

**Journal**

1980 PLD 47

**Court**

PESHAWAR HIGH COURT

**Date**

1979-10-01

**Appeal No.**

RESPONDENT SHARIAT BENCH CASE NO. 3 OF 1979

**Judge**

ABDUL HAKEEM KHAN, C. J., MUHAMMAD KHURSHID KHAN AND KARIMULLAH KHAN DRRNANI

**Parties**

MST. FARISHTA (PETITIONER) VERSUS THE FEDERATION OF PAKISTAN THROUGH MINISTRY OF LAW, ISLAMABAD (RESPONDENT)

**Lawyers****Statutes**

CONSTITUTION OF PAKISTAN 1973 - ARTICLES 203-A-203-D LAWS (CONTINUANCE IN FORCE) ORDER, 1977 [C. M. L. A.S]NO. 21 INTERPRETATION OF STATUTES - ARTICLES 203-A-203-D INCLUDING ARTICLE 203-A LEGISLATION MUSLIM FAMILY LAWS ORDINANCE (VII OF 1961) - S. 4

## Judgment

### Judgment

Abdul Hakeem Khan, C. J--Mst. Farishta has moved this petition under Article 203-B of the Constitution for a declaration that section 4 of the Muslim Family Laws Ordinance, 1961 providing for inheritance of predeceased son or daughter, if any, living at the time the succession opens, is repugnant to the Injunctions of Islam.

2. Notices to the Secretary, Ministry of Law and Attorney-General were issued on 2-6-1979 and they were further asked to arrange for representation by our order dated 4-7-1979. Later on 14-7-1979 a decision was taken that the matter shall be taken up for final hearing on 8th and 9th of September 1979 and Federal Law Secretary and Attorney-General were apprised of this. On that very date it was decided that the matter being of great importance and somewhat ticklish we will need the assistance of Mr. Khalid M. Ishaq and Doctor Tanzilur Rahman, Advocates, Karachi.

3. We heard Mr. Mahfooz Khan, the learned counsel for the petitioner and Mr. Inayat Elahi Khan, Advocate-General on the 8th and 9th of September 1979; Mr. Ghulam Mustafa, Advocate, Abbottabad nominated by the Advocate-General for further assistance on.22-9-1979; Mr.

Khalid M. Ishaq and Doctor Tanzilur Rahman on 23-9-1979. We indeed appreciate the assistance given to us and would like to add that Mr.

Khalid M. Ishaq and Doctor Tanzilur Rahman by their learned exposition of the law have rendered us invaluable assistance.

4. Section 4 of the Muslim Family Laws Ordinance reads :

Succession.-In the event of the death of any son or daughter of the propositus before the opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stirps receive a share equivalent to the share which such son or daughter, as the case may be, would have received if alive.

5. There are three important points on which the fate of this petition hinges.

The first and the foremost that falls for determination in this petition is;

Whether the explanation to Article 203-B will bar the jurisdiction of this

Bench to go into the matter inasmuch as the provision is a part and parcel of Muslim Personal Law.

Second point that will require determination is as to whether the text of the Holy Qur'an itself excludes the children of a predeceased son in the presence of a son.

Third, as to whether there is the Sunna of the Holy Prophet (may the blessings of Allah be

upon him), which is in conflict with the provision contained in section 4 reproduced above.

6. Needless to say that contention of Mr. Ghulam Mustafa that since Muslim Family Laws Ordinance, 1961, whereby section 4 has been brought into the Muslim Law has been given a protection by Article 8(3) (b) of the Constitution, the jurisdiction of this Bench shall not extend to its examination with a view to determine its repugnancy to the Injunctions of Islam, has not impressed us, for it conveniently overlooks that Chapter 3-A, relating to Shariat Benches of the Superior Courts was added by the C. M. L. A. in pursuance of his proclamation of 5th of July 1977, read with Laws (Continuance in Force) Order, 1977 and in exercise of powers enabling him in this behalf and it was, therefore, a supra-Constitutional provision and the provision of Article 203-A therein "the provisions of this Chapter shall have effect notwithstanding anything contained in the Constitution" shall prevail.

7. Mr. Inayat Elahi Khan, the Advocate-General and Mr. Khalid M. Ishaq submitted that Family Laws Ordinance, 1961 was covered by the expression "Muslim Personal Law" as it occurs in Explanation to Article 203-B of the Constitution and, therefore, this Bench had no jurisdiction. Article 203-B (1) alongwith its Explanation reads :

203-B. Conferment of jurisdiction on High Court.-(1) A High Court may on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government, examine and decide the question whether or not any law or provision of law is repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and the Sunnah of the Holy Prophet, hereafter in this Chapter referred to as the Injunctions of Islam.

Explanation.-In this Chapter, 'law' includes any custom or usage having the force of law but does not include the Constitution, Muslim Personal Law' any law relating to the procedure of any Court or tribunal or, until the expiration of three years from the commencement of this Chapter, any fiscal law, or any law relating to the collection of taxes and fees or banking or insurance practice and procedure.

(underlines\* supplied)

There can be no two opinions that if Muslim Family Laws Ordinance is included in the expression "Muslim Personal Law" this Bench will have.

no jurisdiction. But the all important question is whether it is so included. Our attention was invited to the provisions of West Pakistan Muslim Personal Law (Shariat) Application Act, 1962 section 2 whereof uses the expression "Muslim Personal Law" and it was added that since succession whether (testate or intestate), is a subject which shall be determined in accordance with Muslim Personal Law, Muslim Family Laws Ordinance which has amended that Personal Law shall be taken to be a part and parcel of the Muslim Personal

[Here in italics]

Personal Law. We are not impressed by this argument, for in the preamble as also in the body of the Act after the expression "Muslim Personal Law" the word "Shariat" was added

in sections 1, 2, 5. This was not casual. Rather a reference to the titles of the earlier statutes mentioned in the section relating to repeal and savings will show that five statutes holding field before it had also elaborated the expression by adding the word "Shariat" in the case of four and as far as fifth is concerned, the expression "Muslim Personal Law" was prefaced with the expression "Shariat". The titles of the laws have been mentioned at Nos. (d), (/) (g) clause (i) of the section and those read:

(c) The Muslim Personal Law (Shariat) Application Act, 1937, in its application to. West Pakistan;

(d) The North-West Frontier Province Muslim Personal Law (Shariat) Application Act, 1935; The Punjab Muslim Personal Law (Shariat) Application Act, 1948;

The Muslim Personal Law (Shariat) Application (Sind Amendment) Act, 1950;

(g) The Bahawalpur State Shariat (Muslim Personal Law) Application Act, 1951.

