Journal
1986 PLD 269

Court
SINDH HIGH COURT

Date
1986-01-13

Appeal No.
S. M. A. NO. 73 OF 1983, S. M. A. NO. 43 OF 1984 AND S. M. A. NO. 25 OF 1985

Judge
ABDUL HAYEE KURESHI, C. J., ABDUL QADEER CHAUDHRY AND TANZIL-UR-REHMAN

Parties
IN RE : MST. ZAINAB AND OTHERS (PETITIONERS)

Lawyers
S. M. A. NO. 73 OF 1983 MUHAMMAD SHER AWAN FOR PETITIONER. KHALID M. ISHAQUE AND MUNAWWAR ABBAS, AMICUS CURIAE. ADVOCATE-GENERAL ON COURT'S NOTICE.S. M. A. NO. 43 OF 1984 GHULAM ALI KHOKHAR FOR PETITIONER. ADVOCATE-GENERAL ON COURT'S NOTICE.S. M. A. NO. 25 OF 1985 MISS WAJAHAT NIAZ FOR PETITIONER.

Statutes
MUHAMMADAN LAW

Judgment

Judgment

Tanzil-ur-Rahman, J.-In the matter of Succession to the estate of a Muslim husband, the question of entitlement of wife, claiming to be the sole surviving heir, and, thus, entitled to the entire estate has been referred to this Full Bench. In one case (S. M. A. 73 of 1983) the petitioner widow claims herself as well as her deceased husband to be Shi'ah, whereas in the other two cases (S. M. A. 43 of 1984 and S. M. A. 25 of 1985) the petitioners' counsel have stated before us that they are Sunnis.

2. We have heard learned counsel for the three petitioners as well as Messrs Khalid M. Ishaque and Munawwar Abbas, Advocate, as Amicus Curiae (in S. M. A. 73 of 1983) and the Advocate-General, Sind on Court notice.

3. Mr Khalid M. Ishaque, in the first instance, placed his reliance on % passage from "A Code of Muslim Personal Law" written by me which includes a chapter on the Doctrine of Return under the Islamic Law of Inheritance. The said passage appearing at page 533 of Volume II reads as under

"Shi'ah Rule of Conduct :

Shi'ah Zaidiyyah and Imamiyah are, in principle, convinced of the validity of the doctrine of 'Return' but for wife they do not favour the proposition at all. They, however, allow the residue by the 'Return' in favour of the husband only when no other Dhu-Fard exists. Hence the husband, according to the Shia'h Imamiyah, when he is the only heir, after having been given the half of his fixed share, shall also be given the residue half, on the basis of 'Return'. However, the husband, too, in the existence of any other heir, shall not get the residue under the doctrine of 'Return'. If the deceased has left his widow only as his heir, the unanimous view of the Shi'ahs is that she shall get only her one-fourth share and the residue shall belong either to the Imam or to the Government. It shall never go to the widow by 'Return'.

Al-Hilli, the author of Shara'i' al-Islam has written that there are three assertions regarding the 'Return' in favour of the widow. One is to the effect that 'Return' shall be made. The other is to the effect that 'Return' shall not be made. The third is to the effect that in case of no Imam, the'Return'shall be made to her. According to 'Allamah al-Hilli the correct assertion is that there shall be no 'Return' in favour of the widow.

Justice Amir Ali in his book "Muhammadan Law" (Vol. II, p. 123) has written that these days there is no substitute for "Imam" who can take the residue of the estate. Hence the rule as laid down in Sharai' al-Islam cannot be followed. The modern jurists are in favour of giving the residue of the estate to the widow through 'Return' as well. Same is the situation under the current Iranian Law as well, whereunder if there is only the widow and there is no Dhu Fard or 'Asbah heir, the widow shall be entitled to the entire legacy."

It is noticeable that for the passage quoted above, besides Al-Hilli, the author of Shara' al-Islam and late Justice Ameer Ali, reliance was placed on Abu Zahra's Qanun al-Irani

Raji' al-Mirath 'ind al-Ja'fariyyah, Cairo, 1959, section 950, pp. 80-81, and Al-Sarakhsi's Al-Mabsut, Vol.

XXIX, pp. 193-94,

4. Mr. Khalid M. Ishaque, then, referred to a number of passages from Wilson's Anglo-Muhammadan Law, 1921 Edition, pp. 450-51, Syed Ameer Ali's Volume II of Muhammadan Law, 7th Edition, pp. 113-14, Sir Dinshah Fardunji Mulla's Principles of Mohomedan Law, Sixteenth Edition, p. 118, Faiz B. Tayabji's Muhammadan Law, 3rd Edition 1940, p. 924. It will be advantageous to reproduce the said passages, which are as under

Wilson's Anglo, Muhammadan Law:

"473-A. There is no final escheat to a Bait-ul-Mal where a deceased person leaves no possible heir, his property, is liquidated by the Mujtahid as representing the Imam the proceeds to be distributed among the poor of the city in which the deceased was born (or presumably, where that is impracticable, where he died."

Sir Roland Knyvet Wilson at the end of passage quoted above referred to Jami-ush-Shittat, Book on Inheritance, as quoted by Ameer Ali.

Syed Ameer Ali's Mohomedan Law :

"13. Shiah Law of Succession- The husband takes a share in all kinds of property left by his deceased wife, and so does the widow when she has a child 'born of her womb', or child's child. But when she has no child or when a child was born to her, but died before the decease of her husband, then she is entitled to a fourth share in the personal estate only, including household effects, trees, buildings, etc. She takes no interest in the landed property. When there are several widows, they take the fourth of the personal estate equally. But when the widow has children, she takes an eighth of both personal and real property. If the children, however, be not of her womb, she is not entitled to an eight (sic) of the immovable estate.

(Under the Sunni Law, the widow, in default of children, takes a fourth of the entire inheritance, both real and personal).

14. If a woman dies leaving her surviving her husband as her sole heir, he takes the entire inheritance, half as his specified share and the remainder by return. According to the ancient doctors, the widow, when sole heiress, did not take by return ; according to them she took her one-fourth, and the residue went to the Imam.

As stated already, according to the modern jurists the widow is entitled to take by return. This is the rule now in force.

In early times the Sunnis likewise allowed the residue to go to the husband, but not to the widow. For example if a woman died leaving her husband as her sole heir, he took the entire inheritance; but if a man died leaving behind his widow as his sole heiress, she took her one-fourth, and the rest escheated to the Bait-ul-Maal. The modern jurists, however, are of opinion that as the Bait-ul-Maal, which in early times existed for the

benefit of the indigent Moslems, and for the promotion of the welfare of the Islamic Commonwealth, is now entirely shorn of that character, being simply the Government exchequer, the doctrine of escheat does not apply to either the case of a husband or a widow. They, accordingly, hold that where an intestate dies leaving no other heirs, excepting a wife or a husband, the entire inheritance goes to him or her. This view has been rightly adopted and upheld by the Indian Law Courts."

Late Justice Syed Ameer Ali, for the above view, has placed his reliance on Jam'a-ush-Shittat and has also referred to a number of cases reported as Musst. Subhani 1 S D A Reports, Muhammed Arshad Chowdhry v. Sajida Banoo It is also observed by him as per footnote that Abu'l Kasim Ali ibn Abi Ahmed al Hussaini surnamed, Ibn-ul-Huda, commonly known

(1) 1878 I L 3 Cal. 683

as Shaikh Syed Murtaza, holds a different opinion. He is, however, of the opinion, as appears from the footnote, that as there is no machinery now to take charge of the Imam's share, the ancient doctrine enunciated in the Sharaya-ul-Islam is completely exploded.

Sir Dinshah Fardunji Mulla's Principles of Mahomedan Law : "107. Husband and wife and *Return".-Neither the husband nor the wife is entitled to the Return if there is any other heir. If the deceased left a husband but no other heir, the surplus will pass to the husband by Return. If the deceased left a wife, but no other heir, the older view was that the wife will take her share £th, and the surplus will escheat to the Crown; in other words, that the surplus never reverts to a wife. But in Abdul Hamid Khan v. Piare Mirza the Oudh Court followed the opinion of Ameer Ali (Mahomedan Law, Vol. II, 5th Ed. at p. 1254) and held that the rule now in force is that the widow is entitled to take by return."

Sir Dinshah Fardunji Mulla, as indicated by him, has referred to the decision of the Oudh Court which follows the opinion of late Justice Syed Ameer Ali.

Faiz B. Tayabji's Muhammadan Law :

"In the absence of blood relations, and of the successor by contract, the whole of the estate devolves upon the widower or widow as the case may be.'

Faiz Badruddin Tayabji has also referred to Abdul Hamid Khan v. Piare Mirza in which a Shia widow was held entitled in the absence of blood relations to whole estate by Return, on the authority of Rauzat-ul-Ahkam (by Shaikh Mufid, 413 A. tradition of Abu Bashir, (correctly stated, Abu Baseer), Ameer Ali, 4th Ed. Vol. II, p. 153 ; against view preferred in Shara'i' al-Islam was also quoted and B. E.

Baillie's Muhammedan Law Vol. II was also pointed out.

