in Section 4 of the Muslim Family Laws Ordinance, being within their compass the sons and daughters dying before, as well as after the Ordinance came into force. The only condition was that the death should occur before the succession has opened after promulgation of the Ordinance, Section 4 would apply with full force and tne children of predeceased son or daughter of propositus would be entitled to be included in the succession to the estate of the propositus. It was further observed that the construction of such statute should be just, sensible and liberal so as to give effect to the purposes for which they are passed. This proposition of law was followed by a learned Single Judge of the Lahore High Court in the case of Sakhi Muhammad V. Ahmed Khan, 1980 C.L.C. 1006. It was again followed by another learned Single Judge of the Lahore High Court in the case of Ibrahim V. Nehmat Bi, P.L.D. 1988 Lahore 186. This judgment of the Lahore High Court was up-held by a larger bench of Hon'ble Supreme Court in the case of Sardar V. Nehmat Bi, 1992 S.C.M.R. 82. The Hon'ble Supreme Court while up-holding the single bench judgment of Lahore High Court in the case of Ibrahim V. Nehmat Bi (supra) recorded the facts to the effect that the full owner of a property died in the year 1947. His daughter had predeceased him in the year 1942. After death of Ilamdin (the propositus) the entire property devolved on the widow of Ilamdin. On enforcement of West Pakistan Muslim Personal Law (Shariat) Application Act 1962, the limited estate held by the widow was terminated and property was to be inherited by all the legal heirs. The daughter and son of predeceased daughter took plea that the succession opened in the year 1962 and therefore, they were entitled to inherit the property under Section 4 of the Muslim Family Laws Ordinance, 1961, notwithstanding, death of their mother in 1942 and death of their maternal grandfather in the year 1947. On the other hand, plea was raised that only such legal heirs are entitled to succeed in the estate left by Ilamdin who were alive at the time of his death in the year 1947. The Hon'ble Supreme Court up-held the view of the learned Single Judge of the Lahore High Court that on termination of life estate in the year 1962, the children of the predeceased daughter of the last full owner will inherit the share which their mother would have got, if she were alive at the time of the opening of succession, on the demise of her father Ilamdin in 1947. It was further held that the claim to exclude the children of the predeceased daughter of Ilamdin was untenable.

In this judgment the Hon'ble Supreme Court settled the proposition of law propounded by Noor-ul-Arfin, J. in the case of Yousuf Abbas(Supra) that the right of inheritance would be governed by the facts and law prevailing at the time of opening of succession and not always on the date of death of the propositus.

25. This issue agains came for consideration before the Hon'ble Supreme Court in the case of Nazir Ahmed V. Abdullah, 1997 S.C.M.R. 281. The relevant facts in the case were that one Jara had two sons, Nawab and Ali Muhammad. Ali Muhammad died on 1.11.1925. His son Khairdin predeceased him, but at the time of Ali Muhammad's death, Mst. Fazla

Bibi, his daughter-in-law was given half share of his land as the limited owner. Other brother Nawab had two widows. He had also two daughters. Section 4 of the Muslim Family Laws Ordinance, 1961, was not in the field when Ali Muhammad died on 1.11.1925 and Nawab died in the year 1927. If their properties would have been finally inherited in the above years, the question of re-opening of their succession would not have arisen. However, since Mst. Fazla Bibi had acquired rights of limited owner, on her death in December, 1984 the question of succession of Ali Muhammad and Nawab were re-opened. It was held that Mst. Dolat Bibi one of the daughters of Nawab, would be entitled to inherit suit land alongwith the legal heirs of her sister and collaterals of Ali Muhammad. The legal position as affirmed by full bench of the Hon'ble Supreme Court in the case of Sardar V. Nehmat Bi (supra) was referred and applied. Thus, the Hon'ble Supreme Court has taken the view that Section 4 of the Muslim Family Laws Ordinance 1961 shall be applicable not merely with reference to death of a propositus but with reference to the opening of succession, meaning thereby that even if a propositus dies before the promulgation of Muslim Family Laws Ordinance. 1961. but the succession opens after the promulgation of Muslim Family Laws Ordinance. 1961, then the persons claiming through predeceased son or daughter shall be entitled to inherit share from the estate left by propositus per-stripes as provided in Section 4 of the Muslim Family Laws Ordinance, 1961. The result is that the Hon'ble Supreme Court has settled the law to the effect that in every case the succession is not to open necessarily at the time of death of propositus but in certain cases the succession may open much after the death of propositus and the question whether Section 4 of the Muslim Family Laws Ordinance, 1961 which has no retrospective effect is applicable or not shall be determined after ascertaining as to when the succession opens.

