IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:
MR. JUSTICE IJAZ UL AHSAN
MR. JUSTICE MUNIB AKHTAR
MRS. JUSTICE AYESHA A. MALIK

(AFR)

Civil Appeals No.10-Q and 1273 of 2021, CMA No.10780 of 2021 and Criminal Appeal No.4-Q of 2021.

(On appeal against the judgment dated 30.06.2021 passed by the High Court of Balochistan, Quetta in RFA No.41 of 2014 and Contempt Application No.62 of 2018)

Zakia Begum and another.
(in CA.10-Q & Crl.A.4-Q/2021)

Shams-ul-Islam Khan and others.
(in CA.1273/2021 & CMA.10780/21)

...Appellant(s)

Versus

Nasir-ul-Islam Khan and others.
(in CA.10-Q/21)

Shams-ul-Islam Khan and others.
(in Crl.A.4-Q/2021)

Zakia Begum and another.
(in CA.1273/2021 & CMA.10780/21)

...Respondent(s)

For the Appellant(s): Mr. Azhar Ahmed Khan, Attorney.
(in CA.10-Q/21, Crl.A.4-Q/21 & respdts.#1-2 in CA.1273/21)

For the Respondent(s): Mr. Naeem Bukhari, ASC.
(for respdts. in CA.1273/21 for respdts.#1(a-e, g, h), 2 in CA.10-Q/21 & 2-3 in Crl.A.04-Q/21).

Mr. M. Qasim Khan, ASC.
(for respdts.#9-14 in CA.10-Q/21 & 10-15 in CA.1273/21)

Mr. Gul Hassan Tareen, ASC.
(for respdt.#15 in CA.10-Q/21)

Mr. M. Munir Paracha, ASC.
(for respdt.#5 in CA.1273/21)

Date of Hearing: 31.03.2022. (Judgment Reserved)

JUDGMENT

IJAZ UL AHSAN, J-. Through this common judgment, we intend to decide Civil Appeal No.10-Q of 2021

and Criminal Appeal No.4-Q of 2021 *(filed by Zakia Begum, etc)* and Civil Appeal No.1273 of 2021 *(filed by Shams-ul-Islam Khan and others)* as they arise out of the same impugned judgment of the High Court.

2. Through these Appeals, the respective Appellants have challenged the judgment of the High Court of Balochistan at Quetta dated 30.06.2021 *(hereinafter referred to as "**impugned judgment**")* passed in RFA No.41 of 2014 and Contempt Application No.62 of 2018. By the impugned judgment, an Appeal filed by Zakia Begum, etc was accepted and the judgment and decree of the Senior Civil Judge-II, Quetta dated 21.03.2014 was set aside and the suit of the Appellants was decreed. She is however aggrieved of certain portions of the impugned judgment as well as the fact that her Contempt Application filed against the Respondents was dismissed. On the other hand, Shams-ul-Islam and others are aggrieved of the impugned judgment on the basis that by setting aside the judgment and decree of the Senior Civil Judge-II, Quetta, the suit of Zakia Begum, etc has been decreed by the High Court.

3. The necessary facts giving rise to this *lis* are that on 13.12.2005, Zakia Begum and the legal heirs of Mehmooda Begum filed a Suit for Declaration, Possession, Partition, Rendition of Accounts & Permanent Injunction against the Respondents with respect to suit properties and businesses fully described in the plaint (hereinafter referred to as the "**Suit Properties**"). In the fourth and final plaint of

the Appellants, it was averred that the Appellants as well as Respondents No.1 & 2 were the legal heirs of the late Abdul Salam Khan. On 02.06.1977, Abdul Salam Khan died and left behind an estate which included various agricultural, residential and revenue-generating properties/businesses. At the time of Abdul Salam Khan's death, his legal heirs were: his widow Jameela Begum; his two sons Saif-ul-Islam Khan and Shams-ul-Islam Khan; and his four daughters Mehmooda Begum, Razia Begum, Zakia Begum, and Samina Saeed. Jameela Begum passed away on 24.08.1982 and as a result, a bungalow as well as some agricultural land were added to the pool of inheritable properties between the two brothers and four sisters. It was further averred that despite multiple requests, the brothers refused to partition the estate between the brothers and sisters according to their Quranic shares. The suit was contested by the Respondents and after pro and contra evidence was led, the suit of Zakia Begum was dismissed by the Senior Civil Judge-II, Quetta (hereinafter referred to as the "**Trial Court**") vide his judgement & decree dated 21.03.2014. An appeal was filed by Zakia Begum against the judgement & decree dated 21.03.2014 before the Balochistan High Court. The High Court, vide its judgement dated 17.08.2020, allowed the appeal of Zakia Begum, remanded the matter back to the Trial Court and permitted Zakia Begum to file an amended plaint before the Trial Court. Aggrieved of the judgement of the High Court dated 17.08.2020, Zakia Begum filed C.P. No.202-Q/2020 before this Court which was allowed, vide order dated 06.01.2021.

