

ORDER SHEET
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD

IInd Appeal No. 13 of 2011

Date of Hearing : 3.8.2015

Date of Announcement : 7.9.2015

Appellants : Mst. Sughra Begum and others
Through Mr. Naimatullah Soomro, Advocate

Respondent Nos. 1to3 : Mst. Akbari Begum and others
Through Mr. Hakim Ali Siddiqi, Advocate

Respondent Nos.4&5 : Naseem Khan and another
Through Mr. Anwar Baig Mughal, Advocate

O R D E R

NAZAR AKBAR, J.- This IInd Appeal is directed against the concurrent findings of the Court of IInd Senior Civil Judge, Hyderabad whereby F.C. Suit No. 304 of 1997 filed by respondent Nos. 1 to 3 was decreed by judgment dated 29.05.2006 and 1st Civil Appeal No. 122 of 2006 against the said decree was dismissed by VIIth Additional District Judge, Hyderabad by judgment dated 30.09.2010.

2. Briefly stated the facts of the case are that respondent Nos. 1 to 3 filed Suit for Declaration and Partition of the properties of deceased Allah Noor Khan son of Chand Khan i.e. House No. 169, Block-E, Unit No.8, Latifabad, Hyderabad (herein-after referred to as “the suit property”) against the appellant and also claimed share in the rental income from the suit property to the extent of their share as Residuary. The suit property was originally owned by late Allah Noor Khan son of Chand Khan who happened to be real father of Mst. Sughra Begum / appellant No.1 and uncle of deceased Abdul Razaq son of

Noor Muhammad Khan. Appellant No.1 is also first wife of deceased Abdul Razaq son of Noor Muhammad Khan.

3. The respondents / plaintiffs Mst. Akbari Begum is second wife of deceased Abdul Razaq and Nadeem Khan and Pervaiz Khan are also his sons from his marriage to her and they claimed that Mst. Sughra Begum (appellant No.1) was not entitled to inherit the entire suit property left by deceased Allah Noor Khan, her father since she was sole daughter of deceased Allah Noor Khan. According to Muhammadan Law, the respondents contended, Mst.Sughra Begum / appellant No.1 being sole daughter was entitled to only 1/2 (50 paisa) share in the estate of her father Allah Noor Khan and late Abdul Razaq was entitled to remaining 50 paisa share as nephew (son of Noor Muhammad Khan brother of deceased Allah Noor Khan) being Residuary as no other male member was available amongst the Sharers / Residuaries of late Allah Noor Khan. The respondents besides the share in the suit property through Abdul Razaq, also claimed share in the rental income of the suit property which at the time of filing of suit came to Rs.17,136/-.

4. The appellant, Mst. Sughra Begum, her son and three daughters filed written statement denying the claim of respondents through deceased Abdul Razaq on the ground that Abdul Razaq was son of pre-deceased brother of late Allah Noor Khan who died in 1947 or in any case admittedly much before the death of Allah Noor Khan and therefore, Abdul Razaq son of Noor Muhammad Khan was not entitled to claim even residue. They further claimed that Abdul Razaq died in 1984. He was also husband of respondent No.1 (respondent No.1 was second wife of Abdul Razaq) and father of respondent Nos. 2 and 3 / plaintiff from his wedlock with Akbari Begum (respondent No.1) but during his life time he never claimed share by way of inheritance in the estate of deceased Allah Noor Khan father of Mst. Sughra Begum (appellant No.1) because she

was his first wife and other defendants were his children from the wedlock with Sughra Begum. The Trial Court framed the following issues:-