5. Mr. Khalid M. Ishaque also referred to a number of books on - - Shia Theology namely, Al-Istibsar by Abu Ja'far Muhammad bin al-

Hasan al Tusi (d. 460 A. H., Najaf 1957 Vol. III, pp. 150-51, Miftah-al-Kiramah by Al Sayyid

Muhammad Jawwad al-Husain Al 'Amili, (d.

1266 A, H.) Vol. VIII, pp. 179-81, Tehdhib Al-Ahkam by Tusi (ibid), Najaf, 1962 A. D. Vol. IX, pp. 295-99. Al-Nihayah by Tusi (ibid) p.

642, Wasa'il al-Shi'ah by Muhammad b. al-Hasan al-Hurr al A'mih (d. 1104 A. Part II of Vol. VIII, pp. 51 >16, Jawahar al-Kalam, by Shaykh Muhammad Hasan al-Najafi (d. 1262 A. H.) Vol. 3 XXXIX, Beirut, 1981 p. 80, Al-Mabsut fi Fiqh al-Imamiyah, by Tusi (ibid) Vol.

IV, p. 70, Mukhtalif al-Shi'ah fi Ahkam Al-Shari'ah by Al-Hilli p. 737.

6. It will be advantageous to refer to the relevant passages in some detail from the above books of authority. The books cited by Mr. Khalid M I haque are related to two branches of knowledge : One relates to Ahadith and the other Fiqh. I would like to quote first from the books of Ahadith as the Fiqhi (legal) provisions are based on them. Out of the eight books mentioned above three relate to Haditb, whereas the rest are that of Fiqh. The books on Hadith are ; Al-Istibsar, Tehdbi Al-Ahkam and Wassail al-Shiah.

(1) (1934) 10 Luck. 550

Al-Istibsar, Vol. Ill, Pt. II pp. 149-51.

It is a very well-known collection of Ahadith of Shiah Imamiyab, compiled by Shaikh A-Tusi (died in 460 A. Who is a great Scholar of Hadith and Fiqh and is held in high esteem by the Shiah sect. The translation of the relevant passages is as under

"564(1) Abu Baseer stated. -I enquired from Abu Jafar in respect of a woman who died leaving behind her husband with no other heir. Abu Jafar said : when there is none except her husband, the estate is for him and if there is wife for her is the one-fourth and the residue is for the Imam.

(2) It is reported by Muhammad bin Naeem A1 Sahaf that Muhammad bin Abi Umair died. He gave a direction to him (willed) just before his death that he was leaving behind a wife and there was no other relative. He (A1 Hasan) says that he wrote to 'Abd al Saleh (Imam) for direction (about the disposal of the property of the deceased), who replied that one-fourth was to go to the wife and the rest was to be sent to him (Imam).

(3) Ahmad bin Muhammad bin Ali bin Mehryar said that Muhammad bin Hamza Alvi wrote to Imam Abu Ja'far, the Second that one of his slave has willed to him (writer) about one hundred Dirhams and I have heard him saying that whatever belonged to him was for his master. He has died and left behind property and gave no instruction regarding their disposal. He has left behind two wives. I do not know the address/location of one but the other is in Qum. What are your directions regarding the hundred Dirhams. He (Imam) replied that the hundred Dirhams were to be given to the two wives. Their share (out of the property) is one-eighth if there is a son of the deceased, otherwise it will be one-fourth. The balance is to be distributed, God willing among the poor and indigent as you know.

(4) Sahal bin Ziad quoting Ali bin Ashat, from Khalaf bin Hammad, from Moosa bin Bakr

from Muhammad bin Marwan has said that Imam Abu Jafar directed in respect (of the disposal of the property) of a person who died leaving behind a widow that one-fourth was to go to the widow and rest to the Imam.

(5) It has been related by Ahmad bin Muhammad bin Issa quoting Muhammad bin Abu mair from Ibn Musnkan from Abu Baseer saying that he asked Abu Abdullah (Jafar Sadiq) about the disposal of the property of a man who died leaving behind a wife. The Imam said, the property was to be given to the wife. He posed a similar question where the wife died leaving behind the husband. The Imam replied that the property was to go to the husband. These Ahadith are not contrary to the earlier traditions, because they include two presumptions: The first that we should base it on the situation as stated by Abu Ja'far. Muhammad bin Ali bin Al-Hasan bin Bawaih has reported that this Hadith was effective during the absence (GhaibatJ of the Imam. Since the wife is only entitled to one-fourth ; and if the Imam was present (Hazir) he can take the rest ; so when the Imam is not present the rest will also go to the widow. The second presumption would be where the wife is also otherwise related to her deceased husband. She in such a situation, will take one-fourth as her due share and the rest as a relative. This is supported by the Hadith ;

(6) What has been stated by Ahmad bin Muhammad bin Isaa quoting Ai Barqi based on the saying of Muhammad bin al Fazal bin Yassar A1 Basri who asked (Imam) Abul Hasan about (the disposal of the property of a person who died and left behind a wife who was even otherwise related to him (deceased)-and no other relative. The Imam (Hazrat Ali) said that the entire property was to be given to the wife."

Tehdhib-Al-Ahkam, 1962 A. D. Vol. IX, pp. 295-99 :

It is also a collection of Ahadith compiled by Shaikh Al-Tusi. The relevant passages are translated as under

"1055(15) On enquiry from Abu Ja'far stated that if there is no heir except the husband, for him is the (entire property) and if (instead of husband) there is wife it is one-fourth for her and the residue is for the Imam.

1056 (16) Ahmad-bin-Muhammad-bin Isaa, from Muhammad bin Isaa, from Muhammad bin Abu Umair from Ibn Muskan, from Abu Baseer from Abu Abdullah (A. S.) ; has said that I asked the Imam about the disposal of the property of a man who died leaving behind his wife. He said the property goes to her. I asked about leaving behind a husband. The Imam said that in both cases, the property left behind belonged to the husband or wife of the deceased.

This Hadith is based on two presumptions ; one mentioned by Abu Ja'far bin Bawaih (May . Allah have mercy on him), it is so when the Imam is not present (Ghaib), because when the Imam is 'present' the wife can take only one-fourth of the heritage, the rest will go to the Imam ; but when the Imam is absent (Ghaib) the balance will also go to the wife. The other presumption is that when the wife is also related to her deceased husband and there is no relation nearer than her then she takes l/4th as her share as wife (widow) and the rest by reason of relationship. This has been explained earlier and this according to me is the better presumption.

1057 (17).-As stated by Ahmad-bin-Muhammad-bin-Isaa quoting Al Barqi, from Muhammad-bin-Al-Qasim-bin al-Fazeel-bin-Yasaar Al Basri, he said I asked Abdul Hasan imam Raza about the disposal of the property of a man who died leaving behind a widow who was also related to him and there being no other relative, the Imam said that all the property will go to the widow. Whatever I have stated is supported by the fact that the wife is entitled to one-fourth of the property if there is no child, and when there is no nearer relative.

1058 (18).-As related by al-Hasan bin Muhammad bin Samaa quoting Muhammad bin al-Hasan-bin-Ziad al-Attar, from Muhammad bin Naeem Al Sahaq who said, that Muhammad bin Abi Umair died ; he made me the executor. He left behind one widow only and no other relative. I wrote to (Imam) Abd al-Saleh who wrote back that I should (give) one-fourth of the property of the deceased to the wife and send the rest to him.

1059 (19).-From Ahmad bin Muhammad bin Ali bin Mehrayar who said that Muhammad bin Abu Hamza Alvi wrote to Jafar the Second that one of his slaves had made him (the writer) his executor for one hundred Dirhams, whereas I have heard him saying that all his property belonged to his master. He has left behind one hundred Dirhams but has left no directions for its disposal. He had two wives. I do not know actually where one resides, but the other is in Qum. What are your directions regarding these hundred Dirhams. 1 he Imam wrote back to me to distribute Dirhams between the two wives. If there are child/children of the deceased, the wife would be entitled to one-eignt and if there are no child/children the wife will get one-fourth and the rest is to be given in charity to deserving persons according to your information.

1060 (20).-Sahal-bin-Ziad quoting Ali-bin-Asbat, from Khalaf-bin-Hammad, from Moossa-bin-Bakr, from Munammad-bin-Marwan from Abu Jaffar about the disposal of the property of a person who left behind a wife said : The imam directed that one-fourth was to be given to the wife, and the rest was to be sent to the Imam.

1061 (21).-Ali-ibn-al-Hasan quoting Al-Hasan-bin-Bint-Ilyas, Jamil-bin-Darraj has said that (Imam) Abdullah rules that 'Return is neither for the wife nor for the husband.

Wasaail Al-Shi'ah, Part II of Vol. VIII, pp. 515-17 :

This book of Hadith has been written by Allama Aamili (died 1104 A. who is a noted jurist of Shi'ah sect. The relevant passage is translated as under

32889 (2).-It is reported by Muhammad Na'eem al-Sahhaf who said: Muhammad bin Abi-Umair Bia-ul-Sabri died, and he made me the executor of his will. He left behind a wife and no other heir. So, I wrote to the Imam A! Abdul Saleh (peace be upon him) who replied that one- fourth was to be handed over to the wife and the balance was to be sent to him. Al-Shaikh has quoted it from Hasan-bin-Muuammad-bin- Samaa on his chain of authority.