The matter was remanded to the High Court with a direction to decide the matter itself. The High Court, vide the impugned judgement dated 30.06.2021, allowed the appeal of Zakia Begum, reversed the judgement & decree of the Trial Court dated 21.03.2014 and decreed the suit of Zakia Begum. The Court while decreeing the suit, also preserved the rights of Respondents No. 9 to 15 who claimed to be *bona fide* purchasers without notice *qua* the suit properties. The High Court held that the Appellants were entitled to recover their Quranic shares from the sale consideration received for the properties sold to Respondents No.9 to 15. It is against this factual backdrop that Appellants filed C.A.s No. 10-Q & 1273 of 2021 respectively before this Court. Zakia Begum has also filed Crl.A No.4-Q against the same impugned judgement passed by the High Court in Contempt Application No.62/2018.

4. The main argument advanced by the Attorney for the Appellants in C.A.No.10-Q & Crl.A.No.4-Q of 2021 is that the High Court had erred in law by not decreeing the suit of Zakia Begum as prayed for when passing judgement in the Appellants favour. He also argued that the bona fide purchasers had, in fact, been aware of the litigation pending between the parties with respect to the suit properties. This knowledge had, as a result, disentitled them from the protection of Section 41 of the Transfer of Property Act, 1882. He has relied on judgements passed by this Court in *Zohra Bibi vs. Haji Sultan Mahmood* (**2018 SCMR 762**), *Sahib Jan*

vs. Mst. Ayesha Bibi (**2013 SCMR 1540**), *Municipal Committee of Chakwal vs. Ch. Fateh Khan* (**2006 SCMR 688**), **2002 SCMR 1345** and *Mst. Raj Bibi vs. Province of Punjab thr. District Collector, Okara* (**2001 SCMR 1591**).

5. The Learned counsel for the Appellants in C.P. No.1273 of 2021/Respondents No.1 & 2 in C.P. No.10-Q (hereinafter referred to as the "**Brothers**") has argued that the suit of Zakia Begum ceased to be maintainable for lack of necessary parties when she failed to implead all the legal heirs of the late Abdul Salam Khan and Jameela Begum as either plaintiffs or defendants in her subsequently amended plaints. He contends that the estate had already been distributed by the late Abdul Salam Khan and Jameela Begum during their life times through two registered wills dated 24.12.1970 (hereinafter referred to as "**The Wills**"). The High Court, while passing the impugned judgement, had omitted to consider the fact that none of the legal heirs of the late Abdul Salam Khan and Jameela Begum had denied the two registered wills dated 24.12.1970 nor had they denied their signatures on the registered wills which were duly-signed in the presence of witnesses. He further argues that the two wills were in complete harmony with the Injunctions of Islam and were not violative of any of the legal heirs' Quranic shares.

6. The Learned Counsel for Respondent No.5 in C.A. No.10-Q/2021 has argued that the wills dated 24.12.1970 were invalid in light of the fact that they were made in favour

of the legal heirs as well as the fact that they were wills in excess of one-third of the total estate that constituted the legacy/estate of the late Abdul Salam Khan and Jameela Begum. Therefore, the wills, *prima-facie*, went against the principles of Sharia. He has relied on Sections 117 and 118 of Mullah's Muhammadan Law as well as Section 189 and 190 of B.J. Verma's Commentaries of Muhammadan Law.

7. The learned Counsel for Respondents No.9 to 14 in C.A. No. 10-Q/2021 (hereinafter referred to as the "**Purchasers**") on the other hand has defended the impugned judgement of the High Court. The Learned Counsel has also relied on an unreported judgement of this Court passed in C.A. No. 2688/2006 titled *Mst. Alokzai and others vs. Allah Dad and others*.