26. In a recent judgment Muhammad Murad V. Allah Bux, 2006 M.L.D. 268, a learned Single Judge of the Lahore High Court has again considered the issue. The relevant facts in this case were that the original owner of property died in the year 1951. His two sons died during his life time. Some property owned by propositus actually devolved on him through Registered Sale Deed on 24.10.1974 and it was mutated in favour of his legal heirs excluding the sons and daughters of predeceased sons of propositus.

The sons and daughter of predeceased sons filed a suit claiming their entitlement to inherit the property devolved on the propositus in the year 1974, in terms of Section 4 of Muslim Family Laws Ordinance, 1961. The suit was dismissed for the reason that Section 4 of the Muslim Family Laws Ordinance had no retrospective effect. It was not in force in the year 1951 when the propositus died and therefore, Section 4 of the Muslim Family Laws Ordinance, 1961 was not applicable. A plea was taken learned Single Judge of the Lahore High Court that applicability of Section 4 of the Muslim Family Laws Ordinance, 1961 is to be considered from the date when the property actually devolved on the propositus and not from the date of his death in 1951. The plea was not accepted by the learned Single Judge of the Lahore High Court holding that Section 4 of the Muslim Family Laws Ordinance, is applicable when the succession of propositus opens. It was observed that, it is an established principle of Muslim Law that succession of a Muslim opens the moment he dies and same in neither dependent or suspended till happening or non-happing of certain events. It was further observed that the original ower hied in 1951 notwith standing the tact that the property in dispute was mutated in his name in the year 1974. It was further observed that the learned counsel for petitioner was not able to point out any provision of law making succession of propositus effective upon

happening or non-happening of some future events in order to bring the case of petitioner within the ambit of Section 4 of Muslim Family Laws Ordinance. 19M with retrospective effect. The findings of the two courts below excluding the sons and daughters of the predeceased son were up-held. The revision application was dismissed in limine.

27. Mr. Karmani has produced another Single Bench judgment of Lahore High Court in the case of Shah Alam V. Zafar Iqbal, 1986 Law Notes (Lahore) (1176) wherein a contrary view has been taken. The relevant facts in this case were that a property was allotted to one Muhammad Shaft deceased son of Shaikh Dolat Ali. It was occupied by Shaikh Dolan Ali, his wife and four sons.

Shaikh Dolat Ali being a claimant applied for transfer of property and submitted CH form in that behalf. Muhammad Shaft allottee of the property died before it could be transferred to his father Shaikh Dolat Ali. On 17.5.1960 Noor Ahmed got the suit property transferred in his name claiming to be the sole heir or Shaikh Dolat Ali. Shaikh Dolat Ali died on 27.9.1960 and after his death PTO was issued in favour of Noor Muhammad respondent vide amended order dated 26.11.1966 and thereafter names of the legal heirs of Shaikh Dolat Ali were incorporated excluding the predeceased sons of Muhammad Shaft Muhammad. Later on. the property was resumed on 21.2.1970. The matter was pending before the Deputy Settlement Commissioner when the sons of Muhammad Shaft submitted application for incorporation of their names in the PTO. This application was dismissed in the year 1974. Ultimately names of the sons of deceased Muhammad Shaft were incorporated in the PTO. This order was challenged in a writ petition. It w7as contended before the learned Single Judge of the Lahore High Court that the provisions of Section 4 of the Muslim Family Laws Ordinance, 1961 were not attracted to the facts of the case, as both Shaikh Dolat Ali and Muhammad Shafi had died before coming into force of the Ordinance. It was observed by the learned Single Judge that no doubt Shaikh Dolat Ali and his son Muhammad Shafi died before the promulgaxion of Muslim Family Laws Ordinance, 1961, but the question of entitlement of the transfer of the property in dispute was decided after promulgation of the Ordinance. The application for transfer of the house was pending at the time of death of Shaikh Dolat Ali and it was transferred on 18.11.1963 when the Muslim Family laws Ordinance was already in force It was further observed that before issuance of PTO no legal right had accrued in respect of the disputed property to any heir of Shaikh Dolat Ali, deceased. It was only at the time if issuance of PTO when the question as to who were entitled to succeed Shaikh Dolat Ali was determined by the settlement authorities. It was further observed that the succession to the estate of Shaikh Dolat Ali opened on 18.11.1963 and therefore, sons of the predeceased son Shaikh Dolat Ali were entitled to claim the share of their deceased father Muhammad Shafi by virtue of Section 4 of Muslim Family Laws Ordinance, 1961 as the question of succession to the estate of the deceased arose after promulgation of the Ordinance.