32810 (3).--It is reported from Abi Baseer that Imam Abu Jafar read before him (the treatise containing orders) directions. It contained an order that (if) a woman died and she left behind only her husband ; the Imam ordered that all her property should go to

the husband ; (if) a man died and left behind only his wife ; the Imam ordered that one-fourth would go to the wife and the rest to the Imam.

(4) It has been reported from al-Hasan, from Waheeb son of Hafs from Abi Baseer from Imam Abu Jaffar that he directed in respect of the property of a deceased person who had left a wife only that one-fourth will go to the wife and the rest to Imam.

(5) It has been reported by many of us from Sahail-bin-Ziad from Ali-bin-Asbat from Khalaf-bm-Hamad from Musa-bin-Bakht from Muhammad-bin-Muslim from Abu Jafar that he directed in respect of the property of a deceased person who had left only a wife that one- fourth will go to the wife and the rest to the Imam.

(6) Muhammad bin-Ali-bin-Hussain on the authority of Muhammad-bin-Abi-Umair, from Aban-bin-Usman from Abi Baseer from Abu Abdullah (that he) had directed in respect of the property of a deceased woman who had left only her husband, that the entire property shall go to the husband. In a similar situation the entire property of the husband shall go to the wife.

(7) Muhammad-bin-Al-Hussain on the authority of Sahal-bin-Ziad, from Ali-bin-Asbar, from Khalaf-bin-Hamtnad, from Moossa-bin-Bakr, from Muhammad-bin-Marwan that Imam Jafar said in respect of the disposal of the property of a deceased husband who left behind only his wife that one-fourth would go to the wife and rest to the Imam.

32851 (8).-On the authority quoting Ahmad-bin-Muhammad-bin-Isa, from Moawiya-bin-Hakam, from Ismail from Abu Baseer who said I asked Imam Jafar about a woman who died and left no heir but her husband, he directed that all the property will go to the husband.

In a similar position the surviving wife would get one-fourth and the rest would go to the Imam. Sadooq has an authority related from Moawiya- bin-Hakeem from Ali-ibn-al-Hasan-bin-Ziad from Mashma'al, from Abi Baseer in this respect, according to (Sadooq) this ruling is based on the presumption of the presence of the Imam as stated earlier.

(9) It is also reported by him quoting Muhammad-bin-Issa, from Muhammad-bin-Abi Umair from Ibn-e-Muskan, from Abi Baseer from Imam Abu Abdullah, I asked about a person who died leaving only his wife, he said all the property goes to her (Al-Hadith), I say as the Shaikh has said that this formula includes two presumptions-one that has been stated by Ibn-e-Babwaih that this order is based on the assumption of the absence of the Imam, and the other (which is more acceptable/better) that the wife was otherwise related to the deceased husband and he has so argued on the basis of what is related hereafter.

(10) On his authorities quoting Ali-bin-Al-Hasan, from al Hasan-bin-Ali from Ibn-e-Bint-e-Ilyas from Jamil-bin-Darraj Imam Ali Abdullah directed that there can be no 'Radd' (in respect of the remaining heritage) either to the wife or the husband.

(11) The 'Hadith' of Al-Abdi from Imam Ali has already been related that the share of the wife cannot increase above one-fourth nor decrease below one-eighth. I say that both the Ahadith are based on the presumption that there is another heir.

Chapter V. The title of this (chapter) is that if the wife is related to the deceased husband and there are no other heirs ; only then the wife can get the rest of the property as 'Radd'.

(1) Muhammad-ibn-al-Hasan on the authority of Ahmed-bin-Muhammad-bin-Issa, from Al Barqi from Muhammad-bin-Al-Qasim-bin-Al- Fazeel from Yasar-al-Basri, who said that I asked Abul Hasan (Imam) Raza, about the disposal of the property ot a deceased husband who left behind a wife, who was (even otherwise) related to him and left no other relations. The Imam directed that the entire property would go to the wife. I say that this direction is supported by what has been stated earlier.

Now I turn to the books on Fiqh of Shi'ah Imamiyah in the chronological order

Al-Nihayah Part II of Vol. VIII, pp. 515-16.

It is an exclusive work of Shaikh Al-Tusi on Fiqh and Fatawa. The relevant passage is translated as under relation (near or distant), the husband will get half the property according to his Qur'anic share ; the rest will go to him as 'Return' as is proved by the authentic Ahadith of the Imams who were the descendants of Prophet Muhammad (peace be upon him), When the husband dies leaving behind his wife and no other uterine relative (near or distant) the wife will be entitled to one-fourth of the property as her Qura'nic share and the rest will go to the wife as 'Return' as in the case of the husband. The companions have stated in respect of the two traditions that they are applicable in case of absence of the Imam-when he is incapable of taking physical possession of the property but if he is present then the wife's share cannot exceed one-fourth as stated earlier and this position is nearer to correctness.

Al-Mabsut, Vol. IV, p. 70.

It is also a book by Shaikh Al-Tusi. The translation of the relevant passage is as follows

The heirs who get a share by virtue of the Qur'anic injunction or being near relatives, for example, the husband or the uncles or _ paternal- cousins or those who are similarly related, the husband gets a share by virtue of being a Qur'anic sharer and the others not being agnates/relatives and thus all heirs whose shares are prescribed and from their share and that of the lineal descendants, if there is any surplus and if there is no other heir, they will take their prescribed share, and the rest will go to him/tbem as "Return" being a relative For example, if the heir of a deceased is only one daughter or two daughters ; if she is alone she takes half and if there are two or more they take two-third and the rest will go as "Return" to the one or two or more daughters. However, if the deceased has left no heirs, the property will go to the Imam.

But according to persons holding contrary opinion, it will go to the Bait-al-Maal, as I have stated earlier that this is entirely based on

(the principle of) Fai or Kinship.....The conclusion is that if the Imam is present the property will go to him, but if he is not present, then like all his rights, the property will also be preserved for the just Imam and not handed over to a cruel ruler (s) ; whoever so hands over shall be liable ; and there are those who say it will go to Bait-al-Mal so that

all the Muslims benefit ; he said if a trustworthy Imam is available it be made over to him, if one is available, then he has the option to preserve it for the trustworthy Imam, or spend it in good works, or hand over to the oppressive Imam.

Mukhtalif Al-Shi'ah Fi Ahkam Al-Shari'ah :

This book has been written by Allama Najm al-din Al-Hilli, died 474 A* H->.who is also the author of Sharai al-Islam, a very well-known book on Shi ah Fiqh in this Sub-continent. The book quoted above is an exclusive work dealing with the divergent views of Shi'ah scholars on various matters. The relevant passage on Radd is translated as under

In the (matter of) inheritance, 'Imam' Abu-Al-Saleh has provided a that in case no one is available among lineal relatives of husband and 'Muala al-Niamata' and if the wife is alive then her share is I/4th and the remaining is for the 'Imam'. And amongst our jurists (Salladdo has said, 'amongst our jurists arc those also who have ruled that when the wife expires and she leaves behind none other than her husband, then all the estate goes to the husband on account of fixed share and the balance by 'Return', but for the wife there is no provision for Return . It any thing remains after meeting her share, that is to go to Bait-ul-Maal". However, there is one view that the remaining shall go as 'Return' to the wife in the same manner as to the husband, it shows that there is addition in the share/entitlement of both the husband and wife in the form of 'Return'. And 'Ibn-ul-Barraj has said that if the wife expires and she leaves her husband and does not leave anvone else besides him, then the share of husband will be half as 'the 'fixed share' and the remaining half go to him as "Return". However, if the husband expires and leaves only the wife and no one else except her, then she will receive I/4th on the basis of 'fixed share', and the rest will go to Imam. Moreover, there is a saying that as in case of husband the remaining heritage shall go to the wife as 'Radd' (Return). I have stated the apparent view fulfill) but some of the scholars, have sought to combine both the reports and have said that the ruling herein will be dependant upon the state of presence/absence of the Imam but when the Imam is present then it is not more than 1/4th tor the wife and the remaining for Imam. Shaikh Abu Jaffar Tusi has said that the implementation of this ruling is closely dependant upon such condition. According to me, the wife is not entitled, in fairness, to more than I/4th and rest should go to the Imam , because if we act otherwise we would be relying upon Khabar-e-Wahid', which does not find support from any other tradition and, therefore, it is not fair that we should act in this respect dependant upon the presence/absence of the Imam. We should follow the same principle as in case of loan, and will. Ibn-e-Idrees has said that the thing which our Shaikh has attributed as close to piety 18 'as far away from it as East from West', because the effort tor accommodating divergent reports of both categories, which the Shaikh has attempted, needs a very strong argument in suppor , since the properties of human beings and their rights do not become lawful for others due to his absence as the appropriation of the property of others without his permission is unlawful. Our Shaikh has withdrawn from his brief earlier views, because according to him there are two types of sharers in a heritage; firstly the Asnab-i-Asbab and secondly the Ashab-i-Ansab. The Ashab-i-Asbab are relatives like husband and wife, when they are the only survivors they will be entitled to their'fixed share'. If only the husband is there, then his share will be half and if the wife is there then it will be 1 /4th (one-fourth) and the rest shall go to Bait-ul-Mal. Our jurists, however, have said that if the husband is alone, then he remaining heritage too shall go as 'Return' to him. It is supported by Ijma' of the group.

