

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
SMA NO.11 / 2015

Date	Order with signature of Judge
------	-------------------------------

For hearing of Nazir's report dated 14.3.2017 and objections by the objectors.
(Attention is respectfully pointed out towards order dated 22.5.2017).

23.10.2017.

Mr. Muhammad Ishaque Memon Advocate for Petitioner.
Mr. Qamar Riaz Virk Advocate for Objector.

This matter has been listed on Nazir report dated 14.3.2017 as well as objections on the said report filed by the objectors. Nazir in his report has submitted that the propert(ies) of the deceased on directions of the Court from time to time, have been disposed of and the amount so received is lying with him. However, according to the Nazir the legal heirs at serial No. 2, 3 and 5 of the Memo of Petition are not entitled to any share as they are predeceased brothers and sisters of the deceased. At this report objections have been filed by the objectors.

Learned Counsel for the Petitioner submits that though instant Succession Petition was jointly filed by the legal heirs so stated in the Memo of Petition which include legal heirs at serial No. 2, 3 & 5 who are children of the predeceased brothers and sisters of deceased Khawaja Rashidullah Khan; however, as per Muhammadan Law and Sharia these predeceased brothers and sisters were not entitled for any inheritance in the share of their deceased brother, and therefore, their legal heirs are also not entitled for any share.

On the other hand, Learned Counsel for the Objectors i.e. legal heirs at serial No. 2, 3 and 5 of this Succession Petition submits that in view of Section 4 of the Muslim Family Law Ordinance, 1961 sons and

daughters of the predeceased parents are entitled for share of inheritance in their grandfather's and mother's property, therefore, the same rationale may be applied and the share be released to the legal heirs of predeceased brothers and sisters.

I have heard both the learned Counsel and perused the record. Nazir report dated 14.3.2017 reads as under:-

"With profound respect I have the honour to state the in compliance of Honourable Court's above order, the undersigned collected amount of Rs.6,31,39,694/- (Six Crore Thirty one Lac thirty Nine Thousand Six Hundred and Ninety Four Only) and the same was deposited in National Bank High Court Branch Karachi vide L.O No.4116.

It is pertinent to mention here that the Honourable Court directed the undersigned that:

"Nazir would be entitled to receive the amount from the concerned banks as well ensure that cash deposits, fixed deposit deals and shares are distributed amongst the legal heirs. Needless to mention that Nazir shall, with consent of the parties, dispose of the shares left by deceased. Nazir, with consent of the parties would be competent to clear all outstanding dues of the deceased, such statement shall be filed before him."

In compliance of the said directions the undersigned collected all the amounts of the properties and enquired about the legal heirs and it was found that the legal heirs mentioned at Serial No.02,03 and 05 are not entitled to the share as they are pre-deceased as the date of death is also mentioned in the Complaint of the SMA. Furthermore, the Advocate for Petitioner also submitted copy of death certificates, which transpires date of deaths of legal heirs namely Khawaja Saeedullah (08.08.1993), Khwaja Waheedullah (04.10.1989) and Mst. Khursheed Jehan (28.05.1999).

Therefore, the matter is being placed before the honourable Court for kind perusal and further orders."

From perusal of the aforesaid report, it appears that in compliance of the court's order the properties in question have been sold including the shares in the name of deceased Khawaja Rashidullah. Now the amount is lying with the Nazir for disbursement and according to the Nazir the legal heirs at serial No. 2, 3 & 5 are not entitled for any share as they had predeceased their brother Khawaja Rashidullah.

Though the Counsel for the Objectors has referred to Section 4 of the Muslim Family Law Ordinance, 1961 however, apparently the said Section does not apply to the case of predeceased brothers and sisters. It only caters for the share of predeceased sons and daughters of a deceased. More so in this case the deceased Khwaja Rashidullah was survived by as many as two brothers and three sisters excluding the predeceased sisters and brothers at serial No. 2, 3 and 5 of the petition and therefore, the predeceased brothers and sisters would not fall under the category of sharers and or residuaries but under Distant Kindred. In such circumstances the assets of the deceased are required to be distributed amongst the brothers and sisters who survived deceased Khawaja Rashidullah and if anything is left for distribution, only then it can go to the Distant Kindred. In this matter since the deceased is survived by brothers and sisters, resultantly nothing would be left for its distribution amongst the legal heirs of predeceased brothers and sisters.

