

Judgment Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

IInd Appeal No. 27 of 2012

Appellants : Mst. Tabasum Muneer and Muhammad Fahad,
through Mr. Muhammad Javed Tanoli advocate.

Respondent No.1 : Asghar Hameed, called absent.

Respondent No.2 : Government of Pakistan, through National Saving
Officer, National Saving Center, called absent.

Respondent No.3 : Manager Muslim Commercial Bank Limited,
Maisam Plaza Branch, called absent.

Dates of hearing : 03.05.2017, 23.05.2017 and 01.07.2017.

J U D G M E N T

NADEEM AKHTAR, J. – Civil Suit No.1032/2007 was filed by the appellants against the respondents for declaration and mandatory and permanent injunction, which was dismissed by the learned trial Court vide judgment and decree dated 06.10.2009 and 13.10.2009, respectively. Civil Appeal No.222/2009 filed by the appellants against dismissal of their above Suit was also dismissed by the learned appellate Court vide judgment and decree dated 25.01.2012 and 03.02.2012, respectively. The above concurrent findings of the two Courts below have been impugned by the appellants through this second appeal.

2. The case of the appellants before the trial Court was that appellant No.1 was the widow and appellant No.2 was the real son of late Mr. Muneer Ahmed S/O late Mr. Muhammad Shafi (**'the deceased'**), and they were the only surviving legal heirs of the deceased ; respondent No.1 Asghar Hameed was the real brother of the deceased ; at the time of his death, the deceased was working in Saudi Arabian Airlines in Riyadh, Saudi Arabia, and was drawing a handsome salary ; the deceased used to send / transfer / remit substantial amounts from Saudi Arabia to Pakistan on regular basis for his family (the appellants) and for this purpose he had opened a joint bank account bearing No.130902010127957 at Karachi with his brother / respondent No.1 and another joint bank account bearing No.1021612249906 at Pak Patan along with his other brothers Tariq Mahmood and Maqbool Ahmed ; the above named brothers of the deceased never contributed any amount in any of the above

accounts and they were made joint account holders by the deceased only in order to facilitate the deceased and his family ; respondent No.1 had no source of income as he was jobless and the deceased used to support him by providing financial assistance to him ; from his income and savings, the deceased purchased Regular Income Certificates (**'the certificates'**) from National Saving Center / respondent No.2 ; although respondent No.1 had no interest or share in the certificates, his name was mentioned in the forms by the deceased only for the purpose of collecting profit etc. for the benefit of his family / appellants ; and, after the death of the deceased, the amounts in the above bank accounts and the amount invested in the certificates and the profit accrued thereon, all belonging to the deceased, were inherited by the appellants according to Shariah.

3. It was also the case of the appellants that the brothers of the deceased, including respondent No.1, became greedy and dishonest, and instead of handing over the above amounts to the appellants they started asserting their right thereon illegally in order to usurp the same to the exclusion of the appellants ; and, such illegal claim was made by them by claiming that they were the joint account and certificate holders. In this background the above Suit was filed by the appellants which was dismissed and appeal filed by them was also dismissed as noted above. It may be noted that respondent No.1 did not appear before the trial Court and the Suit proceeded against him ex-parte, and he also did not appear before the appellate Court to contest the appeal. The Suit and appeal also proceeded ex-parte against respondent No.3 / MCB. Only respondent No.2 / National Saving Center filed its written statement before the trial Court.

4. In their evidence, the appellants reiterated the claim made by them in the plaint and also produced relevant documents in support thereof through their attorney. It is important to note that the witness of the appellants was not cross-examined by any of the respondents, and as such the entire evidence produced by them remained unchallenged and un-rebutted. In paragraph 7 of its written statement, respondent No.2 / National Saving Center had categorically admitted that certificates were not only purchased by the deceased with his own funds and by issuing his own cheque, but upon maturity the same were also reinvested by him. Moreover, in the impugned judgment the learned trial Court had observed that it was an admitted position that certificates were purchased by the deceased. Despite this admitted position and un-rebutted evidence produced by the appellants, it was held by the learned trial Court that the

appellants had failed to prove their case, and in view of such finding, it was further held that respondent No.1 was legally entitled to collect the principal amount and profit of the certificates, and the other two brothers, whose names were mentioned in the certificates as nominees, will be entitled to receive the principal amount and profit after the death of respondent No.1. Similar finding was given by the learned trial Court in relation to the subject bank accounts that the appellants had failed to prove that the amounts lying therein belonged to the deceased. It was finally held by the learned trial Court that though the appellants were the undisputed legal heirs of the deceased, but they were not entitled to receive the amounts of the certificates as they were not named therein as nominees, and they had no right to claim the amounts lying in the subject bank accounts.

5. Respondents 2 and 3 were duly served, but they did not appear to contest this appeal. Notices were repeatedly issued to respondent No.1 through the learned Senior Civil Judge Pakpattan, who submitted reports that notice was pasted at least twice at his address. Notice was also published in Urdu daily 'Jang' (Multan edition). Despite all the above efforts, respondent No.1 chose to remain absent.