28. We have carefully considered the case law cited by the parties as well as on the judgments on which we could lay hand. The moot point for consideration is as to when succession is opened under the Islamic Law. The admitted point on which there is no controversy, is that if a Muslim male or female dies leaving any estate/property in which he holds proprietary rights, then normally succession opens immediately at the time of death of the propositus. However, it is not absolute rule and presently we will show that

there are certain exceptions to his rule as well. Thus, the general principle is that all properties movable or immovable, which a Muslim has left behind, after payment of funeral charges, debt, and legacies, if any shall be subject to devolution amongst its heir or heirs. Thus, under the general principle, the entire property of a deceased Muslim devolves on his heirs at the time of his death. The law before promulgation of Section 4 of Muslim Family Laws Ordinance, 1961, was that the nearer excludes the more remote under the theory of Mahjub-ul-Irs. There are two categories of Mahjub-ul-Irs, Hujbe-Naqsan and Hujbe-Hirman. The first merely reduces the share of the other co-heirs, while the second totally exclude the remote heirs.

29. It is stated in Ainnul Hidaya, Urdu Translation of Hidaya by Allama Moulana Syed Amir Ali, a well known treatise on Fiqah, Vol.4, page 869, under the heading Kitab-ul-Farraiz that there are three Arkans (conditions) for succession, (i) proporitus, (ii) Estate left by proporitus and (iii) successors/heirs. A child in the womb is also included in the heirs.

30. So far, the propositus and the successor are concerned, normally no difficult arises in determining them as the law in this behalf in Islamic Sharia/Fiqah is almost settled elaborately and in minute details. As already observed under the Islamic Sharia the nearer heirs exclude the remote heirs and the theory is called as Hujbul-Irs. However, by virtue of Section 4 of the Muslim Family Laws Ordinance, 1961 this theory of Hujbul-Irs has been done away with, and it has been provided as follows:- “In the event of death of his son or daughter of the propositus before the opening of succession, the children of such son or daughter, if any leaving at that time the succession opens, shall per-stripes receive a share, “equal to the share that such son or daughter, as the case may be would have received if alive”.

31. The expression “at the time the succession opens” requires consideration particularly with reference to the question as to what is the connotation of the expression ‘estate” the existence whereof is one of the conditions for opening of succession. For the expression “Estate” the words used in the Fiqah Books are “Milk” or “Turka” or “Mal-e-Metruka”. There is considerable difficulty in defining the word ‘milk’ used in the Fiqah Books as no proper definition of this word finds place in any fiqah Book. In Fatawah Usmani by Muhammad Mazharul Haq Ansari, published by Quanuani Qutab Khana, Katcheri Road Lahore, it is stated on page 639 as follows:- 32. The word is defined in Urdu Dairia Maarifi Islamia, published by University of Punjab, in Vol.21. First Edition 1987. at page 569, as follow's:- 33. The word has been comprehensively defined in the Encyclopedia of Islam. 1993 Edition. Vol. VIE Page 60 edited by C.F..

Bosworth. E. van Donzel, W.P. Heinrichs and the late Ch. Pell at as follow s:- “Milk a legal term denoting ownership. One must not expect to find in the earliest fikh texts a definition of ownership.

Certainly, the term milk is found, but forms part of such expressions as fi milkihi "in his ownership"' fi ghyr milkihi “not in his ownership" and kharadja min milkihi “it left his ownership”. The verb “to own”, malaka. is often used, and the phrase malaka ‘alayhi is employed when the object in question passes from one person’s ownership into another's, ownership (milk) is to be distinguished from possession (yad). The characteristic feature of ownership is its perpetual nature. If a tenant or lessee has only temporary possession, the ownership itself cannot be the subject of an act of

relinquishment (iskat q.v in Suppl.).

the person exercising ownership is the owner or proprietor. The term Malik is very little used; rabbal-mal or sahib is preferred to it.

The object of ownership is the thing taken into ownership, mamluk, Slaves, landed estates, houses, etc., can be the subject of this Ways of acquiring ownership. The thing, the object of ownership, can be acquired or become the property of a person by means of purchase (shira), of a gift (hiba), an act of charity (sadaka) or of a testamentary disposition (wasiyya).

Confusion between the right of ownership and the thing or object of ownership. Al-Djurdjani defines the term milk thus: "It is a legal relationship (ittisal shari) between a person (insan) and a thing (shay) which allows that person to dispose of it to the exclusion of everyone else". Yet for the classical Muslim jurists, the right of ownership became confused with the thing which is its object. For them, ownership is not a right (hakk) but a piece of property (mal), which has become ownership. Moreover, milk is so typically a material thing forming part of a person's patrimony that the question arose whether milk could have as its object an immaterial thing. The difficulty arises in effect from the fact that in Islamic law. a piece of property can only be corporeal and material, and a thing which is not considered to be a piece of property cannot be the object of an act of disposition. This is the reason why claims are not transmissible. By a kind of legal fiction, certain departures from the principle are admitted in practice.

