

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Sajjad Ali Shah
Mr. Justice Amin ud Din Khan

AKK

Civil Appeals No. 53 & 54 of 2015.

(Against the order dated 26.12.2000 passed by the
Peshawar High Court in CR No. 41 of 1995)

Abdul Khaliq (decd) thr. LRs.

... Appellants (In both)

Versus

Fazalur Rehman and others.

... Respondents (In both)

For the Appellant (s)
(In both)

: Mr. Tariq Mahmood, Sr. ASC
Syed Rifaqat Hussain Shah, AOR

For the Respondents Nos.
In CA 53/15:
[1(i-iii), 5(Lrs), 6-11, 12(Lrs), 19(Lrs),
20-23, 33(Lrs), 35(Lrs)]:

: Mr. Muhammad Munir Paracha, ASC
ALONGWITH
Mr. Zulfiqar Khalid Maluka, ASC.

For the Respondents Nos.
In CA 54/15:
[1-12, 19-23, 34-36]:

: Mr. Muhammad Munir Paracha, ASC
ALONGWITH
Mr. Zulfiqar Khalid Maluka, ASC.

Other respondents:

Nemo

Date of Hearing

: 08.02.2022

Judgment

Sajjad Ali Shah, J. Leave was granted in these cases vide our order dated 21.1.2015 to consider whether the impugned judgment of the Peshawar High Court was inconsonance with the evidence led by the parties and the applicable law to the case.

2. The litigation in these cases is not only very old but has a very chequered background. The facts as pleaded and evident from the record are that the property/subject matter admittedly was owned by one Naaju who died somewhere around 1906 leaving behind one son by the name of Abdul Ghafoor and a daughter Mst. Roshnae. In accordance with the

prevalent custom, the entire property went to Abdul Ghafoor as the only son to the exclusion of Mst. Roshnae, the daughter. Abdul Ghafoor died issueless in the year 1921 and again, in accordance with the customary law prevalent at the relevant time, the entire property went to Mst. Roshnae. It appears that Mst. Roshnae was a spinster and on 28.4.1964 gifted the entire property in favour of Abdul Khaliq etc., the appellants. The record further discloses that after the death of Mst. Roshnae, the respondents herein on 23.12.1978 claiming to be collaterals, filed a suit for possession to claim their *Sharai* share of inheritance by asserting that Mst. Roshnae was a limited owner and could not have alienated the whole property through the registered gift deed being against the principles of *Shariah*.

3. The appellants after having been served, filed their contesting written statement and the trial Court after allowing the parties to adduce their respective evidence, dismissed the suit on merits as well as being barred by time. The respondents being aggrieved with the judgment of the trial Court filed an appeal before the District Judge Mardan who, after hearing the parties, vide its judgment and decree dated 8.11.1994 held that the respondents were entitled as collaterals to the extent of 1/3rd share in the subject property. The judgment of the appellate Court was again challenged by both the parties before the Peshawar High Court by filing two separate revision petitions and the High Court, after hearing the parties, dismissed the revision filed by the appellants and partially allowed the revision filed by the respondents by modifying the judgment of the appellate Court and holding that the respondents were entitled to 3/4th share instead of 1/3rd as was held by the appellate Court, giving rise to the instant appeals.

4. The matter does not end here, these appeals were earlier decided by this Court vide its judgment dated 12.12.2002 modifying the judgment of the High Court by holding both the appellant and respondents

entitled to equal shares in the property left by Abdul Ghafoor. The appellants against such judgment sought a review which was allowed by this Court vide its order dated 19.7.2004 and the suit of the respondents was dismissed. The record further reflects that some of the legal heirs/collaterals filed an application under Section 12(2) CPC which was ultimately allowed vide order dated 30.9.2011 and while setting aside all the orders, the review petitions were directed to be heard afresh. The review petitions were taken up for hearing on 13.3.2014 and vide order of the same day, were allowed by setting aside the judgment dated 12.12.2002 directing the re-hearing of the petitions which ultimately were converted into appeals by this Court vide order dated 21.1.2015 and are being decided through this judgment.

5. Learned counsel for the appellants made two-fold submissions; firstly, that the respondents are distant kindred and in presence of Mst. Roshnae, the full sister of Abdul Ghafoor are not entitled to inheritance and; secondly, that if they are collaterals and are held as residuaries still they are not entitled to any share as the sister being a superior residuary would eliminate the inferior. To support his submissions, reference was made to the Table of Residuaries annexed to para 65 of 'Principles of Mohammadan Law' by D.F. Mullah to show that the full sister stands at Serial No.6 of the Table whereas descendants of true grandfather how-high-so-ever stand at Serial No.13 and consequently, submitted that the full sister would exclude descendants of the true grandfather. Reliance was also placed on the judgments of this Court in the cases of Saadullah and others vs. Mst. Gulbanda and others (2014 SCMR 1205) and Muhammad Sharif vs. Niamat Bibi (2021 SCMR 1355). It was next contended that even if they are held as collaterals having a superior right as residuaries than the full sister, still they would be entitled only to 1/3rd share in the property because on demise of Naaju, Mst. Roshnae would have got 1/3rd share as