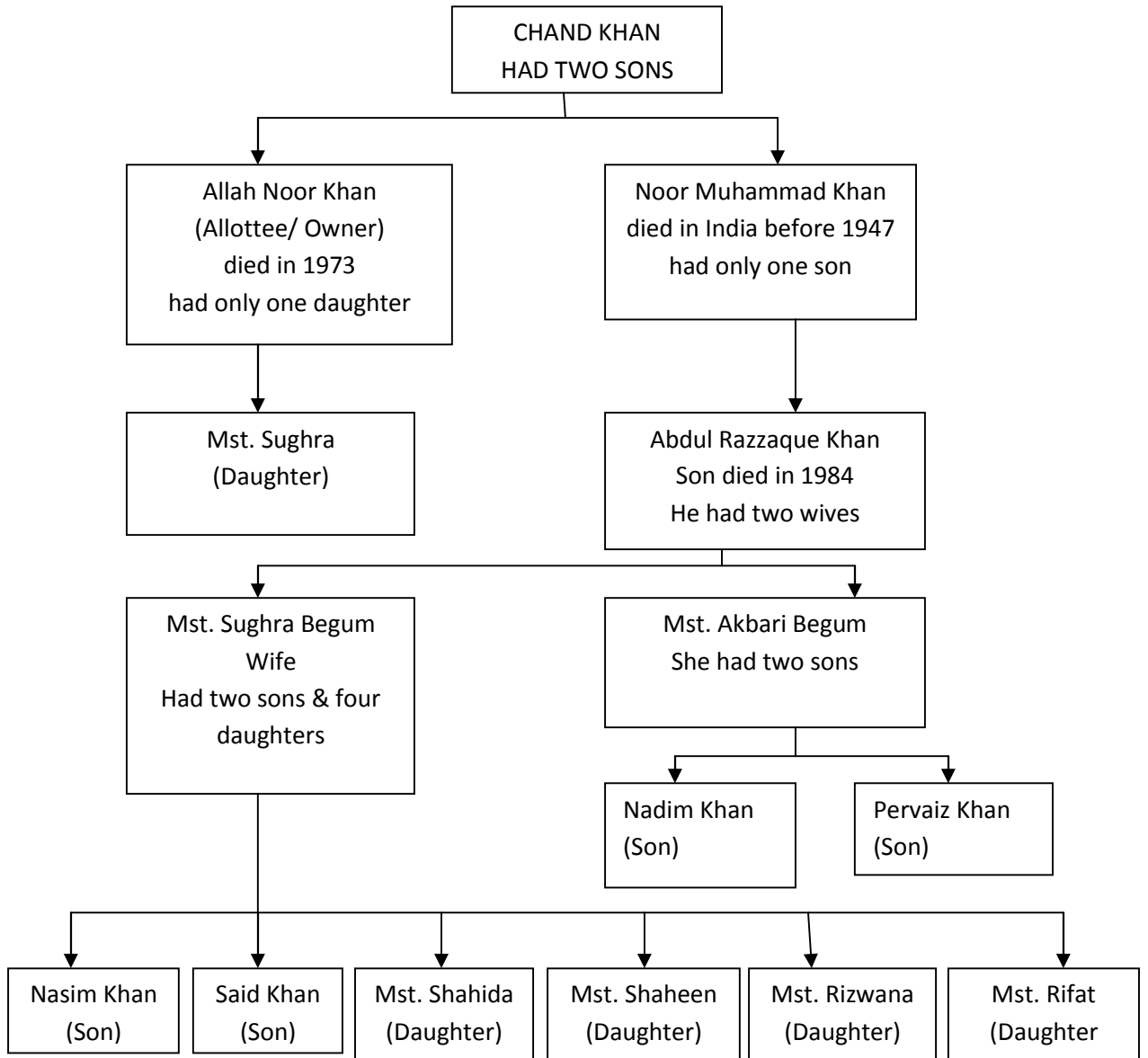
1. Whether the suit is not maintainable in law?
2. Whether the plaintiffs are co-sharers in the suit house No. 169 Block "E" Unit No.8, Latifabad, Hyderabad and in joint possession of the same?
3. Whether the mutation entry made by the defendant No.8 in his official record is illegal, *mala fide* and without lawful authority?
4. Whether the plaintiffs are entitled to get share in the rent or mesne profit of the suit property from the defendant No.1?
5. Whether the plaintiffs are entitled to get the suit property partitioned and separate possession in the suit house by metes and bounds.
6. Whether the plaintiffs have cause of action to bring the present suit?
7. Whether the plaintiffs are entitled to relief as prayed for?
8. What should the decree be?

The parties led evidence in support of their respective claims. The suit was decreed. The appellant preferred Civil Appeal which was dismissed, therefore the appellants have filed the instant Second Appeal.

5. I have heard both the learned counsel and both have conceded that the only law points for determination in this IInd Appeal are that whether the learned lower courts have failed to appreciate that according to Muhammadan Law Abdul Razaq who happened to be son of pre-deceased real brother of Allah Noor Khan was not entitled to claim residue of the estate of Allah Noor Khan solely on the ground that said Allah Noor Khan was survived by sole female legal heir, Mst. Sughra Begum (daughter). And the question of "Radd" (return of residue to the sole female legal heir of deceased) was not properly appreciated in its true and correct perspective.

6. The learned counsel for the appellant to elaborate his contention has referred to the family tree of Chand Khan who was survived by his two sons namely Allah Noor Khan and Noor Muhammad Khan. The family tree was

given in the written statement by the appellants and available at page 101. It has not been disputed. The dates of deaths of relevant persons are also mentioned in front of their names. It is relevant to reproduce the same for the convenience and to appreciate the relations between the parties with the deceased Abdul Razaq and the estate of deceased Allah Noor Khan.



7. The main contention raised by learned counsel for the appellants was that the respondents Akbari Begum, Nadeem Khan and Pervaiz Khan are claiming share in the estate of Allah Noor Khan through Abdul Razaq who happened to be son of pre-deceased brother Noor Muhammad Khan of deceased Allah Noor Khan. He contends that since Noor Muhammad Khan father of Abdul Razaq had died in the life time of Allah Noor Khan therefore

Noor Muhammad Khan father of Abdul Razaq was not entitled to residue being deceased at the time of opening of succession of Allah Noor Khan after satisfying the share in his estate in favour of his sole daughter, Sughra Begum (appellant No.1). She being daughter, the remaining estate, which was equal to the share acquired by Sughra Begum, was reverted back to Sughra Begum as no residuary was in existence at the time of death of her father. The counsel for the appellant has also referred to **para 56** of Muhammadan Law by Mullah which defines “vested inheritance” and has contended that the inheritance is to be decided at each death meaning thereby that if the heir dies before distribution from the estate on the death of his ancestor, the undistributed share from the inheritance shall be vested in the heir of the person who died subsequently will pass to such persons as are from his heirs at the time of his death. Learned counsel for the appellant has relied upon only on the case reported as 2012 MLD 1308 Elahi Bakhsh and others v. Ahmad Bakhsh and others.

