

**2016 M L D 266**

**[Sindh]**

**Before Muhammad Shafi Siddiqui, J**

**Syed SHABI-UL-HASSAN KHUSRO---Plaintiff**

**Versus**

**ASAD MUSTAFA and 6 others---Defendants**

Suit No.1108 of 2014, decided on 16th October, 2014.

**(a) Muslim Family Laws Ordinance (VIII of 1961)---**

---S.4---Civil Procedure Code (V of 1908), O.VII, R.11---Succession---Son of predeceased sister of deceased---Inheritance, right of---Scope---Categories of legal heirs--  
--Plaint, rejection of---Provisions of S. 4 of Muslim Family Laws Ordinance, 1961 were applicable to a specific category of class of legal heirs i. e. sons and daughters of deceased which could not be applied to the son of predeceased sister of deceased---Sons and daughters of predeceased sister would come in the third category of legal heirs i.e. distant kindred---Shares out of assets at first were to be consumed by the sharers and left over to be consumed by the residuaries and if there were no residuaries then same had to revert back to the sharers---If sharers and residuaries were available then distant kindred were not entitled to share under Islamic Law---Both the sharers and residuaries were available in the present case and there was no question of inheritance by distant kindred--  
-Plaintiff being in the third category of legal heirs was not entitled to inherit share from the assets left by the deceased in presence of sharers and residuaries---Plaint could not be rejected in piecemeal---Application for rejection of plaint was dismissed in circumstances.

Barkat Bibi Ghuman Bibi's case 2005 MLD 280 ref.

2007 MLD 800 rel.

**(b) Islamic law---**

---Inheritance---Categories of legal heirs---Categories of legal heirs were sharer, residuaries and distant kindred.

Yousuf Iqbal for Plaintiff.

Agha Zafar and Hummal Zuberi for Defendants.

Date of hearing: 16th October, 2014.

**ORDER**

**MUHAMMAD SHAFI SIDDIQUI, J.**---The plaintiff has filed this suit for administration, partition, declaration, permanent injunction, cancellation of documents and compensation. The case of the plaintiff is two folded. Substantially the plaintiff has claimed his share in respect of the property left behind by the deceased Hassan Mustafa. The plaintiff claims to be son of pre-deceased sister of deceased Hassan Mustafa. The plaintiff's mother Mst. Jamal Fatima died on 31.5.1979. It is the case of the plaintiff that since he is the son of pre-deceased sister of deceased Hassan Mustafa therefore, under Mahomedan Law being legal heirs will be entitled for the share as inherited by other brothers and sisters of deceased Hassan Mustafa. Learned Counsel has relied upon Section 4 of the Muslim Family Laws Ordinance, 1961 and submits that considering analogy in section 4 supra the sons and daughter of predeceased sisters are equally eligible for share.

Learned Counsel in the alternate relied upon Mahomedan Law and submits that since he is also legal heir of the deceased Hassan Mustafa therefore, under the law he is also entitled to claim share under this score. Learned counsel for the plaintiff submits that another aspect of the case as pleaded by him in para-7 is that some of the property is inherited by deceased Ahmed Mustafa, another brother of Hassan Mustafa. It is claimed that before his/Ahmed Mustafa's sad demise on 10.08.2013, he gifted his share/property

to the plaintiff. It is further pointed out that even Ahmed Mustafa died issueless and as such at the time of his sad demise he was survived by two brothers namely Asad Mustafa and Mustahsan Mustafa and one sister namely Mobina Mustafa but that is of no avail since he had gifted his property. He submits that on this score as well the plaintiff claims his right arising out of such oral gift. Learned Counsel has relied upon the judgment in the case of Barkat Bibi Ghuman Bibi reported in 2005 MLD 280.

On the other hand learned Counsel for the defendant submits that the suit is not maintainable in view of the fact that the plaintiff though is a legal heir but he has no locus standi to inherit property and/or assets left behind by deceased Hassan Mustafa. Learned Counsel submits that Section 4 of the Muslim Family Laws Ordinance, 1961 is not applicable to the case of the plaintiff as it applied to the predeceased sons and daughters of the deceased. Learned Counsel further added that plaintiff as being legal heir may have relationship and there is no cavil that the plaintiff is a legal heir but he comes in 3rd category of legal heirs. He submits that there are three categories of the legal heirs i.e. (i) Sharers, (ii) Residuaries and (iii) Distant Kindred. He submits that since the plaintiff is son of predeceased sister, therefore, he does not enjoy and qualify in the first two categories of legal heirs and comes within the ambit of distant kindred. He submits that under the Mahomedan Law the first entitlement and eligibility to claim inheritance is with the "Sharers" and after the consumption of their respective shares, the left over is consumed by the residuaries and in case no residuaries are available then it revert back to the Sharers. He argued that in this scenario since both the first two categories are available therefore, no question of the claim of 3rd category arises. Learned Counsel submits that since the plaintiff has no locus standi to file this suit on this score therefore, the suit is liable to be dismissed.

