IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE UMAR ATA BANDIAL, HCJ
MR. JUSTICE MUNIB AKHTAR
MR. JUSTICE QAZI MUHAMMAD AMIN AHMED

Civil Petition No.3011 of 2021
(On appeal against the judgment 19.02.2021 passed by the Islamabad High Court, Islamabad in RFA No. 281/2020)

Hassan Aziz and others ... Petitioners

vs

Meraj ud Din and others ... Respondents

For the Petitioners : Mr. Mir Afzal Malik, ASC

For Respondent No.13 : Mr. Zulfiqar Abbas Naqvi, ASC

Date of Hearing : 08.02.2022

ORDER

Munib Akhtar, J.: The petitioners seek leave to appeal against a judgment of the Islamabad High Court dated 19.02.2021, reported as *Hassan Aziz and others v Meraj-ud-Din and others* 2021 CLC 1821. At the conclusion of the hearing it was announced that the leave petition stood dismissed. The following are our reasons for this decision.

2. The question of law raised for the consideration of the Court is as follows: are great grandchildren within the meaning of "children" for the purposes of s. 4 of the Muslim Family Laws Ordinance, 1961 ("Ordinance")? The said section is as follows:

> "**4. 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 stirpes* receive a share equivalent to the share which such son or daughter, as the case may be, would have received if alive."

As noted in the impugned judgment s. 4 has been declared to be contrary to the Injunctions of Islam by the Federal Shariat Court ("FSC") by its judgment reported as *Allah Rakha and others v Federation of Pakistan and others* PLD 2000 FSC 1. However, this judgment is under appeal before the Shariat Appellate Bench of this Court (C.Sh.A 1/2000 and connected cases (*Tanveer Jehan v Federation of Pakistan and others*, etc.)). Article 203G of the Constitution provides, inter alia, that no court including this Court itself shall, save as provided in Article 203F (which provides for appeals to the Shariat Appellate Bench), "entertain any proceeding or exercise any power or jurisdiction in respect of any matter within the power or jurisdiction of the [Federal Shariat] Court". The proviso to clause (2) of Article 203D provides, inter alia, that if an appeal has been preferred to the Shariat Appellate Bench then the decision of the FSC shall be deemed stayed pending disposal of the appeal. The position that emerges therefore is that for purposes of deciding this matter s. 4 of the Ordinance is to be regarded as being in the field but the provision must be interpreted and applied on its own footing, purely as a matter of statutory interpretation.

3. The facts out of which the question of law arises may now be stated. One Mrs. Tameez un Nisa ("propositus") was the owner of a residential house in Islamabad ("property"). She died on 19.06.2015. She had several children of whom two sons predeceased her. One of those sons was Nawab ud Din, who passed away on 09.04.1992. One of the children of Nawab ud Din was Aziz ur Rehman, and the present leave petitioners are his children. Thus, Aziz ur Rehman was the grandson of the propositus and the leave petitioners are her great grandchildren. Now, Aziz ur Rehman himself passed away on 07.12.2005, i.e., before the propositus. The leave petitioners claim a share (proportionately) in the property on the basis of s. 4 of the Ordinance. They filed suit in the civil courts of Islamabad on such basis, which was dismissed. The appeal preferred to the learned High Court met with the same fate in terms of the impugned judgment. It was held that s. 4 did not apply to great grandchildren. That was the only point taken before the High Court and was, likewise, the only ground agitated before us. (Quite how the dispute actually arose need not be set out in detail:

the above narration of the facts suffices for present purposes. We may note that the contesting party was respondent No. 13.)

4. Before us learned counsel for the leave petitioners essentially urged the same grounds for the applicability of s. 4 as had been agitated before the learned High Court. Great emphasis was placed on the phrase "*per stirpes*" appearing in the section. It was submitted that this phrase had a technical meaning in law and had been used as such in s. 4. More precisely, learned counsel submitted that when the succession opened, the children of any predeceased son or daughter formed, as it were, a compact "unit", each member of which was (proportionately) entitled to the succession. If perchance any of the members of this "unit" (who would of course be a grandchild of the deceased) predeceased the latter, then his (or her) children (i.e., the great grandchildren) would form part thereof, i.e., take the place of their deceased predecessor and be entitled to share in the succession. It was submitted that the intention and spirit behind s. 4 pointed towards, and was conducive to, such an interpretation and the section ought therefore to be applied accordingly. On such basis it was contended that the leave petitioners were the legal heirs of the propositus and entitled to a share in the property. It was prayed that the impugned judgment be set aside. Learned counsel for the respondent No. 13 on the other hand supported the decision and submitted that it had correctly stated the law and applied it properly to the facts and circumstances of the dispute.

5. We have considered the submission made by learned counsel for the leave petitioners. It was attended to in great detail in the impugned judgment. In particular, the phrase "per stirpes" was carefully examined in the light of various judgments including *Zainab v Kamal Khan alias Kamla* PLD 1990 SC 1051. In the end the contention put forward by the leave petitioners (who were of course the appellants) was found wanting and the appeal stood dismissed.

6. We would like to commend the learned Single Judge of the High Court for the valuable discourse that is to be found in the impugned judgment. However, in our view there is an alternative

basis on which the question can be decided, and one which avoids touching ground reserved by the Constitution for the FSC and the Shariat Appellate Bench of this Court. Now, it is a fundamental principle of the law of Muslim inheritance that the legal heirs of a person are only determined at the moment of death and not before. This rule is clearly reflected in s. 4 by use of the words “opening of succession”. The point is then reinforced by the immediately succeeding words, “the children of [the predeceased] son or daughter, if any, *living at the time the succession opens*” (emphasis supplied). The words emphasized impose a clear limitation: s. 4 applied only to those grandchildren as are alive at the time of death of the propositus. Had these words been absent then, perhaps, a case could be made out for the interpretation put forward by learned counsel for the leave petitioners. However, the words do exist and therefore must be given due effect. To accept the case sought to be made out would, in effect, erase them from the statute. That would be contrary to well established rules of interpretation. It is of course well known that under the rules of Muslim inheritance the legal heirs of a predeceased son or daughter do not inherit from the parent of the predeceased. Section 4 carves out a carefully constructed exception from this rule. It is not without significance that the section does not refer to the legal heirs of the predeceased son or daughter: the words used are “the children of such son or daughter” and not ‘legal heirs’. Quite obviously for the predeceased son or daughter to have children they would have to have had a spouse, who could also be alive when the parent passes away. Yet, any spouse is excluded from the applicability of s. 4. It is also to be kept in mind that some of the rules of Muslim inheritance can apply across generations, which is encapsulated in the phrases “how high so ever” and “how low so ever” used in the standard treatises. Any possibility of s. 4 having such an effect (which, in essence, is the case pleaded by the leave petitioners) is carefully excluded by use of the words emphasized above, i.e., “living at the time the succession opens”. Read as a whole, the purpose and intent behind s. 4 is clear. The exception created by it is limited and circumscribed. It applies only to those grandchildren as are living at the time of the death of the propositus. An extended meaning cannot be given to the section in terms as urged by learned counsel for the leave petitioners. They,

being the great grandchildren, did not have any share in the property left behind by the propositus on the basis of s. 4. Both the learned trial court and the learned High Court were therefore correct in dismissing their claim.

7. For the foregoing reasons this leave petition failed and stood dismissed at the conclusion of the hearing.

Chief Justice

Judge

Judge

Islamabad, the
8th February, 2022
Nisar/*
Approved for reporting