

ORDER SHEET
THE HIGH COURT OF SINDH AT KARACHI
M.A. No. 17 of 2021

Date: Order with signature(s) of the Judge(s)

- 1.For hearing of CMA No.7764/2022
- 2.For hearing of CMA No.1511/2022
- 3.For hearing of main case

27.03.2023

Appellant Mst. Bilquies Bano present in person.
Ms. Sania Malik, Advocate for respondent No. 2 to 6.

Pre-deceased daughter of Muhammad Ashfaq Malik is claiming share as a residuary from property of Abdul Qayyum who died after seven months of the death of Muhammad Ashfaq Malik. By order dated 24.10.2022 being full sharer Mst. Bilquies Bano was declared as entitled to receive the amount, however, during pendency of lis Mst. Khursheed Bano sister of deceased passed away though she was also entitled to receive 2 full share but due to this lis she failed to receive during her life time. With regard to issue of residue category, whether the pre-deceased daughter is entitled to receive the share, it would be conducive to refer the judgment of Apex Court reported as 2022 SCMR 1665 particularly para-12, 13 & 14 which are being relevant are reproduced hereunder:-

12. Now the only question that remains to be decided is whether Mst. Roshnae would also inherit the remaining half share as a residuary or would the same be inherited by the plaintiffs/respondents who also claim to be residuaries of Abdul Ghafoor as descendants of the true grandfather how-high-so-ever. In this regard, we have gone through the case law cited by the learned counsel for the parties and have perused para 65 of Principles of Mohammadan Law' by D.F. Mullah and the Table of Residuaries annexed thereto, as relied upon by both the parties. In our view, Mst. Roshnae would also inherit the remaining 1/2 share in the estate of Abdul Ghafoor as a residuary because a full sister is placed higher in the Table of Residuaries at serial No.6, whereas, descendants of the true grandfather how-high-so-ever are placed at serial No. 13 and below and thus, would not be entitled to inherit after being excluded by the full sister placed higher to them. For convenience, the Table of Residuaries annexed to Para 65 has been reproduced below:

TABLE OF RESIDUARIES IN ORDER OF SUCCESSION

Sunni Law

1. DESCENDANTS:

(1) SON

Daughter takes as a residuary with the son, the son taking a double portion.

(2) SON'S SON h.l.s the nearer in degree excluding the more remote. Two or more son's sons inherit in equal shares. Son's daughter h.l.s takes a residuary with an equal son's son.....

II. ASCENDANTS:

(3) FATHER.

(4) TRUE GRANDFATHER h.h.s. the nearer in degree excluding the more remote.

III. DESCENDANTS OF FATHER

(5) FULL BROTHER

FULL SISTER takes as a residuary with full brother, the brother taking a double portion.

(6) FULL SISTER In default of full brother and the order residuaries about named, the full sister takes the residue if any.....

(7) CONANGUINE BROTHERS

CONSANGUINE SISTER. Takes a residuary with consanguine brother, the brother, taking a double portion.

(8) CONSANGUINE SISTER. In default of consanguine brother and the other residuaries about-named, the consanguine sister takes the residue.....

(9) FULL BROTHER'S SON

(10) CONSANGUINE BROTHER'S SON

(11) FULL BROTHER'S SON'S SON

(12) CONSANGUINE BROTHER'S SON.

Then come remoter male descendants of No.11 and No.12, that is the son of No.11, then the son of No.12, then the son's son of No.11, then the son's son of No.12 and so on in like order.

IV. DESCENDANTS OF TRUE GRANDFATHER h.h.s

(13) FULL PATERNAL UNCLE.

(14) CONSANGUINE PATERNAL UNCLE.