A somewhat similar proposition was before a learned Single Judge of the Lahore High Court in the case reported as *Rasoolan Bibi V. Waris Ali and others* (**2007 M LD 33**), wherein, the deceased had two brothers and one sister. The brother had died before the deceased. However, son of the predeceased brother had obtained inheritance mutation, whereby, one half of the property was mutated in the name of the two sisters and the remaining one half was mutated in his name who also further sold his share of the property to someone else. The matter before the trial Court was decided by holding that since the deceased had left two full sisters, whereas, the brother was predeceased; therefore, his son was not entitled for any inheritance. This finding was upset by the Appellate Court and thereafter, was challenged before the Lahore High Court and the relevant finding reads as under:-

“Learned counsel for the petitioner argued that Mst. Rasoolan Bibi (respondent No.3) had been deliberately shown by Waris Ali as a transferee of the suit - land to frustrate the claim of the petitioner. **It is abundantly clear from the facts of the case that Waris Ali, being the son of Khan Muhammad, who pre-deceased Mst. Aimna, had no right whatsoever in the suit property.** In this view of the matter, it is clear that the impugned appellate decree, dated 6-2-2006 is a result of legal error and material jurisdictional irregularity. The same is, therefore, set aside and the decree of the learned trial Court, dated 5-7-2004 is restored. The petitioner shall also be entitled to her costs throughout.”

In the case reported as *Qamarul Bashir V. Muhammad Ghous Khan and another* (**2007 MLD 800**) a learned Single Judge of this Court has been pleased to hold in a somewhat similar situation, wherein, the case of the Plaintiff was that he was entitled to inheritance on the analogy of Section 4 of the Muslim Family Law Ordinance as he was the son of the predeceased sister of the deceased. The relevant findings wherein, this contention was repelled by the Single Judge reads as 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 pre-deceased 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 pre-deceased sister is not mentioned in the table of sharer nor in the table of residuaries. The children of a pre-deceased sister are included in subsection (2) of section 68 of Mulla's Mohammadan Law, which lays down the list of distant kindreds. The distant kindred only inherits when there are no residuaries. Once it is 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."

The aforesaid findings were later on followed by another Single Judge of this Court in the case reported as *Syed Sabiul Hassan Khusro V. Asad Mustafa and 6 others* (**2016 MLD 266**). The issue before the learned Single Judge was also similar in nature inasmuch as the case of the Plaintiff was to the effect that he was claiming his share in respect of the property left by deceased Hassan Mustafa and he claimed to be son of predeceased sister of Hassan Mustafa. However, this contention was not accepted and was repelled by the Court in the following manner:-

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.....

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.

The case of the objectors in this matter is premised only on Section 4 of the Muslim Family Law Ordinance, 1961, and when confronted as to how the same analogy can be applied to the case of predeceased brothers and sisters, the learned Counsel representing the objectors had no concrete answer. The provision of Section 4 of the Ordinance *ibid*, only provides for per stripes share on opening of a Succession to the children of deceased son and daughter of the propositus. The section is specific to the predeceased sons and daughters of a deceased and cannot be stretched in any manner. No analogy can be applied to the objector's case as contended. The matter is to be strictly governed by the law as it is a matter of inheritance amongst Muslims. The provisions are well defined and no ambiguity is left so as to adopt any analogy. The children of predeceased sister and brother fall under the category of distant kindred. The distant kindred only inherit a share when there are no sharers and residuaries. Admittedly here, there are brothers and sisters who have survived the deceased as sharers and residuaries, and therefore there cannot be any share of the distant kindred.

Learned Counsel for the objector also made an effort to rely upon certain precedents as referred to in the objections, however, on perusal it reflects that the same do not support their case; rather it goes against them. They all relate to a situation wherein the issue was in respect of predeceased sons and daughters of a deceased. For that there cannot be any cavil that notwithstanding the judgment of the Federal Shariat Court in the case of *Allah Rakha v Federation of Pakistan* (**PLD 2000 FSC 1**), whereby, the provision of Section 4 *ibid*, has been declared to be repugnant to the injunctions of Islam, in view of the observations of the Hon'ble Supreme Court in the case of *Mst. Fazeelat Jan & Others v Sikandar* (**PLD 2003 SC 475**), such judgment of Federal Shariat Court upon challenge automatically stands suspended till disposal of the appeal as provided under Article 203D of the Constitution of the Islamic Republic of Pakistan, and till such time the benefit of Section 4 of the Ordinance *ibid*, will be available. However, this is only for predeceased sons and daughters of a deceased which is not the case here.

In view of hereinabove discussion and the case law, I am of the view that the objectors i.e. Legal Heirs of Brother and Sister of deceased Khwaja Rashidullah listed at Serial No.2, 3 & 5 of this petition are not entitled for any share as inheritance as they died before the deceased. Accordingly the Nazir report is approved and taken on record, whereas, the objections are dismissed. Nazir is directed to distribute the share amongst the remaining Legal heirs except Legal Heirs at Serial No.2, 3 & 5.

J U D G E