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IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE FAISAL ARAB

MR. JUSTICE SAJJAD ALI SHAH

CIVIL APPEAL NO. 837 OF 2015

(Against the judgment dated 05.06.2015
passed by the Peshawar High Court,
Peshawar in Civil Revision No. 311-
P/2014)

Faqir Ahmed Khan (decd.) through L.Rs.

...Appellant(s)

VERSUS

Riaz Ahmed & others

...Respondent(s)

For the appellant(s): Sardar Muhammad Aslam, ASC

For the respondent(s): Mr. Muhammad Shahid Rasool, ASC
Mr. Muhammad Ashraf Qureshi, ASC

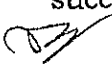
Date of hearing: 14.11.2019

JUDGMENT

FAISAL ARAB, J.- The facts of the case are that one Nawab Khan was predecessor-in-interest of the parties herein. He died in the year 1932. At the time of his death, he left behind one son Faqir Ahmed and one daughter Romaan Sheda as his heirs. He left 600 kanals of agricultural land as well. Both Faqir Ahmed and Romaan Sheda were minors at that time. When Romaan Sheda grew up, she was given in marriage to one Khawaja Muhammad Khan but within a year of marriage her husband died. She was pregnant at that time and came back to her father's house and started living with his brother Faqir Ahmed. She then gave birth to a baby child Zakia. Zakia got married in the family of Faqir Ahmed, her maternal uncle.


2. In 1990, Romaan Sheda died and her daughter Zakia died in the year 2006. In 2007, the heirs of Zakia filed a suit against Faqir Ahmed and sought declaration that they being heirs of Zakia are entitled to a share in the 600 kanals of land which Zakia would have inherited from her mother Romaan Sheda. The suit was resisted by Faqir Ahmed on the ground that under the customary law prevalent at the time of Nawab Khan's death, he as his only son became owner of the entire 600 kanals, which was also mutated in his name vide mutation entry No. 392 dated 26.04.1932 kept in the revenue record. The Trial Court did not accept the plea that customary law was applicable and decreed the suit vide judgment dated 23.06.2011 for distribution of land on the basis of law of Muslim Personal Law. Faqir Ahmed appealed before Additional District Judge-III, Mardan which was allowed vide judgment dated 05.03.2014. The respondents challenged the decision of the Appellate Court in Civil Revision in the High Court, which reversed the findings of the Appellate Court after holding that no custom has been proved whereby Romaan Sheda could be deprived of her 1/3rd share under the Islamic law of inheritance in the estate left by her father, Nawab Khan. Upon such findings, the High Court held that the entire 1/3rd share of Romaan Sheda i.e. 200 kanals out of 600 kanals after her death devolved upon her daughter Zakia and upon her death has to go to Zakia's heirs. Hence this appeal.

3. Learned counsel for the appellants who are successors-in-interest of Faqir Ahmed argued that if at all the right




to claim inheritance was available to Romaan Sheda, it ought to have been availed during her lifetime which she did not, therefore, neither her daughter Zakia nor Zakia's heirs could have claimed any share in the estate left by Nawab Khan, which stood mutated as far back as 1932 in the name of Faqir Ahmed on the basis of customary law. In support of his argument, he relied upon the cases of Janat Bibi Vs. Sikandar Ali (PLD 1990 SC 642), Abdul Haq Vs. Surrya Begum (2002 SCMR 1330), Muhammad Rustam Vs. Mst. Makhan Jan (2013 SCMR 299), Noor Din Vs. Additional District Judge (2014 SCMR 513) & Ghulam Abbas Vs. Mohammad Shafi (2016 SCMR 1403).

4. The question which needs to be examined first is the validity of the customary law in the light of the provisions of the NWFP Muslim Personal Law (Shariat) Application Act, 1935 ("the 1935 Act") which Act became applicable to the entire province of erstwhile NWFP i.e. present day Khyber Pakhtunkhwa. By virtue of Section 3(1) of the 1935 Act, Section 27 of the North-West Frontier Province Law and Justice Regulation (No. VII of 1901), which recognized right of succession on the basis of customary law was repealed insofar as it applied to the Muslims. Thus the Muslim Personal Law stood revived. To give practical application to such a change, Section 3(2) of 1935 Act provides '*whenever a question relating to the succession upon the death of a Muslim arises in any Court, the rule of decision shall be according to Muslim Personal Law (Shariat) as if that law had been applicable at the time of such death.*' Section 3(2) clearly indicates that notwithstanding any customary law that was in force prior to the 1935 Act coming into




force, whenever a question of succession upon the death of a Muslim arises in any Court, the Muslim Personal Law would be applicable with effect from the time of such death. Thus for the purposes of the present case, the succession of Nawab Khan in terms of Section 3(2) of 1935 Act opened on the date when he died i.e. on 07.01.1932. The word '*whenever*' contained in Section 3(2) is significant. It means that whenever a question relating to succession of a Muslim is raised in any Court, the Muslim Personal Law has to be applied with effect from the time when the death has taken place irrespective of the fact that at that time some customary law was in force.

5. Insofar as the argument that Romaan Sheda and Zakia did not claim her share from his brother Faqir Ahmed under the Muslim Personal Law, suffice it to state that a right of an heir to claim inheritance does not dissipate with his death as upon his death, it passes on to his heirs and so on and so forth. So when a Muslim has not received in his lifetime his share in the property to which he was entitled under Muslim Personal Law then the same right stands transferred to his heirs. In other words, no death can prevent a rightful heir to claim his share in the inheritance of his predecessor to which predecessor was entitled under the provisions of Muslim Personal Law. Merely for the reason that one's predecessor had died without claiming or receiving his share in the property that was inheritable by him under the Muslim Personal Law would be of no legal consequence. This right upon his death gets transferred to his heirs and so on and so forth. The 1935 Act recognizes this right of inheritance and states in Section



3(2), which begins with the word '*whenever*'. It means whenever a question relating to succession of a deceased arises in any court, the Muslim Personal Law shall be applied. In the present case, Nawab Khan died in the year 1932 and the question relating to his succession was raised by the respondents in the Court in the year 2007 when they as heir of Zakia claimed share in the land in question. It is their case that mother of Zakia, Romaan Sheda became entitled to 1/3rd share in the estate of her father Nawab Khan by virtue of 1935 Act and after her death her daughter Zakia was entitled to claim her share in what was inheritable by Romaan Sheda in the estate of Nawab Khan and as none of them got their share in the inheritance of Nawab Khan in their lifetime, the respondents being successors-in-interest of Zakia are entitled to what Zakia was entitled to inherit in accordance with Muslim Personal Law.

6. When Muslim Personal Law is applied to the estate of Nawab Khan then obviously Romaan Sheda was entitled to 1/3rd share and she having not survived by any male child then out of her 1/3rd share, half would go to her daughter Zakia and the remaining half to her brother Faqir Ahmed. So Zakia was entitled to 50% share (100 kanals) out of 200 kanals which her mother Romaan Sheda inherited from Nawab Khan and the remaining 50% (100 kanals) will go to Faqir Ahmed thereby his share in 600 kanals would be to the extent of 500 kanals and the remaining 100 kanals would go to the heirs of Zakia.



7. For what has been discussed, this appeal is partly allowed and the impugned judgment is modified accordingly.

Sd/- J
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Islamabad, the
14th of November, 2019
Approved For Reporting
Khurram

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