Shaikh Mufeed at the end of chapter on the heritage between pothers in 'Muqni' has said, that in case there is no relation or participant in the heritage of the deceased (husband or wife), then the remaining heritage shall be given to the surviving spouse as Return . however withdrew from this view in his book Kitab-al-Aia and returned to the (accepted) view. In the chapter on Meecas-ul-

Azdawaj' he has said that the Imamia Sect unanimously agrees that when the wife expires and leaves only the husband and no other heir of any type, all the property goes to the husband-half as his fixed share and the other half as 'Return' according to Sunnat. This view is also supported by Syed Murtaza and this is, according to me, the correct view. There is Ijma' on the view that the remaining heritage shall go as 'Return', to the husband. The great jurists amongst us have so recorded and their recording thus is an authority for us, as also the tradition quoted by Muhammad-bin-Qais with reference to Imam Baqir about the woman who died, leaving behind no known heir, except the husband, the Imam directed that the entire heritage shall go to her husband. And in 'Saheeh' it is stated by Abu Baseer that when Abu Abdullah read the orders of duties by Ali before him, it was also mentioned in the orders that the husband will get the entire property of his deceased wife in case there is no other heir except him. And in the 'Saheeh' there is another tradition with reference to Abu Baseer that he was sitting with Abu Abdullah when he (Abu Abdullah) called for the Book 'A1 Jame,' and consulted it, where it was written that when any woman dies and she leaves behind no other heir except her husband, all her property goes to the husband. Abu Baseer quoting Imam Baqir says then he asked from the latter about that woman who has expired and has left no heir excepting the husband, the Imam said that all the heritage to go to the husband. Shaikh has related from Jamil-bin-Darraj in 'Al-Muwassiq' of Imam Sadiq that the Imam ruled that there can be no 'Return' in case of husband or wife.

Thereafter, Shaikh said that the said saying is not against the earlier sayings because we do not give all the property to the husband as 'Return' but we give half as his (husband)'s fixed share and the remaining due to Ijma', and not by way of 'Return' which appears enjoined in the Qur'an, and laid down in many cases in regard to uterine relations. As far the decision regarding no 'Return' to the wife is due to the basic law that Allah has restricted the share of a wife to 1 /4th in case of no issue. She cannot get more because there is no argument in favour of her demand'share....."

Jawahar Al-Kalam Vol. Ill, Beirut, 1981 p. 80 :

This is a work on Fiqh written by Al-Shaikh Muhammad Hasan al-Najafi, died in 1266 A. H. It is a commentary of Al-Hilli's book Sharai al- Islam. The relevant passage is translated as under

"It is (established) that text (of law) cannot contradict the (Nass) basic law. Where the principle of 'Return' is proved its opposite is also established by other material. The principle contained in the Ayat favours absence of Radd in title as well as in principle. There cannot be argument in opposition to clear Nass. It cannot stand in opposition of "Saheeh" even though the prohibition of "Radd" in favour of husband/wife is not explicitly indicated. This will be attributed to there being right of inheritance in the husband. All this relates to "Radd" upon the husband.

As far the wife is concerned, when there is no heir, except the Imam besides her, then the wife is absolutely entitled to 1 /4th of the inheritance.

There are three views on the proposition about “Radd” in her favour. One view is that it shall go as ‘Return’ to her, based on the view of al- Mufeed. It is based on Saheeh Hadith narrated by, Abu Baseer quoting Imam Baqir. Abu Baseer asked him if a man died and left only his wife, Imam Baqir replied that all the property is to go to her. Then he asked the Imam his views in case a woman died and left only her husband, the Imam said that all the property will go to the husband.

The other view is that (and it is the better view) that there is no “Return” for the wife and remaining property will g9 to the Imam. This is the predominant well-known view and constitutes almost an Ijma’. Perhaps, whatever has been copied by Ibn-e-Idrees is apparently supported by Ijma’. What is related from Mufeed is not clear in this behalf. There is a doubt that he may not have meant husband and wife from the Azwaj but the husband. Based on ‘Kitab-ul-Aalaam, Ibn-e-Idrees is quoted as saying that he had withdrawn from his earlier view. That is which is reliable, popular and is evident in this regard and that hehad made a distinction between the husband and wife.

The third view is that wife will be entitled to “Return” only in case the Imam is not present, as it is now-a-days. She will not be entitled to “Return” in the presence of Imam. It is related in my book “A1 Akhbar” from Sadooq and Shaikh but whatever is from his book “al-Nihaya” is nearest to truth, but in “Muasalik” it has only been copied from Najibuddin-Yahya-bin-Saeed and the same has been copied from Allama in al- Tahreer, in Talkhees and Al-Irshad, and in “Lam’a” from Shaheed, arguing that it is the only way to reconcile the A hadith to prove that “Radd” is not valid in the presence of Imam but valid in the absence of Imam.

It is, as you see, Ibn-e-Idrees has said that the effort to reconcile such divergent ‘Ahadith’ leads to a position similar to one where (distance between) east and west is sought to be covered. It is stated in “Masalik” that the Hadith comprises a question put to Imam Baqir who was alive at that time. If so, how is it possible that when the Imam was present in year 150 Hijra, he would direct the “Return” to the wife when the period of holding was away by one hundred and fifty years from his times. I say, the only possible explanation for the view is that bis period for lack of political power be considered as period of ‘invisibility’ in the same manner as it is interpreted in other matters connected with Imam for example Juma prayers, establishing of Hudood or any other such matters. But such explanation would contradict the report from Ibn-e-Naeem al-Sahaf who has stated that when Muhammad bin Abu Umair died, he had made him an executor and had left a wife and had left no other heirs excepting her. So he wrote to Al-Abdul-Saleh whereupon, he replied to him that the remaining should be sent to him (the Imam) after giving l/4th to the wife. However, there is no evidence (based on real law) to support this view, whereas there is ample evidence in “Ahadith” supporting refusal of “Radd” in favour of the wife which is also in consonance with the basic law. In addition there are decisions (Fatawa) in support of it, and the bare text of the Kitab; hence the need for reconciliation.

For this reason Ibn-e-Idrees, has said that the need of reconciliation arises when there is contradiction with a possibility wof re-conciliation between the reports. The present

situation does not warrant reconciliation because the report ("Khabar-e-Wahid") cannot contradict the Fatawa of the Companions. The property of another person (the Imam) cannot become lawful for another merely on account of his absence. It appears from this discussion as if the people who plead for "Return" to the wife, do so on the assumption that Imam has permitted the property of the deceased husband to his wife except when, the wife is entitled to it by way of inheritance. The status of wife both as an heir and non-heir is apparent and also that if Imam being present and not present.

From these texts objections arise that when the matter was left to the discretion of the Imam, he at one stage directs that the balance of the heritage (i.e. the deceased's property) is to be sent to him, on another occasion he orders that the entire heritage be handed over to the wife, and at the third occasion orders that the balance should be given in charity to deserving persons. However, it is quoted in Saheeh Hadith by Ibn-e-Mehraz-Yar who said that Muhammad-bin-Hamza-Alvi wrote to Imam Abu Jaffar Thani that one of his slaves had made him (Muhammad-bin-Hamza-Alvi) an executor in respect of one hundred Dirhams (belonging to him) ; whereas he has been heard as saying that all his property belonged to his master. He has died and left hundred 'Dirhams' but has made no wiil in this regard. He has left behind two wives.

One was not traceable, but the second wife was living at Qum. He, therefore, solicited the direction of the Imam regarding the said hundred Dirhams. Imam Jaffar Thani directed him to hand over the Dirhams to the two wives the shares of both the wives is 1 /8th of the total if the man (slave) had child/children otherwise their (wives) share will be 1/4th of the total. The balance should be given in charity to needy persons. It appears from the questions posed to the Imam that the slave had no child/children when wives would get l/4th. The correct interpretation of law in respect of "Return" to the wife is that besides being the wife, she should even otherwise be related to the husband. This interpretation would be according to the 'Hadith' of Muhammad-bin-Fazeel when be asked Imam Raza about a person who had died and left no relatives except a wife who was even otherwise related to the deceased. Imam Raza ordered that the whole property should be given to the wife ; or some other method of reconciliation be found.

There is no doubt that the wife should not be considered entitled for "Return" ; though in the current period, it is better that the wife should get all the property of her deceased husband as she is the person best entitled to the property of the Imam, when there are no child/children of the deceased."

Miftah-al-Kiramah, Vol. VIII, pp. 179-81.

It is also a commentary of Fiqh by Allamah M-Amili, who is also the author of Jawahar al-Kalam quoted above died in or about 1266 A. H. It contains the detailed discussion on the subject. The abridged version whereof is translated as under to the wife of a deceased husband when there are no child/children. In case there are child/children or their descendants how low so ever, then one-fourth belongs to the husband and one-eighth to the wife.....The main discussion is that if there is no claimant

besides the Imam under what circumstances the left over, after one-fourth/one-ha)f the share of the wife/husband, can go as "Return" to them or not. There are some precepts in this connection.