6. It was submitted by the learned counsel for the appellants that the un-rebutted evidence produced by the appellants was not considered or appreciated by the Courts below, which error on their part has resulted in grave miscarriage of justice. It was also submitted by him that the evidence produced by the appellants was sufficient to prove their case and by producing such convincing evidence, they had successfully discharged their burden. Without prejudice to his above submissions, he further submitted that the alleged nomination of the brothers of the deceased in respect of the certificates could not over ride the mandatory provisions of Islamic Law of Succession under which only the appellants, being the undisputed legal heirs of the deceased, were entitled to receive the entire principal amount and profit of the certificates. In support of this submission, he relied upon Malik Safdar Ali Khan and another V/S Public-at-Large and others, **2004 SCMR 1219**, and a Division Bench case of this Court viz. Mohammad Hanif Khan Afridi V/S Mst. Shakila Begum & others, **SBLR 2002 Sindh 468**.

7. Regarding the amounts lying in the bank accounts belonging to the deceased, wherein his brothers were joint account holders with instructions 'either or survivor', learned counsel relied upon Syed Shah Pir Mian Kazmi V/S

Mst. Nelofer (widow) and others, **PLD 2012 Peshawar 101**, wherein it was held that under the Islamic Law of Inheritance no legal heir of a deceased bank account holder could be deprived from receiving his share from the bank account of the deceased even if there is nomination in favour of some other person or there are instructions on record such as 'either or survivor'.

8. It was also contended by the learned counsel that the appellants had all along pleaded and had produced un-rebutted evidence that the certificates were purchased by the deceased from his own funds and amounts transferred / remitted from time to time in the subject bank accounts belonged exclusively to the deceased, and respondent No.1 and other two brothers were merely *benamidars* in respect of the above. It was urged that the evidence on this crucial point was misread by both the Courts below. In support of this submission, he relied upon (1) Muhammad Sajjad Hussain V/S Muhammad Anwar Hussain, **1991 SCMR 7013**, (2) Ch. Habibullah and others V/S Sheikhpura Central Co-op Bank Ltd., **NLR 1987 SCJ 229**, (3) Mst. Muhammadi Begum V/S S. Salahuddin Ahmed, **PLD 1992 Karachi 86**, (4) Miss Qamar Ali V/S Syed Nadir Ali, etc., **NLR 1993 CLJ 63 (Karachi)**, and (5) Mst. Zohra Begum and 6 others V/S Muhammad Ismail, **1995 CLC 242**.

9. It is a matter of record that the Suit proceeded ex-parte against respondent No.1 who also failed to cross-examine the appellants' witness. Thus, the claim of the appellants in respect of the amounts lying in the bank accounts of the deceased ought to have been accepted by the learned Courts below. It is also a matter of record that respondent No.2 / National Saving Center had categorically admitted in paragraph 7 of its written statement that certificates were not only purchased by the deceased with his own funds and by issuing his own cheque, but upon maturity the same were also reinvested by him. Thus, it was an admitted position on record that the certificates were purchased by the deceased from his own funds, and this admitted position was specifically noted in the impugned judgment by the learned trial Court. In view of this admitted position and un-rebutted evidence produced by the appellants, the claim of the appellants ought to have been accepted by the learned trial Court as they had successfully discharged their burden and there was no material on record to rebut their evidence, especially when it was not disputed that both the appellants were the only surviving legal heirs of the deceased.

10. In my humble opinion, the law laid down by the Hon'ble Supreme Court in Malik Safdar Ali Khan (supra) and by a learned Division Bench of this Court

in Muhammad Hanif Khan Afridi (supra), cited and relied upon by learned counsel for the appellants, is fully applicable to the facts and circumstances of the present case. In Malik Safdar Ali Khan (supra) it was held by the Hon'ble Supreme Court that nomination in the form of National Savings Certificates could not override the provisions of Islamic Law of Succession, whereunder only legal heirs of deceased purchaser would be entitled to receive property left by the deceased. Likewise, in Muhammad Hanif Khan Afridi (supra) it was held by a learned Division Bench of this Court that nomination by deceased merely confers a right to collect or receive money, but would not operate either as gift or as a will, and thus would not deprive other legal heirs of nominator / deceased who are entitled thereto under the Islamic Law of Succession, and nomination in no way can be held to pass title to nominee nor would such nomination give right to change the Islamic Law of Succession.

11. As held by the Hon'ble Supreme Court in Muhammad Feroze and others V/S Muhammad Jammal Ali, **2006 SCMR 1304**, jurisdiction of High Court is limited in second appeal to the extent of interference on a question of law and not on facts. I am of the view that both the learned Courts below have failed to appreciate the above important question of law involved in this matter. Therefore, the impugned judgments and decrees cannot be allowed to remain in the field.

12. As a result of the above discussion, the impugned judgments and decrees are set aside and the present appeal is allowed with costs throughout. Accordingly, the Suit filed by the appellants is decreed as prayed.

J U D G E