In our view the expression "Shariat" was put into the enactments to demonstrate that Muslim Personal Law as known to the Shariat itself had been brought about by the repealing enactments and this was the intention of Muslim Personal Law (Shariat) Application Act, 1962 as well. In the conclusion that the law amended by an enactment or custom was treated as separate class so to speak, something foreign to the Shariat itself we are further reinforced by the fact that in section 2 of the West Pakistan enactment after the words "the rule of decision" and before the word "shall" the following occurred :

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

It will follow that provisions of Muslim Personal Law were made to yield to statute law and this could not be on the hypothesis that no sooner a law affecting Shariat was brought on the statute book, it became Muslim Personal Law. In our view an inroad into the Muslim Personal Law as applied by the West Pakistan enactment had been already made and can in future be made by a recourse to legislation, but it will be difficult for us to subscribe to the view that such a legislation, though it might be affecting the Muslim Personal Law in its fundamental points, would become a part and parcel of Muslim Personal Law, that is to say, Shariat. Those who brought about the amendment in the Constitution could not be unaware of the existing state of the statute and the legislation that preceded it and, therefore, the irresistible conclusion that follows is that the expression "Muslim Personal Law" was used as synonymous to Shariat and for the exclusion whereof there were and still remain weighty reasons. If the Shariat Benches are to reopen established propositions of Shariat, then they will be opening the Pandora's box. Instead of implementing the will of the law-giver that Shariat should be applied, they would be frustrating that intention and anxiety. We are of the considered view that all that the expression "Muslim Personal Law" does convey is the said law as known to Shariat and not legislative enactments which overrule that law in so far as the subject to which that was applicable. A thing not known to Shariat cannot be brought into the Shariat by legislation,

even though it has got the force of law. The Legislature was free to provide for the son of a predeceased son as they did in section 4 of the Family Laws Ordinance, but the

question is whether that provision which they made was a provision of Shariat. Had it been so, what was the need of enacting the same. If we were to agree with the view projected by the learned Advocate-General and later somewhat half-heartedly argued by Mr. Khalid M. Ishaq, we will be lending our support to the proposition that adoption can be made valid by a statute at any time and thereafter it would become impossible to question its validity with reference to the Injunctions of Islam. Our apprehensions are that if we were to agree to this proposition, then a future Legislature might give validity to a marriage between members of the same sex and provide for succession, marriages and divorce of such spouses. Certainly such shocking deviations would not become part and parcel of the Muslim Personal Law and it appears to us, so will be the case with any other enactment relating to subjects to which Muslim Personal Law is applicable if that enactment is inconsistent with or repugnant to the Muslim Personal Law. There is going to be a revulsion to the induction of a foreign body and this is precisely the question with which we are concerned in this case. For the reason we are clear in our mind that anything which is not a part and parcel of Muslim Personal Law (Shariat) as the words within brackets are commonly understood that would not become a part and parcel of that law merely because that it has been added into it by legislation. It is our duty to sift grain from the chaff and to throw out the latter in exercise of our Constitutional jurisdiction under Article 203-B. No sooner we hold that the provisions of section 4 of the Muslim Family Laws Ordinance are repugnant to the Injunctions of Islam, it will become difficult for anybody to say that it is a provision of Muslim Personal Law (Shariat).

8. The Verses of the Holy Qur'an on the subject of inheritance are available in Sura Nissa (Fourth Sura) and the last Verse of Sura Anfal (Eighth Sura) has also an important bearing on the question of succession.

9. The bulk of the Qur'anic law is contained in Verses 7 to 14 of the Fourth Sura hereinafter called first citation and those read :

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10. Another Verse of the Fourth Sura hereinafter called second citation, which has got bearing on the question of succession is Verse No. 33 and the same reads :

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11. The Injunctions contained in the first citation were supplemented by Verse 176 of the Fourth Sura hereinafter called the third citation and the same reads :

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12. Another Verse reference to which will be helpful is Verse 75 of Sura Anfal (Eighth Sura) hereinafter called the Fourth citation and the same reads :

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13. To facilitate the appreciation of the argument that has commended itself to us we should like to give the translation with explanatory notes of the above-mentioned citations from .u by Maulana Abul A'ala Maudoodi and translation only by A. Yusuf Ali:

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V\* bf5 Ojfjj\* JJ Oj-j jf\ jji J1 Jx jla<».

«j j»jf MSTT U" JepAjj 5" \_jlf«jC" 4lll - B\* » H\*i\*» l j)JJ

- (Aft IT js» \*ol Jjl NOTES

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"s\*\* iaj iy (j>n lUIJI cjm jteT \*jj\*\* £ iljjj l j\*. LJ\*

- Lo 53 (JM YO-T jjt JT

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\*J\*£ IAJ k \*1 - LS ia5 cijhl \*1

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o V? J J-4 .jif-J jji T £

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ar b\*U. j

## NOTES

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jl - Ox JI\*- t£« JZ £- ji \*U} trl alSjl »>J . B\* ej\_j AU:J

«i\_j ,j\*i OL \*?J S 0\*1 y\*J 'utj J» c)lr»J'J

" Ox j'j il \*-'

The Holy Qur'an Text Translation by A. Yusaf Ali : First Citation :

7. From what is left by parents And those nearest related There is a share for men And a share for women,

Whether the property be small or large,--a determinate share.