daughter whereas Abdul Ghafoor would have gotten 2/3rd of inheritance as son and upon the demise of Abdul Ghafoor, Mst. Roshnae again as the only sister would have received a share making her share as 2/3rd leaving 1/3rd for the collaterals. To support his submission, it was contended that The West Pakistan Muslim Personal Law (Shariat) Application Act, 1962 (hereinafter referred to as the "**Act of 1962**") had a retrospective application and would have application from the date Naaju died, reliance was placed on the judgment of this Court in the case of Muzaffar Khan vs. Roshan Jan (PLD 1984 SC 394) and Faqir Ahmed Khan vs. Riaz Ahmad (2020 SCMR 346).

6. On the other hand, the learned counsel for the respondents argued that Mst. Roshnae held the estate as 'limited owner' under customary law and after termination of said estate, the property was to devolve upon the legal heirs of the last full owner i.e. Abdul Ghafoor in accordance with *Shariah*, which included the plaintiffs/respondents as his collaterals. It was argued that section 7 of the Act of 1962 repealed The NWFP Personal Law (Shariat) Application Act, 1935 (hereinafter referred to as the "**NWFP Act of 1935**") and through section 2 of The West Pakistan Muslim Personal Law (Shariat) Application (Amendment) Act, 1964 (hereinafter referred to as the "**Amendment Act of 1964**"); sub-section (2) of section 7 of the Act of 1962 was repealed by virtue of which the Act of 1962 would be applicable to cases even where the death of the last full owner had occurred before the commencement of the Act of 1962. Therefore, the Act of 1962 would be applicable to the case at hand and consequently, through the application of section 3, limited estates in respect of immovable property held by Muslim females under customary law would stand terminated and by virtue of section 5, Muslim Personal Law (*Shariah*) would be applicable and the estate would devolve upon such persons who would have been entitled to succeed upon the death of the last

full owner. Hence, it was argued that upon the death of Abdul Ghafoor, the respondents/plaintiffs would be entitled to a share in his estate under Muslim Personal Law (*Shariah*) as residuaries being descendants of the true grandfather how-high-so-ever. Reliance was placed on para 65 *Mohammadan Law* by D.F. Mulla and the judgment of this Court in the case of Waris Ali and others vs. Rasoolan Bibi (PLD 2014 SC 779).

7. We have heard the learned counsel for the parties and have minutely perused the record. It appears from the record that after the death of Naaju, the property devolved upon Abdul Ghafoor, his son, to the exclusion of his daughter according to the customary law prevalent at that time. After the death of Abdul Ghafoor, who died issueless, the property devolved upon Mst. Roshnae i.e. his sister as 'limited owner' also in accordance with customary law. The NWFP Act of 1935 did not terminate the limited estates of Muslim females and even though through section 7 of the Act of 1962 the NWFP Act of 1935 was repealed, nonetheless, sub-section (2) of section 7 of the Act of 1962 provided that in such cases where the death of the last full owner had occurred before the commencement of the Act of 1962, the Act of 1962 will not apply and the cases will be governed by the Acts repealed in sub-section (1) of section 7 of the Act of 1962. For reference, section 7 of the Act of 1962 is produced below:

7. Repeal and Savings.- (1) *The following enactments are hereby repealed:*

- (a) ...
- (b) ...
- (c) ...
- (d) *The NWFP Muslim Personal Law (Shariat) Application Act, 1935;*
- (e) ...
- (f) ...
- (g) ...
- (h) ...

- (2) *This Act shall not apply to cases where the death of the last full owner or the termination of the life estate or the death of the legatee-in-enjoyment, as the case may be, has occurred*

before the commencement thereof, and all such cases shall be governed by the Acts repealed in subsection (1) according to the territories in which they were operative.

8. However, thereafter, through section 2 of the Amendment Act of 1964 which was enacted on 15.4.1964, sub-section (2) of section 7 of the Act of 1962 was repealed meaning thereby that even if the last full owner had died before the commencement of the Act of 1962, the Act of 1962 would still apply to such cases. For reference, section 2 of the Amendment Act of 1964 is reproduced below:

2. Amendment of Section 7 of Act V of 1962.-

In Section 7 of the West Pakistan Muslim Personal Law (Shariat) Application Act, 1962, Sub-Section (2) shall be omitted.