The first that the husband is entitled to “Return” on the basis of Ijma’. This has been related by Mufid in “Kitab-ul-Alaam, Syed in Tntesar’ Shaikh in ‘Al-Istibsar’, and “Al-Mabsoot” that it is due to the Ijma’ of the Imamia sect and this has attained finality.....

The second tradition is that there will be no “Return” for the husband, and the rest will go to the Imam. I have not been able to get this tradition from any direct source narrating from the companions. Of course it is mentioned in A1 Marasim by Abul Ala, after mentioning that the wife will get one-fourth and the husband half, if there is no child. Among our companions some have said that when the wife dies and leaves no heirs except the husband, the entire property will go to the husband on the basis of his prescribed share and as Return but there is no “Return” for the wife. Whatever is left after meeting her share goes to the Bait-ul-Maal. However, there is a tradition that like the husband a wife is also entitled to “Return”. It has been said in A1 Mukhtalif that the share of the spouses increases due to “Return”. 1 say, this is apparent, provided we do not say that it means that the left over property of the deceased will go as Return to the husband but in case of wife she will only get her prescribed share and the balance will go to Bait-ul-Maal. Actually it is not so, the left over will go the Imam. On a deeper study of the text, it will appear that the traditionalist is more interested in Bait-ul-Maal than “Return”. He wants to say that some of our Scholars following the general (Ahle-Sunnat-wal-Jamaat) have said that whatever is left after meeting the (prescribed) share of the wife will go to Bait-ul-Maal and not to the Imam. A proper reply to it is that reference to the Bait-ul-Maal is to that of the Imam as explained by me earlier.....Our companions have however said that the

Return will go the husband alone according to the Ijma’ of Imamia sect It may be considered that there can be no Return in case of husband and wife when there is some other heir present besides the Imam. In other words, it may mean that there cannot be any Return on them due to being other relatives.

The third tradition is that there will be no Return for the wife. Mufeed has mentioned it in Kitab-ul-Alaam. It is also mentioned in Ijaz by Shaikh, and in the letter to his son by Ali Ibn al Hussain, the Muqanna by Muhammad bin Ali, and by Taqi Qazi and Kuledi as has been quoted from them and in Intesar, Mabsoot and Mohya from Syed and Shaikh and from Ibn Hamza and Ibn Zahra Ibn Idrees and Muhaqqiq and in Kashf al Ramooz and in Al Musannif fil Mukhtalif of his pupil and in Efah of his son, and in Al Daroos Ghait ul Murad, Masalik and al Rawza of Marytrs

.....The fact is that there are apparent meaning and not the basic law.

The fourth saying is that the wife will get as Return the balance of the patrimony as happens in the case of husband. This is mentioned in the authentic tradition of Abu Baseer based on the verdict of Imam Baqir (Referred to earlier). But it appears from what has been stated by the author in Khalaf that there is a difference (from the earlier opinion), because he has said that the companions have quoted two traditions on this subject, and have attributed it to the apparent contents of Mufeed in al-Muqna. The explanation of whatever I have been able to get in this connection is as under

‘When there is no close or lineal descendant of the deceased besides the husband or

wife, the balance of the patrimony will go as Return to the (living) spouse.'

It appears from the wording of the text that in Arabic the word 'zawj' (j-jj) without 'Tae' (*0') is used both for the male and female. I say that Mufeed has followed this principle, but according to all the Muhaqqiqin (researchers) the use of a common (Mushtarak) word for all its meanings (at one place) is not valid.

The fifth saying is that the remaining patrimony will go as Return to the wife when the Imam is absent but not when he is present. This very tradition by Sadooq has been specifically stated in al-Faqih. It is quite possible that the Shaikh also held this belief and it was also his teaching.

This view has been attributed to him in both the volumes of A1 Akbbar but it has been branded as unauthentic in Masalik, Kefaya and al- Tahzeeb. The author of Jam'ia has also supported it but I do not find any reason for it.....The learned

author at the end opines that:

"It can at best be concluded from the margin of Naafi that the question of Return is not without doubt.....It is, therefore, better

to drop this view that the Imam had foregone his share in favour of the wife of the deceased or that the wife was related to the husband....."

7. I may also refer to a number of other noted works on Shi'ah Fiqh, Qawaid al-Ahkam fi Ma'rifat al-Halal Wal-Haram (Kitab al f'raid, Chapter IV) by Allamah Hasan ibn Yousuf bin Aii Ibn Mutahhar Ali Hilli, Al Mukhtasar Nafi' Mirath al Azwaj by Allamah Najmuddin Al-Hili, Irshad al Adhhan by Allamah Mutahhar Al-Hilli, Minhaj al Salehin, Vol. II, Problem No. 1783 by >ayyid Abul Qasim al-Khu'i, Kashf al Litham, (Kitab al fara'id) by 4Hamah Muhammad ibn Hasan Isfahani, Tahrir al Wasilab, Vol. II, p. 396, by Roohullah Khumaini, Kitab al Mirath, p. 259, by Allamah Muhammad Rahim Rahimyan, Mustanad al Shi'ah (Kitab al fara'id Wal Mawarith) section 11 by Allamah Ahmad Naraqi, Fiqh al Imam Ja'far al Sadiq, Vol. V, p. 241, by Muhammad Jawad Maghniyyah and Fiqli al Sadiq pp. 406-8, by Al Sayyid Muhammad Sadiq al Hussaini al-Roohani.

In the first named book it has been stated that if they (sharers by Nasab, Mawla al Ni'mat and Zamin bil Jarirah, are non-existent, it is said that the residue shall go by Radd to the wife and it is said that it is for the Imam and it is said that it will go by return to the wife, if the Imam is Gha'ib (not present).

In the 2nd named book, it is stated that if there is no heir except the husband, the residue shall be given by Radd to him. However, in the case of wife there are two assertions : one is that for her is the one-fourth and the balance is for the Imam, and the second is that the balance will be given to her as Radd like the husband. There is also a third statement that the balance shall be given to her by Radd in case of the absence of Imam. The first assertion is most evident 00-

In the 3rd named book it is stated that if there is none except the wife and there is no Zamin bil Jarirah, the residue will be given to her as Radd in case of the absence of

Imam.

The learned author of the 4th book Sayyid Abul Qasim A1 Khu'i, who is the most prominent Shi'ah Mujtahid of the present age at Qum in Iran and who is considered to be one of the authentic Maraji' in the world Shi'ah Community to whom references are made on religious issues, has stated in his book that if the husband leaves behind no heir by Nasab (blood) or Sabab (like marriage) except the Imam (A. there is one-fourth for the wife as sharer. The question is whether the residue shall be made over to her as Radd absolutely, or if the Imam is Ghaib or it will not be made over to her as Radd at all and the residue is for the Imam ? The most popular assertion is the last one, i. e. the residue is for the Imam.

The learned author of the 5th book named above, has stated that when a husband dies leaving behind her wife only, there are three assertions about her inheritance : the first is that of no Radd to her and that is the popular one ; tne second is that the residue shall be given to her as Radd absolutely like the husband, and that is Zahir al Mufeed, whereas the third is for Radd in her favour in case of the Ghaibat (absence) of the Imam and not in his presence, and that is nearer to the correctness (<->I_aJl

The learned author of the 6th book, Roohullah Khumaini (popularly known as Imam Khumaini, Founder of the present Islamic Revolution in Iran) has stated that none of the spouses inherits the entire property on account of marriage (c~»jj) except in one situation that there be husband and the Imam. Thus, the husband inherits the whole property by share and by Radd (page 396).....and if wife is the only heir for her is one-

fourth and the residue is for the Imam and the mandate about this property during the period of absence of the Wali al-Amr is the same as that of'he entire property of the Imam in the hands of Wilayat al-Faqih, with certain conditions (Page 399).

The learned author of the 7th book, Allamah Muhammad Rahim Rahimyan, who is Mujtahid of Iran, presently staying at Quetta (Pakistan) has stated the same thing as stated by Al-K.hu i except that the word 'Ashhar' (more popular) has been used by him instead of Aqwa (more strong), used by Al-Khu'i.

In the 8th named book, the issue has been discussed in some detail, the gist whereof is that if a husband dies leaving behind his wife only, there are assertions of no return to her absolutely, but for her is the one-fourth and the rest is for the Imam. The learned author has referred to the various books in its support and at the end quoting Al Intisar and Al-Sarai'r has said that there is Ijma' on it. He further says that for application of the doctrine of Radd to her there is the assertion of Mufeed,

but he (Shaikh Mufeed) has used the word "Azwaj" which applies to both husband and wife, but there is probability that he meant by the word Azwaj QrLjj1) only the men (JU.1). Concluding his discussion, he seems to give preference to give the residue to the wife during the absence of the Imam and not in his presence.

The learned author of the 9th book, who is probably alive, has stated that if there is no heir except the Imam, the wife shall take her higher share e. one-fourth) and the balance will be for the Imam, whether he is present or absent.