8. But if at the time of division Other relatives, or orphans,

Or poor, are present, .

Feed them out of the (property), And speak to them Words of kindness and justice.

9. Let those (disposing of an estate) Have the same fear in their minds As they would have for their own If they had left a helpless family behind:

Let them fear Allah, and speak Words of appropriate (comfort).

10. Those who unjustly Eat up the property Of orphans, eat up

A Fire into their own Bodies: they will soon Be enduring a blazing Fire!

## Section 2

11. Allah (thus) directs you As regards your children's (Inheritance): to the male,

A portion equal to that Of two females: if only Daughters, two or more,

Their share is two-thirds Of the inheritance;

If only one, her share Is a half.

For parents, a sixth share Of the inheritance to each,

If the deceased left children;

If no children, and the parents Are the (only) heirs, the mother Has a third; if the deceased Left brothers (or sisters),

The mother has a sixth.

(The distribution in all cases Is) after the payment Of legacies and debts.

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.

12. In what your wives leave,

Your share is a half,

If they leave no child;

But if they leave a child,

Ye get a fourth; after payment Of legacies and debts.

In what ye leave, '

Their share is a fourth,

If ye leave no child;

But if ye leave a child, .

They get an eighth; after payment Of legacies and debts.

If the man or woman Whose inheritance is in question,

Has left neither ascendants nor descendants, But has left a brother Or a sister, each one of the two Gets a sixth; but if more Than two, they share in a third; After payment of legacies And debts; so that no loss Is caused (to anyone).

Thus is it ordained by Allah;

And Allah is All-knowing,

Most Forbearing.

13. Those are limits

Set by Allah: those who Obey Allah and His Apostle Will be admitted to Gardens With rivers flowing beneath,

To abide therein (for ever)

And that will be

The Supreme achievement.

14. But those who disobey Allah and His Apostle And transgress His limits Will be admitted

To a Fire, to abide therein:

And they shall have A humiliating punishment.

Second Citation 33. To (benefit) everyone,

We have appointed Sharers and heirs To property left By parents and relatives. '

To those also, to whom Your right hand was pledged, Give their due portion:

For truly Allah is witness

To all things.

### Third Citation

176. They ask thee For a legal decision,

Say: Allah directs (thus) . . About those who leave No descendants or ascendants As heirs. If it is a man That dies, leaving a sister .

But no child, she shall Have half the inheritance:

If (such a deceased was)

A woman, who left no child,

Her brother takes her inheritance If there are two sisters,

They shall have two-thirds Of the inheritance (Between them): if there are Brothers and sisters (they share), The male having twice The share of the female. Thus doth Allah make clear To .you (His law), lest Ye err. And Allah Hath knowledge of all things..

### Fourth Citation

75. And those who

Accept Faith subsequently,

And adopt exile,

And fight for the Faith

In your company,--

They are of you.

But kindred by blood Have prior rights Against each other In the Book of Allah.

Verily Allah is well acquainted With all things.

14. If we advert to first citation, it will appear that the seventh Verse therein ordains that for men and women a share has been ordained by Almighty in what is left by their parents and relations. The Eighth Verse commends giving reliefs to orphans and destitutes when they are present when inheritance is being divided and it is [further added that nice words should be spoken to them.

Nineth and Tenth Verses do not concern inheritance but they exhort the people to fear God for they may themselves leave behind weak progeny and that they should not appropriate the property of orphans wrongfully. In Verse 11 general law with respect to shares of rival sexes of the progeny have been laid, namely, that a male's share should



be equal to that of two females; if there are two or more females, they shall get 2/3rd, and if one, she will get half. Furthermore, each of the parents shall get 1/6th if there is an issue, and if not and the heirs are his parents, then the mother shall get 1/3rd, but if the deceased has got brothers, then the mother shall get 1/6th and of course all these shares are after the disposal of the bequeathed property and payment of debts. The part of the Verse which will require a serious attention of the interpreters is the last one wherein it is observed :

You do not know who is nearer to you out of your fathers and sons in giving benefits. This has been ordained by Allah and He is Allknowing and All Wise.

It will be seen that the aforementioned part of the Verse reminds us that our knowledge regarding who is nearer to us from the view point of benefit or is going to benefit us more is indeed limited and it is, therefore, that we should submit ourselves to the shares ordained by God, for He is All-Knowing and All Wise. It will follow that those who begin to question the dictates of Allah and interpret them by giving their own reasoning regarding the usefulness of this or that heir in a way question the knowledge or wisdom of Allah who has specified the shares already indicated. This and Verse 8 will also expose that need of this or that heir is not at all a consideration that determines one's entitlements. The reason why the word has been used recalls to

us that in Hindu law inheritance goes by the extent of the benefits that a heir can confer upon the deceased and that during when might was

right and things were settled by physical force males were given preference over the females, inasmuch as they were considered to be more useful and as such nearer to the deceased. This was precisely the reason why females were excluded by all powerful male relations. In Verse 12 shares in the inheritance of wives and husbands have been indicated and it is further provided that if a person dies without leaving a father or son and has got a brother or sister, each shall get 1/6th share and if they are more than one, then they will share 1/3rd. Towards the end of the Verses it has been explained once again that this is the Order of God and He is All-Knowing and All-Forbearing, that is to say,

while making this provision he has not been hard. Rather he has been indulgent. Verse 13 clarifies what has been laid down earlier were the limits of God and the one who obeys God and His Prophet (May the Blessings of Allah be upon him)–The word 'Prophet' in this context is significant, he will be entering the Heavens and that is a great success. In Verse 14 the matter has been elaborated further when it is said:

Whosoever disobeys God and His Prophet and transgresses the limits laid down by him, he shall be sent to Hell and that is a degrading chastisement.