9. In such view of the matter and through the cumulative effect of sections 3 and 5 of the Act of 1962, even where the last full owner had died prior to the commencement of the Act of 1962, the limited estate held by a Muslim female in relation to the said estate would now be terminated and upon such termination, those persons would be entitled to the estate as would have been entitled under Muslim Personal Law (*Shariah*) upon the death of the last full owner and if any such heir had died in the meantime, his/her share would devolve in accordance with *Shariah* on such persons who would have succeeded him/her if he/she had died immediately after the termination of the life estate. It was further stipulated in the proviso to section 5 of the Act of 1962 that the Muslim female holding the limited estate under customary law shall be deemed to be entitled to her share under Muslim Personal Law (*Shariah*) in the estate of the last full owner and the same shall devolve on her. For reference, sections 3 and 5 of the Act of 1962 are reproduced below:

3. Termination of Limited Estates under Customary Law.- *The limited estates in respect of immovable property held by Muslim females under the Customary Law are hereby terminated:*

Provided that nothing herein contained shall apply to any such estate saved by any enactment, repealed by this Act, and the estates so excepted shall continue to be governed by that enactment, notwithstanding its repeal by this Act.

5. Devolution of Property on the Termination of Life Estate and Certain Wills.- *The life estate terminated under section 3 or the property in respect of which the further operation of will has ceased under section 4 shall devolve upon such persons as would have been entitled to succeed under the Muslim Personal Law (Shariat) upon the death of the last full owner or the testator as though he had died intestate; and if any such heir has died in the meantime, his share shall devolve in accordance with Shariat on such persons as would have succeeded him, if he had died immediately after the termination of the life estate or the death of the said legatee:*

Provided that the share to which a Muslim female holding limited estate under Customary Law would have been entitled under the Muslim Personal Law (Shariat) upon the death of the last full owner shall devolve on her.

10. In order to provide certainty, the 'last full owner' as provided in section 5 of the Act of 1962, to our minds, appears to be the full owner whereafter the property did not devolve through inheritance, which in this case would be Abdul Ghafoor. Any other meaning to the word last full owner would not only be against the spirit of section 5 but would also result in uncertainty by delving into an uncertain period in the past. In the instant case, it is an admitted position that Abdul Ghafoor, the last full owner, died issueless in the year 1921 and the property devolved on Mst. Roshnae as limited owner in accordance with customary law. Therefore, upon the application of the Act of 1962 pursuant to the Amendment Act of 1964, the limited estate held by Mst. Roshnae would be deemed to be terminated and those persons would be entitled to succeed who were entitled to inherit from the estate of the last full owner i.e. Abdul Ghafoor in accordance with Muslim Personal Law (Shariah). Hence, the inheritance of

Abdul Ghafoor would be deemed to have opened at that time and was to devolve amongst such persons entitled to inherit from his estate under *Shariah*.

11. In such view of the matter and upon the opening of the inheritance of the deceased Abdul Ghafoor, Mst. Roshnae would inherit 1/2 share in the estate of Abdul Ghafoor as a Quranic sharer, being his full sister. This has been ordained by the Holy Quran in Surah An-Nisa, Verse 176 wherein it has been explicitly ordained that in the absence of a child, a full sister is entitled to inherit 1/2 share in the property of the deceased Muslim. Reference may also be made to Saadullah's case (supra).

12. Now the only question that remains to be decided is whether Mst. Roshnae would also inherit the remaining half share as a residuary or would the same be inherited by the plaintiffs/respondents who also claim to be residuaries of Abdul Ghafoor as descendants of the true grandfather how-high-so-ever. In this regard, we have gone through the case law cited by the learned counsel for the parties and have perused para 65 of 'Principles of Mohammadan Law' by D.F. Mullah and the Table of Residuaries annexed thereto, as relied upon by both the parties. In our view, Mst. Roshnae would also inherit the remaining 1/2 share in the estate of Abdul Ghafoor as a residuary because a full sister is placed higher in the Table of Residuaries at serial No.6, whereas, descendants of the true grandfather how-high-so-ever are placed at serial No. 13 and below and thus, would not be entitled to inherit after being excluded by the full sister placed higher to them. For convenience, the Table of Residuaries annexed to Para 65 has been reproduced below:

"TABLE OF RESIDUARIES IN ORDER OF SUCCESSION -

Sunni Law

1. DESCENDANTS:

(1) SON.

Daughter takes as a residuary with the son, the son taking a double portion.

(2) SON'S SON h.l.s.-the nearer in degree excluding the more remote. Two or more son's sons inherit in equal shares. Son's daughter h.l.s. takes as a residuary with an equal son's son.....

II. ASCENDANTS:

(3) FATHER.

(4) TRUE GRANDFATHER h.h.s.- the nearer in degree excluding the more remote.

III. DESCENDANTS OF FATHER:

(5) FULL BROTHER.

FULL SISTER- takes as a residuary with full brother, the brother taking a double portion.