8. We have heard the learned counsels for the parties at length and gone through the case record with their assistance.

9. The issues that need to be determined by this Court are:-

i. Whether the registered will dated 24.12.1970 was in consonance with Sharia/injunctions of Islam?

ii. If the registered will dated 24.12.1970 went against the injunctions of Islam, what bearing would it have on the rights of the Quranic legal heirs inter se?

iii. Whether Sharia-ordained inheritance rights will take precedence over the protection provided in Section 41 of the Transfer of Property Act (hereinafter referred to as the "**TPA 1882**")?

10. Before we discuss the merits of the appeals in hand, it may be prudent to first define what a will is. Wills are defined in the Succession Act of 1925 under Section 2(h). It is reproduced below for reference:-

> "will" means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.

A will can therefore be considered as a formal document drawn up by a natural person wherein he expresses his wish as to how he would want his estate to be distributed after their death. By virtue of the fact that wills operate after the death of the donor, they are considered testamentary instruments *i.e.* instruments that come into effect after the death of the donor/testator. A will, therefore, ceases to be a will if it is executed and acted upon during the lifetime of the testator. Instead, a will executed in the lifetime of a donor takes on the guise of an *inter-vivos* instrument *i.e.* an instrument which is executed within the lifetime of a person which can take the form of a gift which has its own requirements and different standards of proof. It is not the case of any of the parties that the instruments in question were gift deeds. It is admitted in the pleadings of the brothers that the wills were executed and acted upon during the lifetimes of the late Abdul Salam Khan and Jameela Begum. This factum alone brings into question the validity of the wills in light of Section 2(h) of the Succession Act, 1925. However, the veracity of the wills have not been questioned in the light of their legality per se but have instead been challenged with respect to their incongruity in light of Sharia.

11. In order to ascertain whether the wills in this case are compliant with Sharia, it is necessary to discuss the sections of various treatises relied on by the learned counsel for parties. Section 117 of Mullah's Mohammadan Law is reproduced as follows:-

> *"A bequest to an heir is not valid unless the other heirs consent to the bequest after the death of the testator. Any single heir may consent so as to bind his own share.*
>
> *Explanation - In determining whether a person is or is not an heir, regard is to be had, not to the time of the execution of the will, but to the time of the testator's death."* (**Underlining is ours**)

Section 118 of Mullah's Mohammadan Law is reproduced as follows:-

> *"A Mahomedan cannot by will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. Bequests in excess of the legal third cannot take effect, unless the heirs consent thereto after the death of the testator."* **(Underlining is ours)**

Section 188 of B.J. Verma's Commentaries of Muhammadan Law is reproduced as follows:-

> *"A bequest to an heir is not valid except to the extent to which the persons who are the heirs of the testator at the time of his death, expressly or impliedly consent to the bequest after his death."*

Section 190 of B.J. Verma's Commentaries of Muhammadan Law is reproduced as follows:-

> *"A Mohammedan is not entitled to dispose of his property (which would otherwise devolve on his heirs under Mohammedan Law) by will in favour of a person who is not a heir, in excess of one third* ***except*** *in the following cases:-*
>
> *(1) Where, subject to the provisions of any law for the time being in force, such excess is permitted by a valid custom;*
> *(2) where there are no heirs of the testator;*

> *(3) where the heirs existing at the time of the testator's death, consent to such bequest after his death;*
> *(4) where the only heir is the husband or the wife and the bequest of such excess does not effect his or her share."* **(Underlining supplied is ours)**

The Rule behind Section 190 is reproduced as follows:-

> *"The limit of one third is prescribed in respect of property, except in the cases given in Section 190.*
>
> *This is based on a tradition of the Prophet and the object is to prevent a person from so disposing of his property as to leave the heirs destitute.*
>
> *The second restriction with respect to person is limited to heirs. The policy of Mohammedan Law is to prevent a testator from interfering by will with the course of devolution of property among his heirs according to law although he may give a specified portion, as much as a third, to a stranger. It safeguards against a breach of the ties of the kindred. It is intended to prevent the showing of favouritism to any heir to the prejudice of the others and thus defeating the policy of the Quranic injunctions as to the division of heritage according to fixed principles."*