The learned author of the last book has devoted a separate chapter to the Inheritance of Sharers by Cause ; like marriage (o-jj) and at the end of the discussion he has stated that in fact there are conflicting textual manifestations and it is not possible to reconcile them in the known manner. The recourse should, therefore, be had to preferred traditions and it demands that the tradition for giving the residue

to the Imam be accepted. In respect of the assertion of Shaikh Mufeed about Radd in favour of the wife, the learned author stated that he had resiled from that assertion. However, quoting Al-Intisar the learned author stated thatthe narration of Shaikh Mufeed was never acted upon by the group (vcijlk). Thus, what is more evident is that the remainder of the property is for the Imam

(,OLJI JU\ ol JA'A)-

8. Mr. Munawar Abbas Advocate, amicus curiae, while adopting the arguments advanced by Mr. Khalid M. Ishaque, Advocate, that in case there is no 'other heir of the deceased and there is no Imam or the Bait-al-Maal, the widow is entitled to the residue submitted that even otherwise it is the responsibility of Muslim Society to maintain widows, and so the residue should be made over to the widow as Bait-al-Maal is for the poor and is so spent by the Imam. This part of argument of Mr. Munawar Abbas, I am afraid, is entirely misplaced inasmuch as the doctrine of. inheritance is not governed by rule of necessity. Islam does not holdM poverty, need and helplessness of the relatives of the deceased as the basisj of the settlement of shares in the estate. Otherwise it would not have been said : “Ye know not whether your parents or your children are nearest to you in benefit. These are settled portions ordained by Allah and Allah is all Knowing, All Wise” (Al-Qur’an, IV: 11). This verse clearly proves that in the naming of the heirs and their shares, the economic conditions or their being needy and helpless has not been made the basis of the law. Had it been so, it would not have been said “for the male it is twice that of the female”, rather it would have been ‘for the female it is twice that of the male’, as it may be said that a female as against a male is in greater need of property and due to her being comparatively needy and because of femininity she should have been held to be better entitled to property. Likewise a husband, in the event of his wife having no issue, has been held entitled to half of his wife’s estate, whereas the wife, in the event of having no issues, has been held entitled to only one-fourth of her husband’s estate though the need, helpnessness, incapability of earning livelihood and the absence of required strength to so earn might demand that one-fourth of the estate ought to have gone to the husband and the half to the wife. In case of a widow being destitute, there are other provisions in the Holy Qur’an for their maintenance as poor and needy persons of the society. The institution of Zakat and Ushr established in Pakistan will take care of such situations.

9. After going through the above quotations from the authorities on Shi’ah Fiqb, one may come to the conclusion that there is a complete unanimity among the Shi’ah jurists that

(i) In case there is no heir except the husband the whole estate of the deceased (wife) will go to her husband. He will inherit half as the sharer and the other half as Radd. The expression that Return on the husband is absolute b7ljma\ and that , this order has undoubtedly

attained finality, as used by Allamah 'Aamili in "Miftah al Kiramah" are quite clear about it. B

(ii) There is some difference of opinion if the sole surviving heir is wife (instead of husband) on the question of Radd to her. However, the preponderant or preferred dew seems to be that in case

there is no heir except the wife, she shall take one-fourth as the sharer and the rest as Radd, provided there is no Imam or the Bait-al-Maal.

One or two traditions of Imam Ja'far Sadiq (R. A.) which speak of the whole estate being inherited by the wife apply to a situation when the wife is otherwise related to her deceased husband and the residue is inherited by her in that capacity.

10. Now, I turn to the other two Applications S. M. A. No. 43/84 and S. M. A. No. 25/85, in which the applicants claim to be Sunnis.

Learned counsel appearing for the applicants, except restating their case, advanced no arguments. Since Messrs Khalid M. Ishaque and Munawar Abbas were requested to appear as amicus curiae in S. M. A. No. 73/83 for which the applicant as well as deceased claimed to be Shi'ah, we were not addressed any arguments on the question before us from Sunni point of view. I may, therefore, mention hereinbelow the position as it stands under the Sunni Law of inheritance. At the outset, I may state that there is some difference of opinion among the Sunni Jurists on the question of Radd. It will be appropriate if I deal with the views of the different schools of the Sunni Law on the subject, which are as follows

Hanafi view : C

According to the classical view of Hanafis in the non-existence of 'Asbah Nasabi' and in the event of there being some property of the deceased left out as residue after giving the fixed shares to Dhawi al Furud, the same shall be divided proportionately among the said Dhawi al Furud except the spouses.

If, however, there is only the husband or wife as Dhu Fard (Sababi) he or she, as the case may be, shall not get the said residue ot the estate and the doctrine of Return shall not be made applicable to them. According to the Hanafis, the 'doctrine of Return' is applied only to Dhawi al- Furud Nasabi and not to Dhawi al-FurudSababi e. husband and wife) because they, after taking their fixed Qur'anic shares, are no more regarded as heirs for the purpose of taking other share of property. (Al-Jurjani : Al-Sharifiyyah,

Karachi ; p. 74 Abdullah b. Mahmud b. Mawadud (d. 683 A. H.) Al-Ikhtiyar Li'taalil al Mukhtar, Cairo 1370, Vol. V, pp. 99-100, Fatawa Alamgiri, Volume Kitab al-Fara'id» Chapter XI on Radd)

This rule of conduct is attributed to most of the Sahabah (Companions of the Prophet), including Hadrat Ali.

Indeed, according to Hadrat Zaid Bin Thabit, after giving to the Dhawi al Furud, their fixed Qur'anic shares the residue of the estate shall not be returned to them (the Dhawi al-Furud). It shall, according to him, belong to the Public Treasury (Bait-al-Maal) 'Urwah, Imam Zuhri, Imam Malik and Imam Shafi'i too, in persuance of the assertion of Zaid b. Thabit, do not approve of the doctrine of Radd.

It is stated from Hadrat 'Abdullah Ibn 'Abbas that no 'Return' shail be made to the husband and the wife and to the grandmother. But, according to Hadrat 'Uthman the 'Return' shall be made to the husband and the wife as well. According to him its basis is (j.jiJU piJI o!) (with increase there is the decrease). That is, as there is decrease through 'Awl in the shares of the husband and the wife in the same manner they are entitled to the increase as well. Same is the assertion of Jabir b. Yazid.

Those jurists, who are opposed . to the 'Doctrine of Radd', advance the argument in support of their contention that Allah has the rigljit to increase their shares and, thus, after giving them their fixed shares they cannot be held to be entitled to the residue of the estate, which shall belong to the Public Treasury, as it happens in the case where a man dies without leaving any heir, the entire estate becomes the property of the Public Treasury.

Those who favour 'the doctrine of Radd' argue both from the Qur'anic verse and the Prophet's tradition. In the Qur'anic verse (VIII : 75) Allah says, ; (But kindred by blood have prior rights against each other"). It proves the right of taking the inheritance by the kindred by blood. The verse of inheritance (IV: 11, 12) also prove for some specified kindred by blood their fixed shares in the estate of the deceased. Hence, as far as possible, both the verses shall be acted upon, inasmuch as that, at first, according to the verses of inheritance, their fixed shares are given to them and in the event of there being no other kindred by blood they, on the basis of the other verse, be held entitled to the remainder estate. That is why, no Return is made to the husband or wife because there is no relationship by blood between them.

Besides, those who approve of the doctrine of 'Return' also argue from the tradition of the Holy Prophet stated by 'Umru Ibn Shu'aib. A woman who had been imprecated by her husband (and thus separated by Li'an gave birth to a son, whose pedigree got established from the mother. When he (the son) died, he left behind no heir except his mother. The Prophet held the mother to be entitled to the entire estate left by her son. (Abu Da'ud. Sunan, Karachi 1369 A. H. Vol. I, p. 403). The directive of the Prophet regarding giving away the entire estate to the mother is a proof of the validity of the doctrine of 'Return', as the mother's share, in the circumstance, is fixed in the Qur'an as one-third, and she would not have got the residue, except by the Radd (Al-Sarakhsi ; (d, 482 A. H.) Al-Mabsut, Cairo 1324 A, H. Vol. XXXIX, p. 192).

Further* it is there in the tradition stated by Wathulah b. Asqua' that the Prophet said, "The woman shall inherit the entire estate left behind by her Laqit, (the child lying on the way having been picked up and maintained by her and 'Atiq, (the slave who must have been set at liberty by the woman) and the son whose pedigree is denied by the father through imprecation) (Li'an). (Abu Da'ud : Sunan op. cit).

Imam Sarakhsi has discussed this issue quite elaborately. He writes that Hadrat 'Ali Bin

Abi Talib has said that after the fixed shares in the estate have been distributed among the Dhawi al-Furud, if there is any residue and no 'Asbah of the deceased exists, leaving out the husband and wife, the residue shall be distributed among the Dhawi al-Furud, according to their respective shares, (Al-Sarakhsi : Al-Mabsut, op. cit.)

It is stated from Hadrat Abduilah b. Mas'ud that according to him, excepting the six persons, the residue shall be returned to the other Dhawi al Furud. The six persons to whom there shall be no 'Return of the residue are : (1) Husband, (2) wife, (3) the daughter of the deceased when with her there is the grand-daughter, (4) the true sister when with her there is the consanguine (Allati) (sister :

(5) the mother when with her there are issues and (6) Grandmother when she is with some sharer {Ibid).