8. The counsel for the respondents contends that the plaintiffs being wife and sons of Abdul Razaq who was nephew of Allah Noor Khan have a right in the estate of deceased Allah Noor Khan because according to them their father Abdul Razaq who died subsequent to the death of Allah Noor Khan was entitled to claim residue as the sole surviving nephew (brother’s son). Learned counsel for the respondents has relied on the following case law:-

- (i) 2005 CLC 628 Mst. Khurshid Begum v. Muhammad Ashraf
- (ii) 2007 YLR 2240 Inayat and 9 others v. Muhammad Yousaf & 5 others
- (iii) PLD 2002 SC 741 Ibrahim and 4 others v. Rehmat Ali and 6 others
- (iv) 2003 SCMR 1664 Mukhtar Ahmad v. Mst. Rasheeda Bibi

9. The careful examination of the provisions of **para 56** and **para 66** of the Muhammadan Law by D.F. Mulla shows that the courts below in their judgments have not examined the same. Admittedly Abdul Razaq's father Noor Muhammad Khan died in 1947 or even before and therefore it cannot be said that at the time of death of Allah Noor Khan in 1973 he was one of the heirs of Allah Noor Khan as Residuary. The respondents are claiming through the said deceased Abdul Razaq, who was not entitled to inherit any share as residue in the estate of Allah Noor Khan through his father because his father was not amongst the sharers / Residues of Allah Noor Khan in 1973. Therefore by operation of **Para 56** of Muhammadan Law, the nephew being son of pre-deceased brother cannot claim inheritance even as vested inheritance since the father of Abdul Razaq, the real brother of late Allah Noor Khan was not alive at the time of opening of succession. Thus there was no Residuary. It was not the case of passing of inheritance of undistributed share / residue of deceased Noor Muhammad in the estate of Allah Noor to Abdul Razaq and on the death of Abdul Razaq to his heirs which included respondents. Thus the residue reverted to the sharer in proportion to her share. Sughra Begum (appellant No.1) being sole legal heir was entitled to half of the estate of the deceased Allah Noor Khan as sharer and the remaining half which was to be treated as residue also devolved on her by operation of **para-66** of Muhammadan Law by D.F. Mulla

10. The contention of learned counsel for the appellant also appears to be in line with the observation of Lahore High Court in the case reported in **2005 CLC 628** relied upon by the counsel for the respondents and the relevant portion from the said judgment is at page 632 side note B is reproduced below:-

“The respondents earlier to termination of estate by marriage or death of the petitioner by operation of law, could not file any suit asserting their rights to be land held by Allah Rakha. On termination of limited interest of the petitioner, half of the estate of Allah Rakha, automatically reverted to the collaterals, out of whom, Lal Din was nearest being his real brother and was alive

at the time of death of said owner. Through this reversion to Lal Din and on his death, transfer through inheritance in favour of the respondents, they became co-sharers along with petitioner hence, the suit by the co-sharer could not be held to be barred by limitation”. (Emphasis provided)

The plaintiffs case in the citation 2005 CLC 628 was accepted by the High Court only on the ground that the plaintiffs who filed the suit were claiming through their father who was alive at the time of death of the deceased owner. In the case in hand, the respondents are claiming through Noor Muhammad Khan’s son Abdul Razaq and Noor Muhammad Khan was admittedly not alive at the time of death of the owner of the property in question i.e. Allah Noor Khan.

11. Amongst the case laws relied upon by the Counsel for the respondents, the case reported in 2005 CLC 628 was against the respondents as discussed above was not relevant in the given facts of the present case since the issue of inheritance involved in the cited case was in respect of a propositus who was issueless whereas in the case in hand the deceased was not issueless. The citation from Supreme Court i.e. 2003 SCMR 1664 is only in respect of Section 4 of Muslim Family Law Ordinance 1961 which is not subject matter of the discussion in the case in hand and the last citation PLD 2002 S.C 741 is also distinguished since the issue in the present proceedings i.e. question of inheritance by nephew whose own father had died before the death of his uncle who was survived by only female heir and the question of Radd / Return. These questions were not touched by the Honourable Court in the citation relied upon by the counsel.

12. In view of the above discussion, I hold that the two courts below passed judgments and decrees in violation of law of inheritance as explained in **paras 56 and 66** of the principles of Muhammadan Law by D.F. Mulla.

Consequently, this second appeal is allowed. The judgments and decrees of courts below in F.C. Suit No. 304 of 1997 and in C.A. No. 122 of 2006 being contrary to law are set-aside and the suit of the respondents stands dismissed. The parties are left to bear their own cost.

JUDGE

*Karar/-