12. We have gone over the wills keeping in consideration the aforementioned expositions of law which have long been accepted as the correct meaning scope and interpretation of the relevant principles of Sharia relating to wills made by Muslims. We have noticed that the will of the late Abdul Salam Khan has been drawn up with an obvious bias in favour of the sons. The sons have been given the lion's share in the inheritable pool of properties especially with respect to lucrative revenue-generating properties/businesses to the complete exclusion of the daughters. A sharia-compliant will would not act as an ex-ante instrument which regulates the inheritable shares of any and all legal heirs before the actual opening of the testator's estate. This would

be the case even where the ultimate value received by all the legal heirs is equivalent to what would have been their receivable Quranic share at the time of the opening of the estate. The daughters were just as entitled as their brothers to a share in their father's businesses and other properties at the time the estate would have opened up. They were denied that opportunity to become shareholders by virtue of their Quranic rights of inheritance in the suit properties by virtue of the wills in question. The wills had, in essence, ex-ante deprived Quranic inheritors of their shares in properties which they would have received at the time of the opening of the estate for inheritance. The will of the late Abdul Salam Khan therefore, to our minds, is an unconscionable instrument that is not in consonance with Sharia since it favours some legal heirs (the sons) to the detriment of other legal heirs' (the daughters) Quranic-ordained rights of inheritance. With respect to the will of Jameela Begum, we have noticed that one of the properties was to be transferred to her nephew *i.e.* one Kaleem Khan whereas the other property was to be divided amongst her sons equally. The same will goes on to state that the will is to operate after the death of Jameela Begum. Adverting to our reasoning above, we cannot come to the conclusion that the will of Jameela Begum is inconsonance with Sharia either since it was drawn up to benefit the Sons. The nephew, Kaleem Khan, could not benefit from Jameela Begum's will since the property bequeathed to him was in excess of one-third of the total inheritable amount. Even if the will was found to have been

compliant with Sharia, his right to inheritance under the will would not have taken precedence over the inheritance rights of the Quranic inheritors of Jameela Begum's estate at the time of Jameela Begum's death. We therefore find that the wills drawn up by the late Abdul Salam Khan and Jameela Begum are contrary to the principles of Sharia and are, as a result, null and void.

13. The contention of the Learned Counsel for Respondents 9 to 15 that they are bona fide purchasers of a property without notice and having acquired title in a lawful manner on payment of consideration cannot be annulled or extinguished if the right of the sellers at the time of the purchase emanated from unchallenged wills can only be appreciated after we have gone through Section 41 of the TPA 1882. The same reproduced below for ready reference:

> "**Transfer by ostensible owner**. Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it:
>
> Provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith."

13. The essential ingredients that need to be present before the equitable protection under Section 41 can be claimed has already been elaborately laid down by this Court in case of *Mst. Alokzai and others vs. Allah Dad and others*. The relevant paragraph of the case is reproduced below:-

> *"5. Heard. In the instant case, the dispute inter se the parties primarily revolves around the rule/principle of "bona fide purchasers", as this equitable doctrine has been incorporated and codified in Section 41 of the TPA. On the plain reading of the provision, it postulates four essential ingredients/components for a litigant to seek protection thereof i.e. (a) that transferor was ostensible owner; (b) the transfer is made by the express or implied consent of real owner (emphasis supplied); (c) the transfer was made for consideration; and (d) the transferee while acting in good faith had taken reasonable care before entering into the transaction. In our considered view, all these four elements which are the obvious mandate of law must* ***co-exist****, for enabling a transferee to set up such a defence, to prove and secure the protection of the section."*

It can be seen from the paragraph reproduced above that there are four ingredients that need to be present before the benefit of the equitable doctrine of bona fide purchaser without notice can be claimed. In the present case, the question whether the sons were ostensible owners is answered in the affirmative for the reason that the mutations in their name had been sanctioned pursuant to unchallenged wills. Since the wills had not been challenged by Zakia Begum or the other legal heirs at the time of the purchase, the wills could reasonably have been construed as valid and title-conferring documents. Since the wills were not challenged and the sons were the only ostensible owner(s) of the purchased suit properties, it was not required of the Purchasers to inquire into whether all the legal heirs of the suit properties had consented to the purchase between purchasers and the sons. Only the express consent and/or acquiescence of the sons was required at the time of sale. The transfers were made for consideration, satisfying the third

ingredient. The final ingredient i.e. acting in good faith and taking reasonable care before entering into a transaction would have required the purchasers to do due diligence when purchasing properties from the sons. No doubt when the Purchasers exercised due diligence by approaching the revenue records for ascertaining title of the properties being the record would have shown that the sons were the owners of the properties and had become owners by virtue of the unchallenged wills. We therefore have no hesitation in coming to the conclusion that Section 41 of the TPA 1882 applies to case of the Purchasers and that they were entitled to the equitable protection available to them under Section 41 of the TPA 1882 as has correctly been held by the High Court.

