Judgment Sheet

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Rev. Application No.S-18 of 2014

Applicants	:	Mst. Shan Khatoon through her LRs through Mr. Abdul Basit, Shaikh, Advocate
Respondent No.1(a)	:	Mukhtiar Hussain, through Syed Jaffar Ali Shah, Advocate
Respondents No.2 to4:		Mukhtiarkar (Revenue) Kandiaro & others Through Mr. Ghulam Abbas Kubar, AAG
Date of hearing	:	04.12. 2023
Date of Decision	:	12.01.2024

J U D G M E N T

ARBAB ALI HAKRO, J.- Through this Civil Revision Application under Section 115, the Civil Procedure Code 1908 ("the Code"), the applicants have impugned Judgment and Decree dated 07.12.2013 and 14.02.2013, respectively, passed by Additional District Judge Kandiaro ("the appellate Court") in Civil Appeal No.60 of 2010, whereby; the Judgment and decree dated 28.6.2010 and 29.6.2010 respectively, passed by Senior Civil Judge, Kandiaro ("the trial Court") in F.C. Suit No.85 of 2000, through which the suit of applicants/plaintiffs was decreed, has been set-aside, by dismissing their suit.

2. The case of the applicants /plaintiffs before the trial Court was that their predecessor Haji Dost Muhammad was the lawful owner of agricultural land measuring 76-28 1/2 Acres situated in Deh Gul Shah Taluka Kandiaro District Naushahro Feroze ('suit land'), who died about four years back (of the institution of suit). He left behind applicants/plaintiffs, his only surviving legal heirs, who continuously possess the suit land and pay the land revenue. Respondent No.1, who is step relative of the applicants in collusion with the revenue

officials, secretly and fraudulently got *Foti Khata Badal* of the deceased predecessor of the applicants in respect of the suit land, showing himself as one of the legal heirs of the deceased Haji Dost Muhammad. The applicants challenged the said *Foti Khata Badal* by filing a revenue appeal before the Assistant Commissioner concerned. However, the same was dismissed vide Order dated 16.11.2000, which was illegal and void. In the above background, the applicants filed suit.

3. Upon service of summons, respondent No.1 contested the suit and filed his written statement, wherein he denied the claim of applicants by asserting that he is also one of the legal heirs of deceased Haji Dost Muhammad. Therefore, he is entitled to inherit the suit property left by the deceased.

4. It is a matter of record that the suit of the applicants was initially decreed on 08.8.2006, against which respondent No.1 preferred Civil Appeal No.88/2006, which was allowed vide judgment dated 08.05.2010 and decree dated 10.05.2010. The case was remanded to the trial court by framing issues with direction to the trial court to allow the parties to present their evidence in support of their claim if desired.

5. The appellate Court framed the following issues while remanding the suit to the trial Court: -

i. *Whether the defendant No.1 Ghulam Hussain is not entitled for share in the suit land on the basis of residuary right?*

ii. *Whether the defendant No.2 Mukhtiarkar Kandiaro made the Foti Khata Badal secretly and illegally?*

iii. *Whether the Order passed by the defendant No.3, Assistant Commissioner/D.D.O. (Revenue) Kandiaro is null void, in abinitio in the eyes of law and is not binding upon the plaintiffs?*

iv. *Whether the suit of plaintiff is barred by any provision of law?*

v. *Whether the plaintiff is entitled for the relief, as prayed?*

vi. *What should the Judgment be?*

6. The applicants examined their attorney, Mujeeb Rehman, and produced relevant documents supporting the claim of applicants and one witness, Fazul. On the other hand, the respondent No.1 only examined himself. After examining the evidence produced by the parties and hearing their respective submissions, the applicant's suit was decreed.

7. The above Judgment and decree of the trial Court were then impugned by Respondent No.1 through an Appeal, and through the impugned Judgment, the Judgment and Decree of the trial Court have been set aside, and the appeal has been allowed, and the suit of the applicants was dismissed.

8. At the outset, learned Counsel representing the applicants contended that the impugned judgment passed by the appellate court was not sustainable under the facts and the law, that the learned appellate court erred in law and committed illegality, that the applicants are two widows and three daughters of deceased, they will receive their share as sharers. In the absence of a residuary, the principle of Return (Radd) will come into operation for the remaining share, and the said share will revert to the daughters, excluding the respondents; the learned appellate court has not given reasons for disagreeing with the finding recorded by the trial court, particularly regarding jurisdiction of the respondent No.3 which is against the law; that there is number of other infirmities in the impugned judgment passed by the appellate court lastly he prayed for allowing of the revision application. In support of his contentions, he relied on the cases PLD 2016 Sindh 232, 2014 SCMR 1205, 2003 CLC 1889, and 2007 SCMR 838.