(15) FULL PATERNAL UNCLE'S SON

(16) CONSANGUINE PATERNAL UNCLE'S SON

(17) FULL PATERNAL UNCLE'S SON'S SON

(18) CONSANGUINE PATERNAL UNCLE'S SON'S SON

Then come remoter male descendants of Nos. 17 and 18, in like order and manner as descendants of Nos. 11 and 12 MALE DESCENDANTS OF MORE REMOTE TRUE GRANDFATHERS in like order and manner as the deceased's paternal uncles and their sons and son's sons"

13. After minutely examining the Table of Residuaries, the submission of Mr. Porsche, learned ASC for the plaintiffs/respondents that since the sister is a sharer in the estate of Abdul Ghafoor, therefore, she would not inherit as a residuary

, does not appeal to us for the reason that the Table of Residuarities at serial No.6 provides that in default of a MI brother and the other residuarities above named, the full sister takes the residuary if any ...'. The words above named' are of great significance and negate the submission of the learned counsel by entitling a full sister to inherit as a residuary in absence of the residuarities detailed in serial No .1 to serial No.5, meaning thereby, that the residuarities placed below serial No. 6 would not inherit anything in the presence of full sister. Admittedly, the plaintiffs/respondents are placed much below i.e. under sub-heading No. IV as DESCENDANTS OF TRUE GRANDFATHER h.l.s' and therefore, would be excluded from inheriting the property as residuarities by the full sister which is placed above them. This was the view taken by this Court in a judgment delivered by a two-member Bench in Saadullah's case (supra). On the other hand, the plaintiffs/ respondents rely on Wares All's case (supra) which was also rendered by a two-member Bench of this Court and wherein seemingly an opposite view from Saadullah's case was taken. However, notably, the judgment in Saadullah's case was prior in time and the view rendered by the learned Bench in Wails A/is case had neither taken into account the judgment rendered in Saadullah's case and - nor distinguished it. Furthermore, the view taken by this Court in Saadullah's case has also been followed by this Court in its recent judgment in Muhammad Sharit's case (supra).

14, Therefore, in view of the above, Mid. Roshnae was entitled to inherit the entire estate of Abdul Ohafoor, being his full sister. Notably, the Amendment Act of 1964 was enacted on 15.4.1964 and came into force at once, therefore pursuant to the Amendment Act of 1964 through which the Act of 1962 was made applicable to cases even where the full owner had died prior to the commencement of the Act of 1962, the limited estate held by Mat. Roshnae was terminated and she inherited the complete estate of Abdul Ohafoor in her personal capacity as per Muslim Personal Law Shariah). Therefore, the gift made by Mst. Roshnae to the appellants on 28.4.1964, i.e. after the enactment of the Amendment Act of 1964, was valid as she was no longer holding the estate as a limited owner but had inherited the entire suit property according to Shariah. It is a settled proposition of law that at the time the inheritance of a deceased Muslim opens, all the entitled legal heirs become owners to the extent of their shares there and then, therefore, sanction of mutation, issuance of succession certificate etc. are procedural matters regulated by procedural laws just to make records and for fiscal purposes. Reference is made to the cases of Khan Muhammad through LRs and Others vs. Mst. Khatoon Bibi and Others (2017 SCMR 1476) and Mahmood Shah vs. Khalid Hussain Shah (2015 SCMR 869). Therefore, Mst. Roshnae was competent to gift the entire suit property to the appellants and consequently, the gift would be valid."

Learned counsel for the respondents while relying upon Table of residuarities in succession of Sunni Law contends that Judgment of Apex Court is not according to Mohammadan Law, however, she admits that in view of above judgment pre-deceased daughter is not entitled to receive the share in view of paras as referred to above.

Accordingly, pre-deceased daughter of Muhammad Ashfaq Malik has no right in the share left by Abdul Qayyum Malik hence both sisters were entitled to receive complete shares as sharer(s) as well as residuary. Accordingly this appeal is allowed, impugned order is set aside. Let the amount shall be paid to the appellant Bilquies Bano and with regard to Mst. Khursheed Bano, her share shall be distributed in view of the above referred Judgment and accordingly present appellant is also entitled to receive her share as well as residuary and pre-deceased daughter of Muhammad Ashfaq will not be entitled to receive share of Tarka from the share of Mst. Khursheed Bano. Appeal is disposed of. Amount shall be distributed within three days by the district Court.

JUDGE

Aadil Arab