Hanafi law. for example, allows ownership of a tenure. On the other hand, the term milk is some times applied to an obligation (dayn q.v in Suulp.). In any case, the ideal of ownership (milk) predominates over that of obligation (dayn), and in certain texts, one even reaches a point where the obligation is reduced to a kind of ownership whose object is a piece of property taken in a figurative sense (mal hukmi)." 34. A perusal of the above definitions shows that estate (Mal-e-Terka/Milk) is that property, which is fully and completely owned by a person, having acquired all rights and interest, as well as proprietary right enabling the owner to transfer and dispose of the same. Until and unless the full ownership rights are acquired in a property it shall not be treated as estate of a person. In such eventuality, two conditions, one of the death of a propositus, and the other, existence of successors/heirs at the relevant time may be satisfied, but the third condition of leaving the estate, which is the subject matter of succession shall lack and consequently the succession shall not open until and unless this conditions is also satisfied. Thus, succession opens in respect of estate and not in respect of some property in which the propositus has merely certain rights but does not possess/hold the ownership. There is a very useful exposition in this behalf in the treatise on Islamic Law of Inheritance titled as "Mufeedul Waresin" compiled by Moulana Syed Mian Sahib Asghar Hussain, Muhadis Dar-ul-Uloom Deoband, published in Pakistan by, Adarah-e-Islamiat. It is stated on page 30-31, that succession shall open in all "Mamluka" things of the deceased but in certain rights enjoyed by the deceased and of which he can be said to be "Malik" is not the subject of succession. Certain instances of such rights have been given in which succession is not opened. The first instance is of the preemption rights in respect of a house. It is stated that if a person desires to obtain a house by exercising his right of pre emption, but before acquiring the house, he dies, such right shall not be succeeded by the heirs. The right of Shit'a is also buried with the deceased. After giving

several other instances, it is stated that in certain rights and on every estate (mal) on which right of any other person is not established, and according to Shariat a deceased is made owner thereof in his life time, and he leaves it behind on his death, is called 'Terka'. meaning thereby that the deceased has left it and in such 'Terka' succession opens. But there are certain things which if not complied with no succession shall open in respect of them left by the deceased.

35. For the foregoing reasons it is held, that, if a deceased person/propositus has left some property in which he has not acquired the ownership, but has certain rights therein, no succession shall open in respect thereof, on the death of such person.

As and when the requirements of obtaining ownership/proprietary rights are acquired the same shall become subject matter of succession. In such properties the succession shall open on fulfillment of the conditions of requiring the ownership/proprietary rights.

36. Here a question arises, whether there is any concept of deferment of succession, known in Islamic Law'. The answer is in affirmative. There are several instances in which the succession is deferred and even the estate left by propositus is not distributed for some time. The first instance is, in respect of a child in the womb of its mother, who is entitled to inherit if borne alive. If the child in the womb may possibly be an absolute excluder of all possible heirs then estate is not to be distributed, until its birth but if it can not be absolute excluder, then preliminary distribution may be effected, considering the possibility of the child being a male or a female, and the smallest share may be given to the existing heirs, reserving the remainder for final distribution, after the birth of the child, on ascertaining its sex. (The Muslim Law of Inheritance complied by Al-Haj Muhammad Allah Ibne S. Jang, Page 88). Thus, the concept of deferring the succession even in case of estate held by propositus is not alien to Islamic Law. The deferment of the opening of succession on account of non-fulfillment of the requirements of one of the conditions is on much higher pedestal.

37. With the above propositions of law in respect of the opening of succession we hold that the law laid down by Single Judge of this Court in the case of Yousuf Abbas (supra) followed by several other Single Judges of the Lahore High Court and ultimately up- held by the Hon'ble Supreme Court as well as the law laid down by the learned Single Judge of the Lahore High Court in Shah Alam case 1986 Law Notes (Lah) (1176) appears to have laid down the correct propositions A of law pertaining to the opening of succession. The Single Bench judgment of the Lahore High Court in the case of Muhammad Murad 2006 M.L.D. 286 has not considered the earlier judgments on this point and therefore, we are not persuaded to agree with the view held in the said judgment.

38. The Revision Application is dismissed. The impugned judgment of the Additional District Judge Shahdadpur is up-held. While propounding the propositions of law, we have not referred to the facts in the present case for the reason that learned two courts below have not decided the issues of facts and law on merits. The learned trial Court shall decide all the issues after affording full opportunity to both the parties.

Case Remanded Revision Application dis