9. Conversely, learned Counsel representing Respondent No.1 supported the judgment and decree passed by the appellate court and stated that the respondents are blood relatives, being the father's cousin's son, and such relation comes under the category of distinct kindred; there is no male child of deceased, thus respondents are entitled to inherit the residue share in the suit property; that the learned appellate court has thoroughly discussed the evidence and decided the case correctly and learned appellate court had not committed any irregularity or illegality while passing the impugned judgment and decree. Lastly, he prayed for the dismissal of the revision application. In support of his contention, he relied on an unreported judgment passed by the Islamabad High Court in case **C.R.No.442-D-2003 Muhammad Tariq and others vs. Sabira and others.**

10. Learned A.A.G. for official respondents supported the impugned judgment and decree passed by the appellate court.

11. The arguments have been heard at length, and the available record has been carefully evaluated with the able assistance of the learned Counsel for the parties, including case law relied upon by them. To evaluate whether justice has been dispensed, it is imperative to analyze the findings of both the Courts below.

12. The primary point that needs to be determined in this case, which would resolve the dispute between the parties, is whether respondent No.1 Haji Ghulam Hussain, who claims to be a '**Distant Kindred**', is entitled to inherit the suit land, left by the deceased Haji Dost Muhammad, in the presence of the Sharers. The Sharers, who are the applicants in this case, are the two widows and three daughters of the deceased. It is, therefore, necessary to examine the Muhammadan Law of Inheritance. From a careful study of the Muhammadan Law of Inheritance, it is manifest that heirs are primarily divided into **three classes**, namely, (i) **Sharers**, (ii) **Residuaries** and (iii) **Distant Kindred** respectively. In this connection, I may refer to

Para 61 of Chapter VII of Mulla's Principles of Muhammadan Law, which is relevant. It reads:

> *"61. **Classes of heirs:-** There are three classes of heirs, namely, (1) Sharers, (2) Residuaries, and (3) Distant Kindred:*
>
> *(1) "**Sharers**" are those who are entitled to a prescribed share of the inheritance;*
>
> *(2) "**Residuaries**" are those who take no prescribed share but succeed to the "**residue**" after the claims of the sharers are satisfied;*
>
> *(3) "**Distant Kindred**" are all those relations by blood who are neither Sharers nor Residuaries,"*

13. Under Para 63 of the D.F. Mulla's Principles of Muhammadan Law, the wife and daughters are a "sharer" and are entitled to "*one-eighth* share" and "*two-third* share", of inheritance *respectively*. The relevant portion of Para 63 reads:

> *"**63. Sharers.**-- After payment of funeral expenses, debts, and legacies, the first step in the distribution of the estate, of a deceased Muhammadan is to ascertain which of the surviving relations belong to the class of sharers, and which again of these are entitled to a share of inheritance, and, after this is done, to proceed to assign their respective shares to such of the sharers as are, under the circumstances of the case, entitled to succeed to a share. The first column in the accompanying table contains a list of sharers; the second column specifies the normal share of each sharer; the third column specifies the conditions which determine the right of each sharer to a share, and the fourth column sets out the shares as varied by special circumstances.*

(1) Sharers	(2) Normal Share		(3) Conditions under which the normal share is inherited	(4) This column sets out— (A) Shares of Shares Nos.3, 4, 5, 8 and 12 as varied by special circumstances; (B) Conditions under which Sharers Nos.1, 2, 7, 8, 11 and 12 succeed as Residuaries
	Of one	Of two or more collectively (b)		
4. WIFE (c)	1/8	1/8	When there is a child or child of a son h.l.s.	¼ When no child or child of a son
7. DAUGHTER	½	2/3		[With the son, she becomes a residuary: see Tab. Of Residuary, No.1]

14. In the present case, Respondent No. 1 claims to be a 'Distant Kindred'. As held by the Appellate Court that 'widows will receive their share according to the share prescribed in Verse No. 12, and the daughter will receive her share as per Verse No. 11. The remainder of

the share will go to the Distant Kindred, as there is no son of the late Haji Dost Muhammad.' Para 67 and 68 of D.F. Mulla's Principles of Muhammadan Law define the "Distant Kindred" and its classes. It would be appropriate to read the aforementioned Paras hereunder:

> *"**67. Distant Kindred.** (1) If there be no shares or Residuaries, the inheritance is divided amongst Distant Kindred.*
>
> *(2) If the only sharer be husband or wife and there be no relation belonging to the class of Residuaries, the husband or wife will take his or her full share, and the remainder of the estate will be divided among Distant Kindred.*
>
> ***68. Four Classes-**(1) Distant kindred are divided into four classes, namely;*
>
> *(1) descendants of the deceased other than sharer and Residuaries;*
>
> *(2) ascendants of the deceased other than sharers and Residuaries;*
>
> *(3) descendants of parents other than sharers and Residuaries;*
>
> *(4) descendants of ascendants how highsoever other than residuaries."*

15. Admittedly, in the present case, Respondent No. 1, also known as the descendant of the grand-uncle, is the descendant of a brother of the grandfather of the deceased Haji Dost Muhammad Tunio. He is considered part of the 'Distant Kindred' or 'Agnatic Heirs'.