It has already been observed that the commands of the Prophet (May the blessings of Allah be upon him) have to be obeyed and for obedience reward and for disobedience chastisement is going to follow. The conclusion is, therefore, irresistible that those who confine themselves to the text of the Holy Qur'an alone are violating the Injunctions of the Holy Qur'an when they exclude the consideration of the Hadees of the Holy Prophet in the matter of inheritance. A warning has been given that whosoever transgresses His limits, that is to say, the shares which He has already specified should be ready for a degrading

punishment. These Injunctions of Qur'an make us extremely wary and we cannot conceive far a single moment of transgressing the limits of Allah as laid down in the Qur'an. Verse 33, i. e., Second citation will show that God has indicated right holders with respect to every property left by parents and relations and as far as promises are concerned, those have to be met during the lifetime. In the Fourth citation i.e., Verse 176, "nJtAT" has been clarified but towards the end it has been

explained the God was elaborating all this so that we should not be led astray and again God says that He is All-Knowing. As far as the Fourth citation, i. e. last Verse of Sura Anfal is concerned, that indicates that inheritance is to go by blood relationship and that some of them have been preferred in the Book of God over others for He is All-Knowing.

15. It is not disputed and we think rightly that the words

; "jj" J "bl" and "lul" occurring in various froms in the above citations are the expressions of widest possible amplitude. So to speak they not only include immediate parents, children, father and mother, but also parents of the parents how high soever and children of the sons or issues howlowsoever.

That is to say these expressions not only have restricted meaning but extended meanings as well. It can also be said that the said expressions apart from the real meanings have been used metaphorically. Mr. Ghulam Mustafa, however, expressed his reservations as to whether or not the word jt-Olj as used in the citation is included in the expression OjjjTsl and in this behalf his argument was that the first expression is followed by a conjunctive "j" and it reads: j jJJljl". He elaborated that if Ojjjil included the letter "j" would not have been there. We

have given careful consideration to this argument and are of the opinion that though generally conjunctive is used to indicate a genus or category not included in the earlier expression but it does not always so happen and those who are familiar with the principles of interpretation that prevail in our Courts, know it fully well that word "and" is sometime used where more appropriate word would have been "or". As a matter of fact it is the context which gives the meaning of a particular word and when we take into consideration that the principles of interpretation of Holy Qur'an namely, SJVa" and "ull ojlil" will also support us, we become all the more clear in mind that the context here would show that even in the case of "jJJljl" they should be 651 of a particular claimant whether he be male or female. In this we are further fortified by the following observations on pages 310 to 313 under the heading j in by Maulana Mufti Muhammad Shafi, wherein it has been also indicated that the expression in its generality includes descendants and parents but the word "ol-Olj" has been used to emphasize its importance. The learned Mufti says:

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jil ojlj! £

j{ uf- Jj\*9"119 J-?' j>-

OU jil IVJL ji TS" oVj i/C\*ij »j \*lj»- t?jl» & TSJl'J j ft

£ 6l ji Lr0'\*\* OJj\*\

uviAj JjLk\* Ip \*J 2\_ kij < lJT bi j? l-U iju jkj ji 1 JjS" BSJJ\*I Ut\* LAS

LS ISJJL jf OjlJ) LS -iy Ji y \*>' '-'sij\*

v-iU ob i-ji ii&jS' - u. buji ic ja.j-i \*-a\* Lrj\* cci IVJL £ lJfc J

(j»l Jf £- ob\*I jj (Jjl jil if-

j jji v JU jj y

(jj (aSJ jIH OdIjJ 15 lJY Jf j7 jj-} £L J j?"l »'Sr a! Jjv»l jr> ji ji

jf\* A\*JI l\_j 2\_J-J Vj'l jf' Ji 'V'i 3? j'J

(\_>j»l ,£1 i-\*« olij fcXj jf Oj Olj

CJLJJ JJCX UO Jj Oj C\*\* ol Ojsjyl »j»J (JlJlr £>

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as. (3»> O\*' & 0j>Pi jil oyjj\* jrj> y-l Cj- L. U\*- 'jj O\* ft\*J TSJJ\* li ji K 0\ \* k J W- <-£f ol ok-SQ (J»  
IJJJ jj' Jli a3- ii" i\*.)'-5 "J u' Ji

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J~ Jf JJ?" e.L»dlj JUjU slrQ \*\* \*\*J\*

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(jjw« Ojjli h"

>-.r.>.!lj 1 j? c-#JS (ju ..ij jU« j"\* j\* ialj l\*-

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U Uj JL\*- \* lj Ojjli IA-IJ i7" j>4\* £

JCW I Jjjll Jp I-JI IJ (fiS Jjl Ia\*« JJ J\* \*1 1/IJ Jj

1 ia3l\* \*ll JLW c«>jyl SGjLjS»fcl iJ y4i its £ tj\*i u£f~ j\*\*' KiSr J j& f x L {jij 1 JI (Jj UptZ«-1 (JM ClJ  
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O b\* (l>1 LALLTW-\* Ojjjj 5\* (?si

C~«Jlj jtjXJ uuJ. Ji I U'l\*> x (Jl®\* 4Jb» £, Xjjl J\*\*i coljj (jnXtwT tj J) \\$ JI ' ' \_yf «ibj &JJjy\* £.

k-'JJjttf ij 0\*1 "1 '(Jit' Vj'l TJCR\*

C\*17 yfl fill&l L\*\*«J I TXJLL UM (jy olwlkxjl

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y\*J \*J «£L \*AU Vj\*\* JJ'5 <-&\*

Ol\*\*Jj\*aJ £ <£\*).&\*) (jT l£i j-T t2\*-«l l£jU\* a 1\*5 (J£f\*

Ij x \*j?j\* u\*1 ji-\*

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» Is\* CdljJ uy y« >K 4\$T\* J» UM C-sL Jji«