As far as the second frame of the claim i.e. Ahmed Mustafa having gifted the property is concerned, learned Counsel submits that there are no witnesses to this effect and until and unless there is a registered gift, mutation could not be effected. Learned Counsel submits that neither such gift is accompanied by handing over and taking over of possession on which account the gift cannot be considered to be completed and hence on this score plaintiff cannot succeed.

I have heard the arguments of both the learned Counsel and perused the record.

As far as provisions of Section 4 of Muslim Family Laws Ordinance, 1961 is concerned, it is quite clear that it relates to a specific category of class of legal heirs i.e. sons and daughters of deceased which is not the case here. Since the plaintiff claims to be son of predeceased sister of deceased and quite fairly learned Counsel submits that with all due diligence that he made the provisions of Section 4 of the Muslim Family Laws Ordinance, 1961 could not be applied. However considering another limb of the plaintiff's case as to whether any analogy of such principle of Section 4 of Muslim Family Laws Ordinance, 1961 could be applied, I am afraid that it is the wisdom of the legislature, who incorporated the predeceased sons and daughter. Had the words of legal heirs been incorporated such as "predeceased legal heirs" than the plaintiff's case could be looked into, however the plaintiff's case is confined to such that relates to the sons and daughters of predeceased sister which is not the scope of such provision and since purposely the words "sons and daughters" is used in section ibid and its horizon cannot be extended to predeceased sisters.

Coming to the second limb of the arguments that he being legal heir as the parties admittedly belong to Hanfi Fiqqah, there are three categories of legal heirs defined under Mahomedan Law i.e. (i) Sharer, (ii) Residuaries and (ii) distant Kindred. Although learned counsel for the plaintiff maintained that he is sharer, however, the perusal of law reveals that sons and daughters of predeceased sister come in the 3rd category i.e. distant Kindred and as such at first shares out of assets was to be consumed by the Sharers and left over to be consumed by the residuaries and if there are no residuaires then it had to revert back to the sharers. If the sharers and residuaries are available the distant kindred are not entitled for share under Mahomedan Law. I am afraid that since in the present case both the sharers and residuaries are available therefore there is no question of inheritance by distant kindred. Same issue came up before the learned single Judge of this Court reported in 2007 MLD 800 in the case of Qamarul Bashir v. Muhammad Ghous Khan and the operative part of the judgment is under:--

"I have considered the submissions of the learned counsel and have examined the law, on the subject. So far section 4 of the Ordinance is concerned, the same being on the statute book at the time of filing of this suit has no application to the case because it only provides for per stripes share on opening of succession to the

children of deceased son and daughter of the propositus. As is apparent, this section applies to the relations who are specifically mentioned in it and to no other. Plaintiff is not the relation mentioned in this section. As regards the question of analogy, it may be noted that the matter of inheritance among Muslims is strictly governed by law and its provisions are well-defined leaving no ambiguity about the persons who are entitled to inheritance in the estate of the deceased. In the present case the deceased has left him surviving a full sister and also two sons of predeceased brother. In terms of the table of sharers provided in the Mulla's Mohammadan Law, a full sister is shown to be 1/2 sharer while table of residuaries include full brother son. The son of predeceased sister is not mentioned in the table of sharer nor in the table of residuaries. The children of pre-deceased sister are included in subsection (2) of section 68 of Mulla's Mohammadan Law, which lays the list of distant kindreds. The distant kindred only inherits when there are no residuaries. Once it established that the deceased has left as his heirs the sharers and residuaries, there will be no occasion for inheritance being claimed from the estate of the deceased by a distant kindred. Plaintiff admittedly being son of pre-deceased sister is a distant kindred and in the presence of sharer the residuaries will not inherit from the estate of deceased when relationship of the plaintiff with deceased is admitted and his place in the matter of inheritance is determined, such place by mean of analogy to section 4 of the Ordinance cannot be changed as he will remain what he is. The suit is therefore dismissed."

In view of the above facts and circumstances, I am of the view that the plaintiff being in the 3rd category of the legal heirs is not entitled to inherit share from the assets left by the deceased Hassan Mustafa in presence of sharers and residuaries. However considering the second aspect of his case that he was gifted part of the property owned by Ahmed Mustafa for which he did not produce any witness or affidavit and as such in absence of such facts being proved and in the absence of any witness, it would be far fetched idea to presume that such gift was made.

Be that as it may, these observations are only tentative and would not affect the case of the plaintiff, if they proceed with their case to the extent of this issue in evidence. However, as far as this interlocutory application is concerned, the plaintiff has not made out a prima facie case, accordingly the application bearing CMA No.8906/14 is dismissed.

Since the plaint cannot be rejected in piecemeal therefore, the application under Order VII, Rule 11, C.P.C. is also dismissed, however, now the case of the plaintiff is confined only to the extent of his claim as alleged in para 7 of the plaint. Both the learned counsel agree that they would be filing consent issues on the next date so that the evidence could be recorded in this case.

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Order accordingly.