14. There is another aspect of the matter insofar as it relates to the property that was sold in favour of Respondents No.9 to 15 for valuable consideration. In view of the fact that we have held that the daughters of Abdul Salam Khan and Jamila Begum being their legal heirs were entitled to their respective shares in the entire estate of the said persons, they were also held entitled to their respective shares in the property that was sold by the sons in favour of Respondents No.9 to 15. Having held that despite the fact that sale by the sons was unauthorized and voidable, the sale *per se* could not be set aside or annulled in view of the fact that Respondents No.9 to 15 were *bona fide* purchasers without notice and for valuable consideration. Therefore, the question arises how would the daughters be compensated for their respective

shares in such sold property. The only viable solution appears to be that the sons be directed to pay for the equivalent of respective shares of the daughters in the said property in monetary terms. The sale price of the property when it was sold is duly documented and none of the parties has argued or alleged that the property in question was sold for a value less than its market at the relevant time. However, the fact remains that the sons received the entire sale consideration and have since then used the same for their own benefit. We therefore direct as follows:

i) The respective shares of the daughters in the total sale consideration shall be determined;

ii) The sons will pay mark up from the date of sale at the Bank rate to the daughters on their respective shares till the time of payment; and

iii) We further declare and reiterate that all other transactions relating to the properties that constituted a part of the estate of late Abdul Salam Khan and his widow Jamila Begum shall devolve upon all their sons and daughters in accordance with their respective shares as provided in Sharia Law.

15. At the very end of his arguments, the learned counsel for the Appellants in Civil Appeal No.1273 of 2021 argued that some of the properties were purchased by the sons from their own resources. The Attorney for the Appellants in Civil Appeal No.10-Q of 2021 has vehemently contested the said assertion and submitted that all other properties purchased by the sons were acquired by utilizing

funds from joint family business and sale of joint properties. Therefore, they constituted a part of divisible assets/estates of their deceased parents. Further, despite our query, the learned counsel for the Appellants in Civil Appeal No.1273 of 2021 has not been able to place on record any documentation indicating any independent source of income of the sons which they could have utilized for acquiring the additional assets in their own respective names. Even otherwise, this question was not raised before the lower *fora* therefore it is unnecessary to rule on this issue which has so belatedly been raised.

16. We find that the High Court has come to the correct conclusions in decreeing the suit of the daughters of Abdul Salam Khan and Jamila Begum. Further, we find ourselves in agreement with the reasoning adopted by the High Court in preserving the rights of Respondents No.9 to 15 who were *bona fide* purchasers without notice and for valuable consideration and giving them the benefit of Section 41 of the Transfer of Property Act, 1882. The learned counsel for the Appellants in Civil Appeal No.1273 of 2021 has not been able to persuade us to hold that there is any illegality, jurisdictional defect or perversity and misreading or non-reading of evidence that may furnish lawful basis to interfere in the well reasoned judgment of the High Court. We note that the High Court has elaborately gone through all material aspects of the case and assigned cogent, valid and legally sustainable reasons in decreeing the suit of Zakia Begum, etc.

17. On hearing the learned counsel for the Appellants as well as the Respondents, we have reached the same conclusions as the High Court and have no lawful reason, basis or justification to take a different view. We therefore affirm and uphold the judgment and decree passed by the High Court dated 30.06.2021 subject to the aforenoted modification to which extent the judgment and decree shall stand modified.

18. For reasons recorded above, Civil Appeal No.10-Q of 2021 is partly allowed to the extent noted above, Civil Appeal No.1273 of 2021 is dismissed and Criminal Appeal No.4-Q of 2021 is also dismissed.

19. Since the main appeals have been finally decided, all miscellaneous applications filed from time to time alongwith the appeals are also dismissed.

Announced in open Court on 06.10.22 at Islamabad.

'Not approved for Reporting'
Khalil Sahibzada, LC/-*