J

ljfjefil£. £ Ojjilj uU ijAnj 5 JU FL«lL tja\*4 um Oj-\*j? u»i <\_ IT Oj\*!/\* OljffJ\* «-»\* t\_->- \*J e/jftJ jljli  
jll ijJ4r5 w u-u. y / cola trl jSC.l C)Tj» - l\*J UU. b.j j ol JS oyjl\_j U\*

wrt ( U >i i\$jl! Ij\*\* W4J (\_j4 jc? j»- um j" \*? NJ

iji £ [\*««2J u>U. Jj JS7- jlj l>J~5r jlj um

" Oif" 4\$~J

L»jl (,£« ja.T J uy TXA M' ujU. £ eu) vl> «jjL, £ kiilj\*

-« £ -aT lo 5b \*J y-l f fcjyu UaJ\* . LUl

A\* 0l - cy 4a\*> \*ijr j£ as. iaJ cy «!\_l«ji OTJ»

- j». (jj>5 r Ja.V j ij' lj W«S7' (U jjl i\_j y.J7' .\*

OjIjJ S' Ij \*jLm HJ jil fcXjl fjji Jiil y.l jil um j-l J cj\_ c.Xu Jj jaa, J

O tf\*i Ct-J l~J (Jl «>va.» Ujl (JM svf'' 5 w£j OjJ

u"5"il «-A\*t» tfc CJCJU .j, ol; t5j«JJ iaJ - J CXLU " Ij Jli U J 5" vu>»

02\* Ojji J UC-J £ C~f4 J (JjJli (5jl) £ Ojji-5 VCWJ

TJFR\* ""Ui'\* J 0\*1 cijU £ J yf Oj'j \*-jl

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WS4 'i'lj 0\*1 1 I J\*\* !A«ij jj J( jjj» U- m Uj( UJH 70 Peshawar All Pakistan Legal Decisions Vol. XXXII jI9 S" jli IflZij ij j} Jj#I M LWL>

- USCui X \*\*SI!'Jj jil Ji ls" (jl C-»\_J £ l±j\_£-4 jt-urfJ Cfi/ Ji\*

vv\$C>a> 2\_5i9tJU jil Oj JJ\* \*J J »w\*flj' NCK

(-i4 \*-\*1\* (Jx OSw< jil seS" (jM 6l

Oj«\*. 6l Oji ei~Jr «i jil Oj-j EJ\_J U w\*ia. 1l Lj jli \*Z£j ji u? ,5C" (jIj 4 jt-il is" jyCi Ji jil o-b J

\* ji 6yf cr

JS cijio IJVJI iaZ7 J4&} ji' ujUol trji j UJJ\*. flkJ JTJL »-jl jji j u&« £ <->j>I MS uo VILA Ij UI;j JTJI

jtjI Ji jil »V\*JI Jlj LJj}» (5j-»Ji " (Sr

\*->«<5jllilj " iaJ (JM '-"JT 'Xjl JI jil». £ (Jty.

j5jjjU o\*\*Jlj JJJlJ JjSJlJji J jfl DJI

«?-J Ji f->JA ESL ut\* Cf£~\*\* 1 (\*£i jli

\*5r j\* Jil OjJlj jj Oj- ij\*j\* 1\* <£\*!ju

"l «£1 6l yji

tljJ jil p

15. Mr. Ghulam Mustafa also argued that Verse 8 of the First citation provided for a share of the orphans but this, is plainly untenable, for it does not specify any share for the orphan muchless orphan grand-child and all that [t says is that a portion should be given to them and kind words should be spoken "to them. This, as has been pointed out, by Doctor Tanzilur Rahman, is £>j while the second speaks of relatives generally and quite obviously does not refer to those persons for whom share has been specified in the Holy Qur'an itself. The argument of Mr. Ghulam Mystafa that son of a predeceased son is of his grand father for the link which connects him with the grandfather is non-existent

and, therefore, in the absence of the impediment is on equal footing with the son is an argument which he has adopted from Muhammad Aslam Jirajpuri and Ghulam Ahmad Parvez. But this is in direct conflict with the Verse of the Holy Qur'an which pre-supposes that something has been left by 61-\*Jlj and 6jj/l. How it can be said that a father of

the predeceased son has left the estate of his father, for when he died the succession had not by then opened. There is another reason as well why we should ignore this interpretation and it can be found in the fact that the Holy

Qur'an speaks of the share of JUj and »LJ and it goes without saying that JU-j and cannot be but persons living at the time when succession opens-If the intention was to give something to the c>~4 as well, the words JUj and would not have occurred. The conclusion becomes allthsmor,. invulnerable if we concentrate on the following in the first two citations in OjM by Maulana Mufti Rashid Ahmad

JS G-LaO ol\* (J .ulj OJFC' 6l j - cl - ii! jl a!j - -0\_j o£ 6l\* - j\*.J jl - j\*J 6l UJ&\* 6l\* - j 6- o' - AJJ yj l lji! 6l\*

t TU-JJ "i/Uj Sji.l ljjU' olj - oi

As has been observed by Maulana Mufti Rashid Ahmad on page 104 of his pamphlet cjljj 6>>l» published by j? c-LiVljb the conclusion

would be irresistible that inheritance was being given to the living and to the dead. It will follow that before that a person can inherit his parents or near . ones, he should be alive and he can only get something if something has been left by his parents or near ones. In this context it may be mentioned that Verse 33 excludes disposition by covenants, for instance by adoption and says whatever has been left by parents and relations for that God has ordained rightful owners. The dictum in this Verse provides law for the residuaries and on this point there is a Hadees which will be noticed in the sequel. The last Verse of Sura Anfal should clinch the matter, for in- there it is ordained that some of the blood relations have preference over others in inheritance under the law of God contained in the Book (Holy Qur'an). The word used is FU-JVL Jjl not

FUJL i£ji the latter word being technically applicable to distant kindred, that is to say, relations through females. It will be seen that the principle

YVL\* vj\*' is deducible from the Verses of the Holy Qur'an as in

Sura Nissa and beyond doubt by the last words employed in Sura Anfal, that is to say, the Fourth citation. It may be mentioned that if we were to adopt the reasoning which has prevailed with Muhammad Aslam Jirajpuri and

Ghulam Ahmed Parvez in so far as the expression Vj\*I is concerned,

we may find ourselves in direct conflict with the Injunctions of the Holy

Qur'an in the following case :

'A' dies leaving B a daughter and D a son of the predeceased son B.

