JUDGMENT SHEET

IN THE PESHAWAR HIGH COURT, ABBOTTABAD BENCH
JUDICIAL DEPARTMENT

C.R No: 90-A of 2014

JUDGMENT

Date of hearing……22.07.2014…..……..

Appellant(s)/Petitioner (s)……Aqsa Sabir etc…….

Respondent (s)…Dr. Sajid Hussain ……..

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MRS IRSHAD QAISER,J:- Mst. Aqsa Sabir and her sister Mst Ayesha Sabir daughter s of Sabir Hussain filed the present revision petition against the judgment and order dated 13.02.2013 passed by learned Additional District Judge-IV, Mansehra whereby the appeal filed by respondent Dr. Sajjad Hussain against the judgment and order dated 20.04.2013 passed by learned trial Court/Civil Judge-V, Mansehra was accepted, the judgment of trial Court was set aside and the case was remanded to the

trial Court with the direction to decide the case per law.

2. The brief facts of the case are that respondent Sajjad Hussain filed a suit for declaration to the effect that Mutation No.2658 attested on 28.11.2007 and Mutation No.81352 attested on 18.10.2012 are wrong, illegal and against the law which are liable to be corrected. That defendants NO.3 to 5 are bound to make the correction while defendants NO.1 and 2 (Petitioners) are not entitled to the share in excess of their legal one. He has challenged the above mutations on the ground that these mutations have wrongly been attested in complete disregard of inheritance law. He has also sought for perpetual injunction against the defendants (petitioner). In the body of the plaint it is stated that Maroof-un-Nisa widow of Fazal Dad was the mother of plaintiff/respondent and Sabir Hussain who died prior to the death of his mother. Upon the death of his mother Maroof-un-

Nisa, her inheritance devolved upon the plaintiff (respondent) and defendants No.1 and 2 (petitioners) who are daughters of Sabir Hussain. It is contended that in the impugned mutations the plantiff was wrongly entered as entitled to half share while the other half share was illegally assigned to Mst Aqsa Sabir and Mst Ayesha Sabir in equal share. This entry and distribution of share in mutations are against the law and sharia because the share of the daughters of predeceased son (Sabir) comes out to be 2/3 rd. That from the inheritance of his mother plaintiff is entitled for 6 out of 12 share (1/2 share) and the rest of 6 share (1/2) are required to be divided in the ratio of 4 and 2 because the share of the daughters of predeceased son (Sabir) come out to be 2/3 and the rest 2 shares are required to be given to plaintiff/respondent being brother of deceased Sabir. Thus in total plantiff is entitled for 8 share while defendants NO.1 and 2 (petitioners) are

entitled to 4 share out of 12 share. That for correction of Mutations an application was submitted to revenue officer which was returned with the direction that correction be made through Civil Court. Hence, he filed the suit.

3. Along with the suit he filed an application for grant of temporary injunction against the defendants from changing the nature of suit property and from alienating it till the disposal of suit.

4. Defendants were summoned. Defendants/petitioners on appearance through counsel contested the suit and applicator by submitting their written statement and replication. The learned trial Court after hearing the arguments on the application rejected the suit of the plaintiff under Order-VII Rule 11 CPC on the ground that plaintiff has neither got any prima facie case nor his plaint discloses any cause of action and is also barred by law vide judgment and decree dated 20.04.2013.

While rejecting the suit it is hold by trial Court that;

> **"in terms of Section IV of the Muslim Family Laws Ordinance 1961, the children of the said predeceased son were entitled to receive share of their father in the estate of Mst Maroof-un-Nisa per strips, hence ½ share of Mohammad Sabir deceased in the legacy of Mst Mahroof-un-Nisa shall devolve upon his daughters/defendants NO.1 and 2. The contention of plaint is held to be without any substance."**

5. Feeling aggrieved respondent/plaintiff filed appeal which vide impugned judgment and decree dated 13.02.2014 accepted the appeal and set aside the order of the trial court and remanded the case back to the trial Court by holding that;

> "**According to Muslim Law of inheritance applying of Section 4 of Muslim Family Laws Ordinance 1961, in the legacy of propositus (Sabir Hussain supposed as alive) the entitlement of two daughters and a brother comes out to be each entitle to 1/3 rd share. So the total shares**

of two daughters comes out to be 2/3 rd and 1/3 rd of the share of Sabir Hussain reverts to his brother Sajjad Hussain."

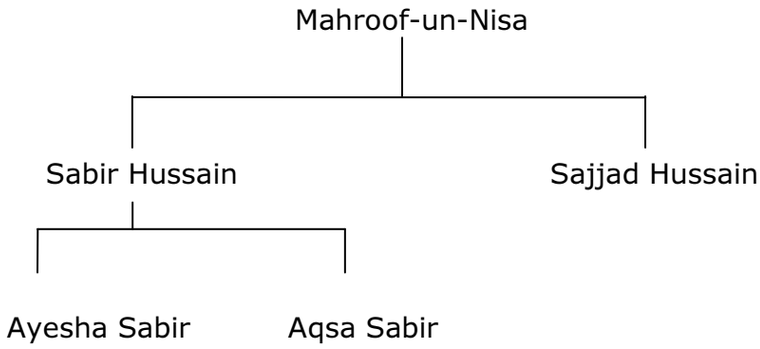
Hence, the present revision petition.