(6) FULL SISTER- In default of full brother and the other residuaries above named, the full sister takes the residue if any

(7) CONSANGUINE BROTHERS.

CONSANGUINE SISTER.- takes a residuary with consanguine brother, the brother, taking a double portion.

(8) CONSANGUINE SISTER.- In default of consanguine brother and the other residuaries above-named, the consanguine sister takes the residue,.....

(9) FULL BROTHER'S SON.

(10) CONSANGUINE BROTHER'S SON.

(11) FULL BROTHER'S SON'S SON.

(12) CONSANGUINE BROTHER'S SON'S SON.

Then come remoter male descendants of No.11 and No.12, that is, the son of No.11, then the son of No.12, then the son's son of No.11, then the son's son of No.12 and so on in like order.

IV. DESCENDANTS OF TRUE GRANDFATHER h.h.s.

(13) FULL PATERNAL UNCLE.

(14) CONSANGUINE PATERNAL UNCLE.

(15) FULL PATERNAL UNCLE'S SON.

(16) CONSANGUINE PATERNAL UNCLE'S SON.

(17) FULL PATERNAL UNCLE'S SON'S SON.

(18) CONSANGUINE PATERNAL UNCLE'S SON'S SON.

Then come remoter male descendants of Nos.17 and 18, in like order and manner as descendants of Nos.11 and 12. MALE DESCENDANTS OF MORE REMOTE TRUE GRANDFATHERS - in like order and manner as the deceased's paternal uncles and their sons and son's sons."

13. After minutely examining the Table of Residuaries, the submission of Mr. Paracha, learned ASC for the plaintiffs/respondents that, since the sister is a sharer in the estate of Abdul Ghafoor, therefore, she would not inherit as a residuary, does not appeal to us for the reason that the Table of Residuaries at serial No.6 provides that '*in default of a full brother and the other residuaries above named, the full sister takes the residuary if any ...*'. The words 'above named' are of great significance and negate the submission of the learned counsel by entitling a full sister to inherit as a residuary in absence of the residuaries detailed in serial No.1 to serial No.5, meaning thereby, that the residuaries placed below serial No. 6 would not inherit anything in the presence of full sister. Admittedly, the plaintiffs/respondents are placed much below i.e. under sub-heading No. IV as 'DESCENDANTS OF TRUE GRANDFATHER h.h.s' and therefore, would be excluded from inheriting the property as residuaries by the full sister which is placed above them. This was the view taken by this Court in a judgment delivered by a two-member Bench in Saadullah's case (supra). On the other hand, the plaintiffs/respondents rely on Waris Ali's case (supra) which was also rendered by a two-member Bench of this Court and wherein seemingly an opposite view from Saadullah's case was taken.

However, notably, the judgment in Saadullah's case was prior in time and the view rendered by the learned Bench in Waris Ali's case had neither taken into account the judgment rendered in Saadullah's case and nor distinguished it. Furthermore, the view taken by this Court in Saadullah's case has also been followed by this Court in its recent judgment in Muhammad Sharif's case (supra).

14. Therefore, in view of the above, Mst. Roshnae was entitled to inherit the entire estate of Abdul Ghafoor, being his full sister. Notably, the Amendment Act of 1964 was enacted on 15.4.1964 and came into force at once, therefore pursuant to the Amendment Act of 1964 through which the Act of 1962 was made applicable to cases even where the full owner had died prior to the commencement of the Act of 1962, the limited estate held by Mst. Roshnae was terminated and she inherited the complete estate of Abdul Ghafoor in her personal capacity as per Muslim Personal Law (Shariah). Therefore, the gift made by Mst. Roshnae to the appellants on 28.4.1964, i.e. after the enactment of the Amendment Act of 1964, was valid as she was no longer holding the estate as a limited owner but had inherited the entire suit property according to *Shariah*. It is a settled proposition of law that at the time the inheritance of a deceased Muslim opens, all the entitled legal heirs become owners to the extent of their shares there and then, therefore, sanction of mutation, issuance of succession certificate etc. are procedural matters regulated by procedural laws just to make records and for fiscal purposes. Reference is made to the cases of Khan Muhammad thr. LRs and Others vs. Mst. Khatoon Bibi and Others (2017 SCMR 1476) and Mahmood Shah vs. Khalid Hussain Shah (2015 SCMR 869). Therefore, Mst. Roshnae was competent to gift the entire suit property to the appellants and consequently, the gift would be valid.

15. In view of what has been discussed above, these appeals are allowed, the impugned judgment and decree of the High Court is set-aside

and the judgment and decree passed by the trial Court dismissing the suit of the plaintiffs/respondents is restored. No order as to costs.

Islamabad,

Announced on 30/6/2022.
A. Rehman

Approved for Reporting.