According to the Holy Qur'an 141\* CJE6TJ B would get half and the residue will go to the son of the predeceased son, namely, D. But if the reasoning of Muhammad Aslam Jirajpuri and Ghulam Ahmad Parvez is adopted, then in the absence of C, D will be treated as son. If that is going to be the case, we shall have to give effect to the Injunctions of the Holy Qur'an and D shall get two shares.

It will follow that we shall have to deprive daughter B of her half Qur'anic share and the same shall be reduced to 1/3rd. .

16. The inconsistency in the argument of Muhammad Aslam Jirajpuri and Ghulam Ahmad Parvez will also be apparent while we take the following illustrations :

A dies leaving a grand son C and grand-daughter, namely, E's son F. E and her father D as also her uncle B whose son C is living were dead during the lifetime of A. If A's inheritance is to be distributed in accordance with the thesis projected by Muhammad Aslam Jirajpuri and Ghulam Ahmad Parvez, C a grand son will not be getting the entire estate but he will have to share it in all probability equally with F who is a distant kindred.

17. Let us take another example: A dies leaving a son B and D, E, F, J and K, five grand sons from predeceased son C. The death of C (removal of impediment will result in making D, E, F, J and K, five in number, the sons of the deceased. Since all the sons have to share equally, B's shares will stand reduced to 1/6th.

18. Again A dies leaving B, a son and D, a grand son from predeceased son C and C's wife F. What can be the rational basis for ignoring C's wife who is entitled under the Qur'an to 1/8th in the estate of her husband C if the ratio for the distribution is that C is to be taken notionally alive at the time when the succession opens.

19. All the inconsistencies in the argument of Muhammad Aslam Jirajpuri and Ghulam Ahmad Parvez have been fully noticed and repelled by

Maulana Mufti Rashid Ahmad in his book oil jj 6>il» published by c-cU'il jli opposite Maulvi Musafir-Khana, Karach-1, CJLJJ j\*. & by Sayed

Ghulam Ahmad Rizvi published by Anjuman Khuddam-ul-Qur'an, Lahore and by Doctor Tanzilur Rahman in his Fifth Volume of f (JI

as also in his booklet 'Islamization of Pakistan Law'.

20. As far as Hadees is concerned, beyond dispute Sahih Bukhari is a compilation of great authority. At page 605 of jijl \_

published by Deeni Kutab Khana, 38, Urdu Bazar Lahore, Volume II, report from the Holy Prophet (May the blessings of Allah be upon him) along with the translation is as follows:

1 6 uJ (jil ij b-u

YSJ Li Iflfc b oSljill JI» fit 1 1

U»\* I I- (A\*»-jj

61 i- YT ua cjljj NJIC Jjl cj

- IsHj\* as. O 't-J JI\* Jf Ji j?

At page 607 ibid there is another report the relevant citation in Arabic and Urdu translation read as follows: tfa (J lil JJJJI XJyr IJ, ajj Jtf, cfi Crfl

byji 1\*5 byji jfy Jf"± J> Jp

' U1 U1- -3 &Ji u\*1 U\*1 Ufi L)c tril (j k\ u l-r'=&J lj'l tji p1-\* I'J-k\*

(jJb® JI lj2>bJI L«j i/'lc \*yj djil Jy\*} (JU JU

- Jp"\* Jfj

"b'fi (S Oj~t{ I't' i- "4j jji jji i-w jji C.-9 2-itS U-J u-l \*j jji <-y yk Jf OjA<

jji US? FJJ\* 4) «AJ LS"1 FJJ\* Ojjil Jyi rje jj\

- Syi \*i (J j? wi\* i£ ,Aj s'jl

bj e- t)\*1 (jji < 0\*jI - ,jl> < <-r~jJ < [\*Slbi' iji qojljf f ljUs p,,Li,j uU dlil jiy\*

£- J& J\* jji J\* l»if; (3\*\* ,£

The tradition narrated by o\*Uc. 1 appears at No. 1639 on pages 666-667 of Jjl g»v» published by Qur'an Mahal, Karachi and two other narrations at Nos. 1640 to 1641 ibid. The Hadees of crL£ I is shown at No. 2910/2 page 74 of i'b&U by j£ JjJaIJj U1

published by j ljW jji nili i-and it is indicated that it is

HJA . Reference with advantage may also be made to

1961 Edition, published by Nur Muhammad, Aram Bagh, Karachi page 997 where the report of url £(1 has not only been quoted but has also been explained by marginal Note 3. The Notes are by:

j-j (Sjiki JLUW)LLC' CjJs«Jg.iJlIijWl

and he gives the reasons why word has been used after the word J-fj.

He relies on Khitabi and elaborates that description has been given for a residuary who may be uncle or son of an uncle with a sister- sister does not inherit anything according to He goes on to say that ji



descendants are the nearer (adjacent) and not maternal relations. He then relies on and adds that means J\*)i\ <-r«ija)\ the nearest

of the relation who is near to the deceased through a male and not through a female. He also says that the reasons why the word J.\*.j has

been mentioned and females have not been mentioned can be found in the fact that in Qur'an itself share of a male has been equated to the share of two females. A reference to page 997 ibid would show that there is a Chapter entitled:

and on the authority jji the following tradition has been quoted :

i JJjJI ftUjVWj jji JU

yjVI Aj Vj 0U./" Oyji &yji j\*\*Wlj

-

Zaid says--issues of the sons are equal in status to his son if there is no son besides them. Their male is like their male and their females are like their females; they inherit as they inherit and they become impediments as they would become impediments (in the first case the reference is to the issues generally and in the second to proximate issues, son or child) and child of a son would not inherit with son. Reference with advantage may also be made to page 1970 of oylji s-jf. Volume V, by Doctor Tanzilur Rahman who relying on says that on this there is

21. Our attention was invited to of Sirajiyyah which has been quoted alongwith translation on pages 127 and 128 of the Muslim Law of Inheritance by Al-Haj Muhammad Ullah ibn S. Jung, M. A., LL. D., published by Law Publishing Company, Lahore and it was asserted by Mr. Khalid M. Ishaq (incidentally supporting Mr.