6. I have heard learned counsels for the parties and perused the available record with their assistance.

7. Now the question for determination is that whether under Section 4 of the Muslim Family Laws Ordinance, 1961, petitioners are entitled to inherit the same share which their father Sabir Hussain was entitled in the inheritance of his mother Mahroof-un-Nisa or they being grand daughters are not entitled to more share than what could be inherited from parents according to Islamic law.

8. In the present case plaintiff/respondent has challenged the inheritance mutation with the contention that property has not been distributed in accordance with law. To properly

understand the matter the pedigree table is given below.



9. According to this pedigree table Mahroof-un-Nisa had two sons Sabir Hussain and Sajjad Hussain. Sabir Hussain died during her life time leaving behind two daughters Ayesha and Aqsa. These facts have not been denied by the parties.

10. Learned counsel for the petitioner contended that language of Section 4 of Muslims Family Laws Ordinance, 1961 is quite clear. The petitioners at the time of opening of succession were entitled to receive a share equivalent to the share of their father, predeceased son of Mahroof-un-Nisa, who would have received from their father. That the interpretation made by appellate Court is incorrect. That whatever the property was to be inherited

by their father on the death of their grandmother, will be inherited in toto by the petitioner. In support of his arguments he relied on cases Mst. Aarina Jan Vs. Mst. Akbar Jan (PLD 1975 Peshawar 252), Ata Ullah Khan and others Vs. Mst. Surraya Parveen (2006 SCMR 1637), Mst. Saabran Bibi and 9 others Vs. Muhammad Ibrahim and 12 others (2005 CLC 1160), Qutab-ud-Din Vs. Mst. Zubaida Khatoon and others (2009 CLC 1273), Saifur Rehman and another Vs. Sher Muhammad through L.Rs. (2007 SCMR 387), Haji Muhammad Hanif Vs. Muhammad Ibrahim and others (2005 MLD 1), Jamroz Khan Vs. Aamir Khan and others (2013 CLC 542 Peshawar), Rehman Ghani and others Vs. Shahzad Khan and others (2010 CLC 610 Peshawar) and Hoshang and others Vs. Dr. Eddie P. Bharucha and others (PLD 1973 S.C 206).These arguments were rebutted by learned counsel for the respondents and supported the judgment of appellate

Court. He contended that the grand children are not entitled to more share than what could be inherited from the parents according to the principles of Islamic law of inheritance. That Section 4 of Muslim Family Laws Ordinance, 1961 could not be construed against the interest of the other heirs of the deceased who are entitled to share the inheritance in accordance with the principle of Muslim Family Law. In support of his arguments he relied on Kamal Khan alias Kamla Vs. Mst.Zainab (PLD 1983 Lahore 546), Mst. Zainab Vs. Kamal Khan alias Kamala (PLJ 1990 SC 445), Muhammad Yousaf and others Vs. Mst. Bilqees Begum and others (2006 YLR 889), Mst. Fatima Begum and another Vs. Khush Naseeb Khan and others (PLD 2005 Lahore 641), Mst. Rashida Begum and 5 others Vs. Mst. Rehana Nasreen and 4 others (2004 MLD 1304 Lahore), Mst. Qabal Jan Vs. Mst. Habab Jan and 9 others (1992 SCMR 935),

Mst. Saira Yousaf and another Vs. Sher Muhammad (2012 CLC 1593).

11. Before discussing the case it would be proper to reproduce Section 4 of the Muslim Family Laws Ordinance, 1961, which reads as follows;

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

12. The succession provided for in Section 4 of the ordinance is for the benefit of the orphaned sons and daughters of predeceased parent under Muslim Family Laws Ordinance, 1961. It was meant to remedy the discrimination which was believed to exist against grand children whose parent had died before the succession opened. The law provides that the

parents of such a grand children will be deemed to be alive for the purpose of succession. It cannot be assumed that the law ever intended to give a share to the grandchild more than what would have been his/her due if the parents were actually alive when the succession opens. In this respect guidance is sought from the judgments of Superior Courts. Reference is given to a case **Kamal Khan alias Kamla Vs. Mst Zainab (PLD 1983 Lahore 546)**, wherein it is held; "**Per stripes referred to in section 4 is the antithesis of per capita. This means a share according to the stock or the root or the family as against per capita which means share per head. This assumes greater importance only where the propositus leaves behind a number of grand children whose parents died during the life time of the**