16. In the present case, the deceased, who had no sons, left behind two widows and three daughters (*the applicants*). These individuals are classified as 'sharers'. As such, the widows are entitled to inherit one-eighth (1/8) of the suit land, and the three daughters are to inherit two-thirds (2/3) of it. The remaining one-fifth (1/5) of the suit land will revert to, and be inheritable by, the three daughters under the doctrine of "Radd"/"Return", as outlined in Para 66 of D.F. Mulla's Principles of Muhammadan Law, which reads as follows:

> *"66. Return (Radd)-If there is a residue left after satisfying the claims of Sharers, but there is no Residuary, the residue revert to the Sharers in proportion to their shares. This right of reverter is technically called "Return" or Radd."*

17. The "Doctrine of Radd" applies when there is leftover property after distribution, or in other words, when the unity party is divided, and the sum is less than unity. After the deceased's property has been distributed among the Sharers if there are no heirs categorized as Residuaries, the remaining property is returned to the Sharers in proportion to their shares. This right of the Sharers to have the residual property revert to them in the absence of residuary heirs is referred to as the Return or the Doctrine of Radd.

18. Under Muslim Law, the Doctrine of Return is activated when the leftover property, also known as the residue, is given back to the "Sharers" and not the **"Distant Kindred"** if there is no heir in the residuary category. The property is returned in shares proportional to their original ownership if there are several Sharers. If only one sharer exists, the entire residue property is returned to that individual. The residue cannot be transferred to the **"Distant Kindred"** as long as a sharer or a residuary is alive.

19. In the case of Khalil Khan and another vs Fazaldad Khan and 4 others (2022 Y.L.R. 2059), it has been held as under: -

> *"The above statement of real respondent depicts in a loud and clear manner that at the time of death of Aziz-Ullah Khan and Sarwar Begum the predecessor of appellant Ashraf Begum was alive and she expired after the death of her brother and sister which ipso facto proves that her legal heirs are entitled to get the share regardless of the fact that at the time of attestation of the impugned mutation in the year 1997 she had died. So far as the claim of the appellant regarding the whole share of deceased Aziz-Ullah Khan is concerned,* ***in this regard it is observed that as real respondent failed to prove his relationship with Aziz-Ullah Khan, thus, the principle of radd (return) comes into operation which postulates that if there is a residue left after satisfying claims of sharers but there is no residuary, the residue revert to the sharers in proportion to their share and this right of reverter is technically called return or radd. Where there is no sharer by blood the residuary or distant kindred person but only a sole surviving daughter, the daughter is entitled to inherit share in the estate of deceased as per the Muhamadan Law and by the principle of rudd she will also take remainder because when daughter of deceased is***

> ***in existence the absence of residuary entitled her to take the whole share keeping in view of the principle of rudd***. *Reliance can be placed on 1980 C.L.C. S.C. A.J.K. 121, 1990 MLD 725 and PLD 1986 Karachi 269."*
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> ***[Emphasis Supplied]***

20. The Islamic inheritance law chart shows the fixed and residuary sharers including Husband, Wife, Sons (or Sons of Sons how low soever), Daughters (or Daughters of Sons how low soever), Father (or Father of Father how high soever), Mother (or Mother of Mother and/or Mother of Father how high soever), Full and Paternal Siblings and their male descendants, and, Maternal Siblings. "Distant Kindred" relatives can inherit if neither fixed sharer nor residuary survives, with the exception that "Distant Kindred" do inherit in the presence of Husband or Wife. Spouse inherits only fixed or prescribed share. Children (and Grandchildren how low soever) can inherit as fixed and residuary sharers. Paternal Parents inherit as fixed and residuary sharers. Maternal Parents inherit as fixed sharers. Siblings inherit as fixed and residuary sharers. The distant kindred are those legal heirs that do not come up in the first two classes of inheritors and are related to the deceased through their female blood relations. It is well-settled proposition that the distant kindred are only entitled to the inheritance should the first two categories not exist, that is to say, the first two categories take priority over the last category. So, the fixed sharers take the first priority alongside the residuaries. There are also cases where the legal heir becomes both sharer and residuary. Should there be no fixed sharer or residuaries, only then will the distant kindred be entitled to the inheritance. In Case of Muhammad Kasim v. Khair Muhammad and others (1987 SCMR 1560), it was held by the Apex Court that:

> *"According to Syed Ameer Ali in his book on Mahomedan Law under the Hanfi Law of Succession the heirs connected to the deceased by the tie of blood are divided into three classes, namely, sharers, I agnates and uterine relations. The agnates are called residuaries and the uterine relations are called the distant kindred. According to the learned author and this is well-established the sharers take their specified portions and the residue is then divided among the agnates. If there should be no agnates but only uterine*

> *relations, the residue would revert or return to the sharers in proportion to their shares except in the case of the husband or wife. It is only when there are neither "sharers" nor "agnates" that the estate is divided among the uterine relations. From these established rules governing the succession under the Hanfi Law, it is clear that in the presence of an heir belonging to the category of "residuaries" no one falling in the class known as distant kindred can inherit the property of the deceased. In view of this clear legal position the appellant would exclude the respondents who fall within the category of distant kindred being related to the deceased through the intervention of a female".*

21. Considering the above position, according to Muhammadan Law, a father's cousin's son (Respondent No.1) is not entitled to inherit a share of the estate of the deceased Haji Dost Muhammad unless there are no other closer relatives from the paternal or maternal side. The father's cousin's son (Respondent No.1) belongs to the **"Distant Kindred"** category and is only eligible for inheritance if there are no fixed heirs or agnates. Fixed heirs are close family members who inherit a fixed share of the estate, such as the spouse, children, parents, grandparents, and siblings. Agnates are relatives who are connected to the deceased through a male link, such as the father, grandfather, son, grandson, brother, nephew, uncle, etc. Respondent No.1 is an agnate, but he is excluded by the presence of nearer agnates, such as widows and daughters (applicants). Therefore, he can only inherit if no one else is from the fixed heirs or the agnates. In this regard, I am fortified with the case of **Abdul Khaliq vs. Fazalur Rehman (PLD 2004 Supreme Court 768)**, wherein the Supreme Court of Pakistan has laid it down as follows:–

> *"It is a decided fact that if a sharer or a residuary exists, the distant kindred are completely ousted from the inheritance. In the instant case, Mst. Roshnai, the donor, was the real sister of Abdul Ghafoor, who died issueless. She would, therefore, inherit ½ share in the property of her brother Abdul Ghafoor as sharer and as of her own right.* ***As the sharer is in existence and as in the presence of sharer no distant kindred is entitled to inherit, the entire residue under para-66 of the text aforesaid and under the Principle of Return (radd.), would revert to the sharer****.*
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> *(Emphasis supplied)*

22. In a case reported as Sarwar Bibi v. Anwari Bibi (2004 MLD 1136), a similar proposition was presented. In this case, a distant kindred was claiming inheritance in the presence of the sharer while there was no residuary. The Lahore High Court made the following observation:-

> *"The Principle of Mahomedan Law as contained in para.66 above is clear, concise and unambiguous. If there is no residuary, the residue shall revert to the sharers in proportion to their shares.* ***Had the distant kindred been entitled to the residue, the rule would have been that if there is a residue left after satisfaction of claim of the sharers but there is no Residuary or the distant kindred, the residue reverts to the sharers in proportion to their shares****. Absence of the category of distant kindred as legal heirs from the rule in para 66 means that residue will at maximum devolve upon the residuaries but cannot be given to the distant kindred and shall instead revert to the sharers, if there are no residuaries."*
>
> *[Emphasis supplied]*

23. In light of the aforementioned discussion, it is clear that when the deceased is survived by his two widows and three daughters, they will receive their share as sharers. In the absence of a residuary, the principle of Return (Radd) will come into operation for the remaining share. This means that the said share will revert to the daughters, excluding the "Distant Kindred". The trial court, after duly appreciating the evidence and law, passed a well-reasoned judgment. However, this Judgment was wrongly set aside by the appellate court, which suffered from material illegality and irregularity.

24. In the case of Karim Bakhsh through L.R.s. and others v. Jindwadda Shah and others (2005 SCMR 1518), the Supreme Court of Pakistan held that when the findings of two courts below were at variance, the High Court was justified in appreciating the evidence to arrive at the conclusion as to which of the decisions was in accord with the evidence on record. In the case of Abdul Rashid v. Muhammad Yasin and another (2010 SCMR 1871), the Supreme Court of Pakistan held that where two courts below, while giving their

findings on a question of law, had committed material irregularity or acted to read evidence on point which resulted in miscarriage of justice, the High Court had the occasion to re-examine the question and to give its findings on that question in exercise of revisional jurisdiction, and the High Court was obliged to interfere in findings recorded by courts below while exercising power under Section 115 of the Code.

25. For the foregoing reasons, the instant Revision Application stands allowed. Consequently, the impugned judgment and decree of the appellate court are set aside as it suffered from material irregularity, illegality and misconception of law. Resultantly, the Judgment and decree of the trial court is restored, with no order as to cost.

J U D G E

Faisal Mumtaz/P.S.