Ghulam Mustafa who has referred us to a quotation from Jarjani in booklet CJJJ by Muhammad

Ismail Zabih Rajorvi pages 49 to 51) that the learned author of namely, OU- jj while commenting upon Sirajiyyah has expressed

his disagreement with the proposition that a son of predeceased son does not inherit alongwith his uncle as it will appear from the underlined part on page 49 of Sharifia photostat copy Exh. H. 1. But on a careful and thorough examination by Dr. Tanzilur Rahman we had no hesitation in coming to the conclusion that Jarjani was in no doubt about the inheritance by a son's son in the presence of son. Dr. Tanzilur Rahman gave us an oral translation of the exhibit in Court and added the portion marked BB by us was unequivocal.

The learned counsel elaborated that Jarjani was giving reasons in support of the principles (z) v\* 4rO»VI ; 00 AaJ VI and

that principle at No. 1 in case of applied only where reason for inheritance was the same.

To complete the record we got the relevant part of the chapter translated by Mufti Muhammad Yusuf of Darul Uloom Jamia Arabia Hadiqatul Uloom, Peshawar City and the same is Exh. H. III. The learned Mufti has explained the meaning whereso ever he thought it necessary and has added his own comments in the end. The part of the translation which is relevant is being marked CC. It cannot be imagined for a moment that Jarjani did not agree with the author of Sirajiyah whose observations in this respect are reflected in the following quotation and translation which we have taken from the Muslim Law of Inheritance ibid pages 124-125:

j

CiW

tJlJf (iilj\*-]lj j-e-SJ \_jl 'U-j-vl-ijJJ bj\*-\*ji < \_j\_jsMI».U. 0;

L)lj l-jVIJ <\*\1\*>l pj lJLL® Olj pkjIJ Ojll

\_jLL. jl j j\*kj«J j\*j «\*” c-j\*? f»J

JF\* ;.l»J jji ji <£i (-ljl t-si O'.XJlyJli 01 J'-J jj

£-\*ll" COxJlJ O OjI OjijIJ»2 f 'u?l

Ojl»s li! flj c.«jl flj

41 j»Ufi (j j»J 0;v)l»Ui- (j j\*SC«J (\_£j0j\_J l-sIV (Jjl j\*j j v"

- «\*» fl5' J (»J

Translation (On Residuaries)

18. There are three kinds of residuaries by nasb: (1) residuaries in their own right, (2) residuaries in another's right, and (3) residuaries together with another. .

19. A residuary in his own right is every male in whose line of descent to the deceased no female intervenes and there are four classes of these: (a) the descendants of the deceased, (b) and his 'root', (c) and descendants of his father (d) and that of the grandfather, preference being given to the nearer in degree. In short, first come the deceased's descendants, i.e., his grandsons howlowsoever, then his root i.e. his father, then his paternal grandfather i.e. his father's father howhighsoever; next the descendants of his father,

i.e., full-brothers then their sons howlowsoever; next the descendants of the grandfather, i.e., his uncles, then their sons howlowsoever; the preference shall be given by the strength of relationship, that is preference is given to one having double relationship over one having single relationship, whether male or female as observed by the Prophet (on whom be peace): "Relations by the same father and mother shall be preferred to relations by the same father only." A sister by the same father and mother, as a residuary with the daughter will be preferred to a brother or sister by the father only; and the son of

the brother by the same father and mother will be preferred to the son of the consanguine brother and same is applicable in the case of paternal uncles of the deceased and also in the case of the paternal uncles of grandfather of the deceased.

It will be difficult to deny that Jarjani's opinion was a solitary opinion. The view contained in Sirajiyah finds full support from 'Tanvirul Absar', Durrul Mukhtar' and 'Raddul Muhtar', an extract whereof along with the translation by B. M. Dayal from pages 437 and 438 of Durrul Mukhtar, published by Law Publishing Company, Katchery Road, Lahore reads:

j\*1 (Jj- 6l j jtJ j! Vlf v'j'VI

I~>V Cx\*j- V (Vlajl dja- J»SI £yt .UtlLt I\_>jl-«lj (!A®

(JA«. Ulj) V»V JJJJ V (il \*j) Translation)

Precedence is given to the nearest relative and then to the one nearer than the rest in the following order:-first son, then son's son, how low soever, then father, who when accompanied with one daughter or more, becomes a residuary as well as a sharer, then true grandfather, namely father's father, howhighsoever-as to mother's father, he is false grandfather and is amongst distant kindred-then father's descendants, namely, full brother then consanguine brother, then full brother's son, then consanguine brother's son bowlowsoever.