Thus, according to the classical Hanafi jurists, following is the order of inheritance

(1) Dhawi al-Furud (Sharers).

(2) Asbat (Residuaries).

(3) Radd ala Dhawi al Furud Nasabi (Return to sharers by blood, if there is no 'Asbah). P

(4) Dhawi al Arham (distant kindred).

(5) Muqir lahu Bil Nasab (Person in whose favour paternity has been acknowledged by the deceased).

(6) Musa Lahu bi jami' al-mal (Legatee for the whole of property).

(7) Bait-al-Maal.

Maliki View : 1°

The doctrine of "Radd" according to Maliki School of Fiqh is not valid. In the event of there being no 'Asbah the residue of the estate shall be the property of the Public Treasury, whether the Public Treasury is managed or unmanaged. Dhawi al Arham shall have no share. However, according to view point of the postclassic Maliki jurists, in the event of Public Treasury not being managed, it shall be valid to make the Return of the residue to Dhawi al-Furud (Al-Abi : Jawahar al Aklil, Cairo, 1366 A. H. Vol. II. p. 332 ; Ibn Rushd : d. 594 A. H. Bidayat ul Mujtahid, Cairo, 1369 A. H. Vol. II, p. 352.

Shafi'i View : E

According to Imam Shafi'i as the estate, in the event of there being no Dhawi al-Furud and 'Asbat is held to be the property of Public Treasury, likewise, in the event of non-existence of 'Asbah and after giving away the fixed shares to Dhawi al Furud, the residue of the estate shall be held to be the property of the Public Treasury, provided it is managed properly under the control of a Ruler, If it is not so, according to Shafi'i group of Ahl-i-Tanzil, as the author of Al-Muhazzab puts it, the residue shall be distributed

following the doctrine of 'Return' with the exception of husband and wife, among the Dhawi al-Furud Nasabi, proportionate to their shares. If Dhawi al-Furud Nasabi do not exist at all, and there is no 'Asbah too, the same shall be divided among Dhawi al-Arham in the absence of a properly managed Public Treasury. But the authentic rule of the Shafi'i fiqh is that the 'Return' cannot be made to Dhawi al-Furud. The Public Treasury shall have the right over the residue of the estate (which shall be spent on the general welfare of the Muslims). Even if the Public Treasury is not managed, no 'Return' be made to Dhawi al Furud. Whoever be in possession of the property so left, he shall himself spend it on the affairs conducive to public good. (Ibn Qudamah al-Maqdisi d. 620 A. H. Al-Al-Mughni, Cairo, 1367 A. H.

Vol. VII, p. 201; Abdullah b. Ahmad al-Maqdisi : Al-Muqni' Matba' af-Salfiyyah, Vol. II, p. 424.

Hanbali View i-

According to the authentic version, the Hanbali rule of conduct is in accord with the Hanafi rule (Al-Firozabadi d. 476 A. H. Muhazzab. Cairo 1379 A. H. Vo). II, p. 32).

ZahirVs View /G

I may also state the view of the Zahiri School which is generally looked with reverence by a group of Muslims known as Ahl-i-Hadith

Imam Ibn Hazm al-Zahiri has written in his book Al-Muhalla (Vol. VI» P- 380) that after giving the fixed shares to Dhawi al-Furud, if there is the residue and no 'Asbah entitled to it is there, the same shall be spent on the general good of the Muslims, and no part of it shall be given by way of 'Return' to Dhawi al-Furud or to Dhawi al-Arham inasmuch as, according to him, the 'Return' is not incumbent under the Qur'an, Sunnah or the Ijma'. The argument of Ibn Hazm in this respect is almost the same as that of Imam Shafi'i.

11. Analysing the arguments of the various Schools of Sunni Fiqh, my conclusion is as under

Those who do not approve of the doctrine of Radd, including Imam Malik and Imam Shari'i, their basic argument is that Allah has fixed in the Qur'an the shares of Dhawi al Furud. As their shares are fixed, any increase thereon shall be forbidden as it amounts to going beyond the prescribed limit, for which there is a severe denouncement for those who exceed the limits as has been said by Allah Himself at the end of the verse (IV : 14), relating to inheri-„ tance. But in my humble view, it shall be wrong to say that giving to Dhawi al-Furud the residue of the estate through 'Return' amounts to exceeding the prescribed limit, because the manner in which the fixed shares are decreased through 'Awl which stands proved from Ijma', in the same manner the fixed shares may also be increased. Besides, the verses of inheritance (IV : 11, 12) fixing the shares of Dhawi al-Furud, undoubtedly establish the right to a fixed share in the estate for each of them, yet in the event of there being no 'Asbah, the dictates of the Qur'an are implemented in the manner that the sharers, at first, take their fixed shares under verses (IV : II, 12) and then whatever is left is divided between the Dhawi al-Furud on the basis of womb relationship, under the verse (VIII : 75). The verse (IV : 14) may, however, mean that the heirs in whose favour the shares have been fixed in the Qur'an should not be deprived of their shares.

Hence, after giving the shares to 'Ashab al-Farai'd, when there is no 'Asbah, to give the residue, will not be against the intent of the Qur'an, nor can it be said to be going beyond the Limits, prescribed by Allah because the 'Ashab al Fara'id, in the non-existence of 'Ashab, being closer in womb relationship with the deceased compared to Dhawi al-Arham are entit,pf1 than tho "Ra't-al-Maal". Thus, the Qur'anic verse,) and the principle of inheritance both are acted upon. Imam Sarakhsi

has also said the same thing which appeals to reason as well.

So far as the question of non-application of Radd to husband and wife is concerned, according to early Hanafis, the husband and wife are entitled only to their fixed shares, whether the Public Treasury is managed or not. But the verdict of later Hanafi jurists is that if the Public Treasury is not properly managed and there is no heir including Dhawi al Arham, the residue of the estate shall be made over to the husband or the wife, whosoever is alive. Allama Ibn 'Abidin, the author of "Radd al-Muhtar" (Cairo 1294 A. H, Vol. V, p. 556) quoting from Imam Ghizali's work, "Al-Mustafa" has also stated the verdict, in such a situation, in favour of husband and wife as valid. Besides, he has also quoted from Ahmad Bin Yahya b. Sa'd Taftazani that most of the later Masha'ikh have given their verdicts in support of applying the doctrine of Radd in favour of husband and wife when no other heir of the deceased exists, because the Rules (of the time) are Fasiq and the authorities have become cruel. The later Shafi'is have also adopted the same (Al-Amili). According to the later verdict, therefore, it shall be proper to say that a Sunni husband or wife shall be entitled to Radd, where the Public Treasury is not managed (according to Shari'at) the surviving husband or wife may be given the residue by Radd, provided there are no Dhawi al-Furud Nasabi, 'Asbat and the Dhawi al Arham.

12. It will be of interest to note that this question has received attention of Legislatures of several Muslims Arab countries as well. In Egypt under section 30 of Qanun-al-Mawarith No. 77 of 1943 it has been laid down that after having been given the fixed shares to Dhawi al-Furud in the estate, if there is the residue and there is no Asbah Nasabi' leaving aside the husband and wife, the residue shall be distributed among Dhawi al-Furud, in proportion to their fixed shares. If no one of 'Asbah Nasabi or Dhu Fard Nasabi or Dhawi al Arham exists, the 'Return' shall be made to one of the spouses 'husband or wife, whoever is alive. The Syrian law of inheritance too on this subject is in accord with the Egyptian law. (section 288). In Tunisian and Moroccan Laws, there is no provision of Radd available, apparently because the doctrine of Radd under the Maliki Fiqh is not recognized and the Maliki Fiqh is in practice in Tunisia and Morocco.

The Indian Courts, in pre-partition days, have also pronounced their decisions on the question of Radd in favour of the widow as sole- surviving heir. Indeed, when tnere is no heir except the husband or wife, l the wife or the husband (.whoever exists) has been held entitled to the residue through the doctrine of Radd (as then no Bait-al-Maal, existed).

It has thus been held in the case of Guja Dhar Pershad v. Shaikh Abdullah (1)

F- B- Kemp and F. A. Glover, JJ. that when Dhawi al Furud exist but j no Asbah is there, the residue of the estate shall be given, excepting the husband and wile, to Dhawi al Furud, m accordance with their shares.

It was also held that even presence of the Dhawi al Arham, shall not r present the application of the doctrine of Radd in favour of Dhawi al Furud. It has been held in another case Bufatan v. Bilati Khartum (2) that in the event of the Nasabi Dhawi al Furud and Dhawi al Arham not! being there, the estate shall belong to the wife or husband, as the case? may be, through Radd.