propositus. The principle of succession in such case will not be inheritance per capita but per stripes in accordance with the root or stock to which the grandchild belongs, and will only get the share to which grandchild is entitled through his parents. In the event of there being a single surviving grandchild the principle per stripes is pushed to the background but cannot be employed to support principle which militates against the Islamic Law of Inheritance." This view has been upheld by the apex Court in case **Mst. Zainab Vs. Kamal Khan** (**PLD 1990 SC 1051**), wherein it is held; **"According to Section 4, share from the deceased grandfather's property has been bestowed upon the children of his predeceased son but this does not mean that the other heirs of the**

deceased would be excluded from their share of inheritance. Under Section 2 of the Muslim Personal Law (Shariat) Application Act, 1962, the rule of decision shall be the Muslim Personal Law (Shariat) (in cases where parties, are Muslim). In spite of the non-obstante clause section 4 is to be interpreted in the light of section 2 of the Act 1962. Both thus can stand together." It is further held; "**The principle of Muslim Law of Inheritance was that the near in degree would exclude the remotest. Before the introduction of Section 4, the children of predeceased son were deprived of any share. The intention of Section 4 is to safeguard the interest of the children of predeceased son and not to deprive the other heirs of the prepositus of their due. Thus,**

section 4 cannot be interpreted in a way so as to exclude the other legal heirs of the deceased Sufaid Khan. Section 4 could not, therefore, be construed against the interest of the other heirs of the deceased who were entitled to share the inheritance in accordance with the principles of Muslim Law of Inheritance. As such, grand-child is not entitled to more share than what could be inherited from the parents according to Islamic Law. The estate would be divided in proportion of the respective shares of their parents. The heirs claiming through different line of descent would get their own shares as per stripes." Reference is also made to Mst Bhaggay Bibi and others Vs. Mst. Razia Bibi and others (2005 SCMR 1595) wherein it is held; "**Law of Shariah was not overridden by Section 4 of**

Muslim Family Laws Ordinance 1961 and consequently the parties would not get more than their shares in the property in accordance with law of Shariah--- widows and daughters of predeceased son would get what they were entitled on the death of predeceased son, after opening of succession of father of the predeceased son---Purpose of enacting S.4 in Muslim Family Laws Ordinance, 1961 was to cater the need of grandchildren to remove their sufferings but this provision could not be interpreted in a manner affecting the shares of other descendants in the property in accordance with law of Shariah---Heirs of predeceased children, according to law of Shariah, would inherit what their father or mother would have inherited during their

life time on the opening of succession---Supreme Court did not find any error in the judgment under review---Petition was dismissed." Reference is also made to **Qazi Fazal Ahmed through legal heirs V. Riaz-ur-Rahim and others** (**PLD 2004 SC 77**). Wherein it is held; "**According to Muhammadan Law both the daughters could inherit 2/3 rd share in the land devolved on them, therefore, the remaining 1/3 rd share would be devolved on collaterals of Mehr who had become joint owners along with two daughters."** **Reference is also made to Mukhtar Ahmed Vs. Mst. Rasheeda Bibi and another** (**2003 SCMR 1664)**, wherein it is held; **"Plaintiff being the only daughter of the predeceased son would inherit ½ share from the property of her father while the remaining**

share of father of plaintiff (predeceased son) would go to other collateral---Supreme Court reduced the share of the plaintiff to the extent of ½ of the share of the father of the plaintiff." Guidance is also sought from **Mst. Tabassam Bibi Vs. Abdur Rashid Khan and 2 others (1999 CLC Lahore 1216**) wherein it is held; "**Children of predeceased son or daughter of propositus were entitled only to their shares, and the same could not be increased in any way."**

13. The whole process of succession depends on the fiction that Sabir Hussain was alive at the time of death of Mahroof-un-Nisa. In this event Mohammad Sabir will naturally inherit ½ share of his mother along with his brother (respondent) but he can pass on such of his estate to his daughters as is permissible under the Islamic Law

of inheritance. Petitioners being the surviving children they cannot get more than 2/3 of the estate of Sabir Hussain and the remaining 1/3 must revert to the collateral namely Sajjad Hussain respondent.

14. Thus while concurring with the finding of appellate Court I hold that petitioners can inherit only to the extent of Islamic share in the estate of their father Sabir Hussain notionally assessing that he was alive at the time of death of his mother the original propositus and that Sabir Hussain's death occurred only subsequent to the death of his mother. This means that Muhammad Sabir will inherit ½ share of his mother and that petitioners will inherit only 2/3 of the share of Mohammad Sabir. He had no son but only daughter. The remaining share will revert to his collateral/respondent. The petitioners have failed to prove their

claim through over whelming and reliable reason. The authorities produced by the petitioners are not applicable to the facts of the case. The finding of the appellate Court is neither illegal nor suffer from any irregularity or jurisdictional defect. The judgment is in accordance with law and the case has rightly been remanded to the trial Court.

15. Accordingly, for the reasons stated hereinabove, the revision petition being without any substance is hereby dismissed with no order as to cost.

Announced:
22.07.2014

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