22. The following observations from the TSJXDU JJUS on pages 426, 427 and 429 will reinforce the view taken by the earlier Jurists:

<£/\_S\*JU Jsiki

J\*?1 '-jllj ji (jllj\* XL J 1

\*J CjU Jilj J& <£-- I-jlsCtC I jji Ji\*\*

JWI L I j j 1 <»» . I~J

<-5'j - (jy j-j X- Ji uu\*a.£ jji - EZ- TJT\*

cy CL-JI £L- y\*J fji J jl

1 LtJ I d J J JI IJ !

- uy \_ih«sl »jU oj jji! \_\_)T 0) iiJ>» cjm JUJ

Jj\*1 If Sr1 XL 0\*1 jji (°w'J I jli Sr\*) ""P\* jji C" Of OLa-ft (jl (y K") Jj»- If lili £ (J\*1 jji ji fc\* ia»jJ s) tf \_/~J

CZL ylj OU CXJL jty x If \*»JJ jl jti JM s. cj\_

(tljl. J" yb KSI I5». J ol\* '-SvjI jtri

IS\* jt} l~J K\* l?t>. slij k«i Uj

Ji S V1\* Jt Vli - JI «£- J Jt-

If lib Uy If cijj» J" yb ksi £ tjlj l!y f JL. XL yli "t-)'4 l/1 \*1 \*1 <22. O1 CjLvxC jfl jji JajujJI(j35r IjjSJIAfc  
{mfxi f jf\* ol VJJJ ijl J?

IJ'UJ'\* SL jlj jii «Xj JS' UXJL uy ij\* S' «J- "s! I (s' Jlj c£l ,£2 t J il JL\* jj 2 o° ,T l»f>- jji £j\_ liy <-£j]

Jj iaS5" uijlf (\*«2) J <-\*" aa' jM"" £- uJ

. c4 jlyj»I iaJ j-> l Ij {1

" <7- JK £" £/k Ji 4-\* - U£\* «jy JZ L--?ca. ; olj l\$JJ\*

Jl VJ\*\* <~L -'lj iav\*- \*5" iaJ (jUaai bii OL\*<\_ "»' J (jUaii

1\*1 J\*\* Ul» J-J FJJ Jb (\_j\*J JUA. jji - j\* £».lj £ uwa»-

J jji c£> i-j-j ufr vj cjlj «j >a5 CC# l j 4\*. uvT" (jy n 6 p- r r l \*y\_ JU. \*j ol cfi\* jlj j\*. i\_lj- il

S lf-J UjJ t-ij'\*2 J -\*-J .. ttJl Biljj iiv« j» S ia«i «T i£. (5" yb j jl. jji UjT t-»j JVVJ! S j\*H \*J

tr-S' «£i ij\*B-" Jf jji l~P' J\$~ Vj?141 J""(JjeUj lj

'ijlj 2\_j-( ij»« JI 0\*1 »J Jv>u Ojji W.J £ jaJfl

l~ylj -ji i-j-j i OU i-JJJ »o iaS OU j j'iljl i\_lj- c\_ b'x cjf\*

-dik-st

23. Amongst the Fatwas which support the proposition that son of a predeceased son would not inherit is a Fatwa of Mufti Muhammad Mazhar in of Muhammad Aslam Jirajpuri and Ghulam Ahmad Parvez as contained in Exh. H. III. But by far more important comment on the subject is contained in the Islamization of Pakistan Law by Doctor Tanzilur Rahman, pages 56 to 72. The learned author assisted us by oral arguments as well and he took'

us through the relevant parts of the preface to his book f!A~.l oylly

Volume V, and his thesis on the subject as contained in the 37th Chapter

OUJ» j page 1941 to 1982. He has refuted all the arguments in favour of the continuation of section 4 of the Family Laws Ordinance and we are in entire agreement with him that section 4 is repugnant to the Injunctions of Islam. His observations:

IS- UJJ-'-S} 2. ((\*\*o) jj\*-3\* o\*I

JjT 0\*1 /I Ji j'l il uu b- Jb b\* L- J>r Si Jjl

Jjf jtf" J" (J-j lj A; (p<£-?\*) IH jj >t <->l j-< jj-d £, c»c»Jlj m<

Am4 1 ---i/O i/Jjll? jji WOJJJ J ill IAXAMS jji jji f t l-5jj\*-\* j\*£ jffj\* fiL.I& UJA5J j vwjT jji A\* £». - c£}

Is\* -Xj>&4 b ia ( Ul 43 cfe\* ol c\*£»

& \*-r\* JI yi-J \*-l r\* jflSt".

dii jji 2\_Ji O l-W j JJ X (Jj jj' "Ji)

jL. £ JS\*L lj i £ yjj jj" (\*~2J (JL\*jJ uusj

lj.' JT" djji OL,

AJSOLJ (jlj JJ jji 2\_j{ - S' jf '-ij,? OJ ljj cx«l »l um « o\*I t c»jjy» ; <5jU« CJjJtf A\*\*\*\*

S ijd \*i 2~ c\*=\* J jj' B\* JS jji SL 'Z~\* 'S' JS"jj 5-,>'

- Oj-j VJ ctij lj ,j\*.lj j uu-ljJ\* b would indicate that something new has been inducted into the Muslim Personal Law by section 4 of the Muslim Fartf ly Laws Ordinance. j

24. It was suggested to us that to meet the situation in which son of a predeceased son may find himself, we should advise a recourse to compulsory will as has been provided for by the Egyptian Law but we think that the making of a will not being a compulsory duty of a muslim we will be importing something into the Shariat which may be equally indefensible. We should

- rather like to commend pursuasion and suggest that a child of a predeceased son may himself or through his next friend move the District Judge within the local limits of whose jurisdiction the property or most of the property is situated (of course during the lifetime of his grandfather) that he should be advised to make a will which should ensure to him what he would have got as an heir to his father had his father not died during the lifetime of his own father. The intervention of the District Judge would incidentally remind the grandfather of his duty and give relief to a son/daughter of a predeceased son in most of the cases. In case, however, the grandfather refuses and District Judge feels that due to minority or for other reasons such a son/ daughter will require maintenance, it should be possible for the State to arrange accordingly.

To sum up we are of the considered opinion that section 4 of the Muslim Family Laws Ordinance is against the Injunctions of Islam and that it should be repealed and to relieve distress of the son/daughter of a predeceased son the legislation suggested by us may be considered. The law repealing section 4 shall come into force as from today and that we give to the Government period of three months for necessary legislation.

s. a. H. Decelared accordingly.