I may also refer to few other cases reported as Muhammad Arshad Chowdhiy v. Sajida Banoo Koonari Bibi v. Dalim Bibi (h) and Mir Isub Walad Mir Inus and others (heirs of the deceased) v. Bawasaheb Balbale and another

In the first case named above (I L R 1878) there was a suit brought by the widow of one Nawab Ali Chowdhry for recovery of certain lands, part of the estate of her husband, who died on the 21st of July 1867. The plaintiff claimed as sole surviving heir of the deceased. In the written statement, the defendant represented himself as a "Cousin in the collateral line to the said Nawab Ali Chowdhry, and among other defences denied the right of the plaintiff to more than a fourth share of her husband's estate. The parties to this suit were Sunni. The Court of first instance found on the facts that the defendant was not of the same family with Nawab Ali Chowdhry, and that in the absence of any other heir, the enled to all the properties left by her husband, the said Nawab All Chowdhry. The defendant appealed to the High Court which was heard by Mr. Justice Kemp and Mr. Justice Morris. It was observed

"...That brings us to the question raised in this case as to whether the plaintiff is entitled to succeed to anything beyond a four-anna share in the estate of her late husband Nawab Ali Chowdhry. The learned counsel lor the appellant quoted a Privy Council decision in the case of Mst.

Hurmutool Nissa tsegum v. Alladia Khan (17 W. R. 108) Baillie's Mahomedan Law, 2nd edition, pp. 10,

11, 44, 77, 79; Macnaghten's Mahomedan Law, p. 93 ; and also a passage at p. 651 of the Fatwa Alamghiri. In the Privy Council decision quoted by the learned counsel, their Lordships observed that 'the proposition which assumes that if there are no iesiduaries the three-tourths of the property would necessarily go to the Crown, may be contestable. As a general rule, a widow takes no share in the return ; but some authorities seem to hold that if there are no heirs by blood alive, the widow would take the whole estate to the exclusion of the fisc''. Now these observations, although they had no bearing upon the ultimate decision of the

(1) (1869) 11 S W R 220 (2) I L R 30 Cal. 683

(3) I L R 3 Ca). 702 (4) I L R 11 Cal. 14

(5) I L R 44 Bom. 947

case, seem to us rather in favour of the plaintiff than of the defendant. Then with reference to the quotations from Baillie's and Macnaghten's Mahomedan Law and from the Fatwa Alamgbiri, there can be no doubt that the more ancient authorities did heW

that the widow and the husband were not entitled to the 'Rudd', or return under the Mahomedan Law ; but more modern authorities have held the other way, and have ruled that, in the absence of the 'Bait-ul-Maal,' the widow and husband are entitled to the return. They otherwise have quoied a decision of the Sudder Dewany Adawlut in the case of Mst. Soobhanee v. Bhetun alias Shah Azim All (i Sel. Rep. S. D. A. 346), before Harrington and Stuart, Judges of the Sudder Dewany Adawlut. In that case, which is precisely on all fours with this case, the Futwa of the Moulvis, widow was entitled to the return under the Mahomedan Law. The authorities cited by the Molvis in support of their Fatwa are mentioned in a note appended to that case by Sir William Macnaghten. These authorities are the Hemadya, which is a work of considerable authority (see page 341 of Morley's Digest), and the Zukheerali. The modern authorities as to the widow being entitled to the return under the Mahomedan Law are set out at page 233 of Shama Churn's Lectures on Mahomedan Law.

We, therefore, think that the weight of authority is in favour of tho plaintiff's contention. She, as widow of Nawab Ali Chowdhry, is entitled to the return to the exclusion of the defendant, who has failed to establish his title as kinsman under the Mahomedan Law, We, therefore, hold with the Subordinate Judge that the widow is entitled io the return."

The other case was a suit brought by one Dalim Bibi (who was the paternal-aunt of the half-blood of one Jonab Ali Lasker, deceased), to recover by right of inheritance one-half of the plots of lands left by Jonab Ali Lasker, as against the widow of Jonab Ali Lasker, Koonari Bibi, and Akbur Mollah, the maternal-uncle of said Jonab Ali Lasker. The plaintiff claimed to inherit as coming under the class of ''distant kindred of the deceased, Koonari Bibi alone appeared in the suit, and she contended that the plaintiff was not entitled under the Mahomedan Law to obtain by right of inheritance any part of the property of Jonab Alt Lasker ' and that a portion of the land claimed by the plaintiff was land that had been given to her. Koonari, as dower, and as such was in her possession. The Munsiff held that there was no doubt but that Koonari, as the widow of the deceased, was entitled to a one-fourth share in his estate; and on the question as to whether she would be entitled to the residue of the estate of the deceased (there being admittedly no other heirs nearer than those coming under the class of distant kindred), he found on the authority of the case of Mst. Soobhanee v. Bhetun and Rumsay on Mahomedan Inheritance, page 15, that the widow was entitled to the residue in addition to her prescribed share. The plaintiff appealed to the Subordinate Judge, who held, on the authority of Baillie s Digest, pages 695 nd715, that ' distant kindred" were classed as heirs, and that the husband and wife were ''disqualified from taking the return , that the plaintiff's kinship not having been denied, there was nothing to prevent her from recovering her share of the "return". The defendant appealed to the High Court, which was heard by Mr. Justice Macpherson and Mr. Justice Beverley who observed as under extent. What the cases decided was, that in the absence of other heirs (and 'distant kindred' are heirs) the widow is entitled to the "return" as against the Bait-ul-Maal, or public treasury. And this is in accordance with authority.

Originally, it would seem, the widow was not entitled to...in the 'return' at all, and an exception was only made in favour as against the public treasury. But she has no claim to the 'retura' as against any of the heirs."

In the third named case, Abdulla and Allisaheb were two Sunni Mahomedans who owned

certain property as heirs of their father in equal shares. Abdulla died in 1888 leaving two widows, Jamalbi and Lat fa, and his brother Allisaheb. Under Mahomedan law the widows would take two annas out of Abdulla's eight annas. Allisaheb would take six annas. Allisaheb died in 1897 leaving a widow Amina. She would succeed according to Mahomedan Law to the fourteen annas of her husband. It was argued that she would only be entitled to one-fourth of her husband's estate and in the absence of sharers, residuaries and distant kindred and the three-fourth would escheat to the Crown.

It was observed by Sir Norman MacLeod, Kt., Chief Justice and Mr. Justice Heaton that: -

"Where a Mahomedan dies leaving a widow as his sole heir the widow will take one-fourth as her share and the remaining three-fourth by Return. The surplus three-fourth does not escheat to the Government."

14. Despite search, I could not lay my hand on any ruling of our Pakistan Courts on the question of Radd to a widow as before us, except a Lahore case decided by Shabbir Ahmad and Sajjad Ahmad, JJ., reported as Nur Ali v. Malka Sultana (1) and of the Supreme Court of Azad Jammu and Kashmir by Ch. Rahim Dad Khan, C.J. and Raja Muhammad Khurshid Khan, J. (now Chief Justice of that Court) reported as Sahib Din and another v. Mst. Hastan Bibi and 2 others, In the Lahore case the question of Radd arose, though not direct on the point, and it was observed that the "widow cannot benefit by the rule of Radd" as other sharers by Nasab are present. The Azad Kashmir case also arose out of the same situation and it was observed that "widow under Muslim Law is not entitled to any return so long there is a daughter of the deceased in existence." Thus according to the above rulings too, it can be stated that a Sunni wife (and so the husband) is not entitled to get any property by,, Radd beyond he or his Qur'anic share, in the presence of a sharer by Nasab, and so the presence of distant kindred, as already referred by me earlier.

15. It is noticeable that explanation to Article 227 of the Constitution of Pakistan, 1973, added by P. O. No. 14 of 1980 provided that "In the application of this clause to the personal law of any Muslim sect, the expression "Qur'an and Sunnah" shall mean the Qur'an and Sunnah as interpreted by that sect".

16. To sum up, I may record my opinion on the question referred to the Full Bench that in case there is no Dhu Fard Nasabi (Sharer by blood) 'Asbah (residuary) or Dhu Rahm (distant kindred) and that there is only a sole-surviving Muslim widow, she is entitled to inherit one- fourth share in the estate of the deceased as heir/sharer, and she takes theN remainder, in case of the deceased and she being Shi'ah if there is no Imam present or Bait-al-Maal in existence, and in case of her and the deceased being Sunnis there is no well-managed Bait-al-Maal.

17. It may be observed that the decisions of the Indian Court relate to the period when India was being ruled by British, and there was no question of establishment of any Bait-al-Maal, at that time. But now, after Independence, a new State, Islamic Republic of Pakistan has come into being on 14th August, 1947 and so the question of Bait-al-Maal has ° become not only relevant but necessary to the issue, whether there exists a Bait-al-Maal in Pakistan in terms of the Shari'ah ? If so, whether it is not well-managed, in accordance with the Shari'ah, so as to attract the provisions of Radd to a spouse, in the

absence of any other heir. Since no argument was advanced on this aspect of the matter this question is left open to the learned Single Judge who will pass necessary orders on the individual applications. Perhaps, he may like to issue notice to the Attorney-General of Pakistan in this behalf.

18. Before parting with the case, I would like to thank Messrs Khalid M. Ishaque and Munawwar Abbas for their valuable assistance to place before us the Shi'ah law on the subject.

Kureshi Abdul Hayee, C. J.-I agree,

Abdul Qadeer Chowdhry, J.-I agree.

M. B. a. Reference answered.