

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT,  
HYDERABAD.**

**R.A. No.34 of 2017  
[Wikiyo versus Mst. Aami and others]**

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For Applicant:	Mr. Amanullah Khan Advocate.
For Respondents No.1 & 2:	Mr. Mazhar Ali Laghari Advocate.
For Respondent No.3 to 5:	Mr. Rafique Ahmed Dahri, Assistant Advocate General, Sindh.
Date of hearing	07.08.2023
Date of announcement:	16.08.2023.

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**JUDGMENT**

**Muhammad Shafi Siddiqui, J.**- The applicant in this Revision Application under Section 115 CPC has impugned the concurrent findings of the two Courts below. Respondents No.1 and 2, Mst. Aami and Mst. Eisan, filed a Suit for declaration, possession, mesne profit and permanent injunction against an individual Wikiyo and some officials arrayed as defendants in the Suit. The applicant and the private respondent claimed to be the 3<sup>rd</sup> and 2<sup>nd</sup> tier descendants of Bacho s/o Mureed (lineage chart provided), who owned substantial piece of land measuring 160 acres. The respondents No.1 and 2 in the Suit prayed for the following reliefs:

- “(a) To declare that the plaintiffs are the lawful owners according to their respective shares in the suit property and that the defendant No.4 have no concern with the suit land, who had illegally and unlawfully occupied the same.
- (b) That the defendant No.4 may be directed to hand-over the vacant possession of the suit land to the plaintiffs and he may further be directed to pay the mesne profit to the plaintiffs for the last 3 years at the rate of Rs.5000/- per year.
- (c) That defendant No.4 may permanently be prohibited, prevented and restrained from changing and alienating the present position and status of the suit land or transferring and leasing out the same to anybody else.

(d) That the defendant No.3 may also be restrained from making any entry in favour of defendant No.4 in the records of right, without the due course of law.

(e) That costs of the suit be borne by the defendant.

(f) That any other relief which this honorable court deems fit and proper be awarded to the plaintiffs.”

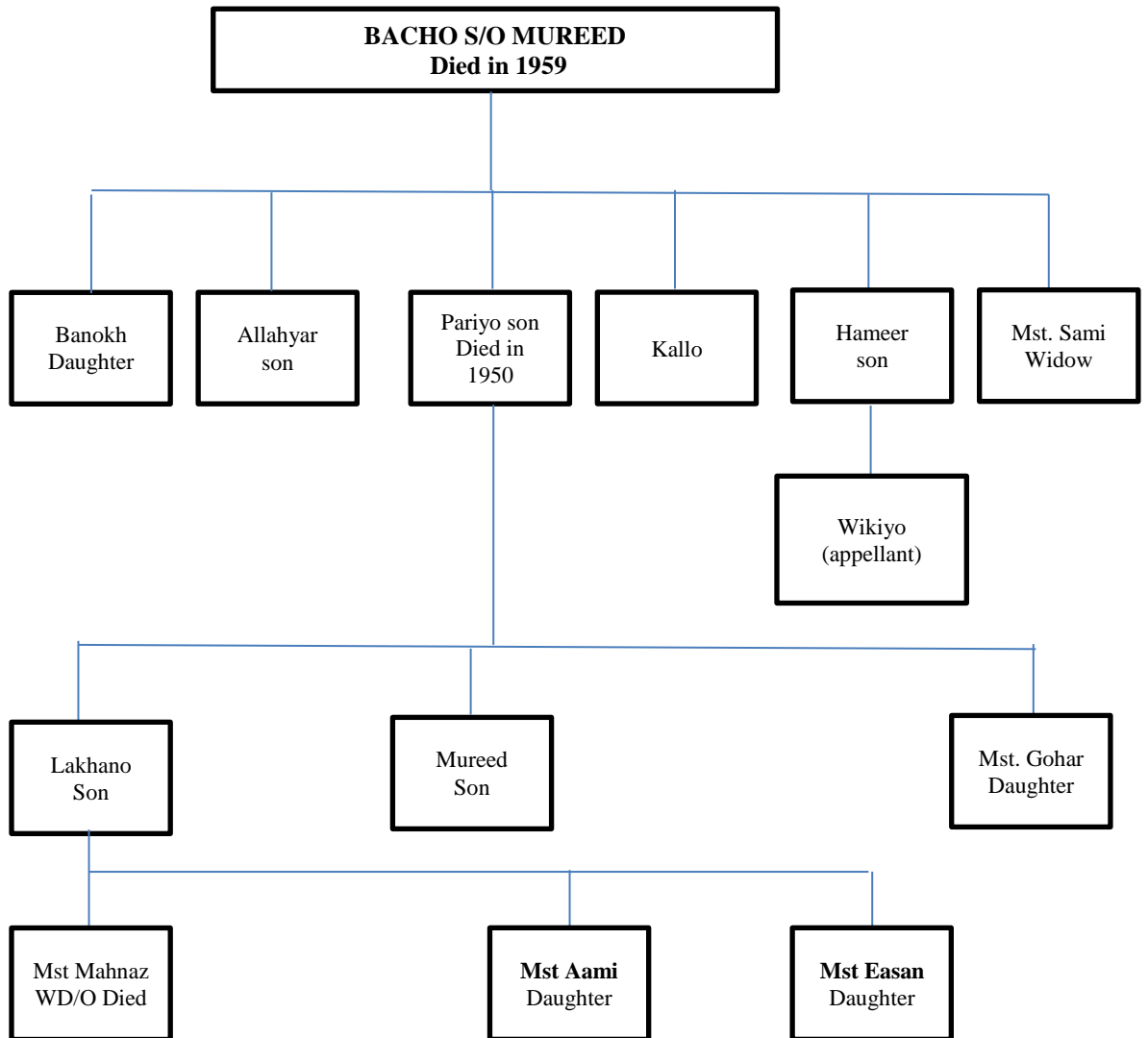
Notices/ summons were issued, served, and accordingly, issues were framed, and the parties recorded their evidence. The following issues are therefore framed and decided by virtue of reasons assigned. The judgment was maintained by the appellate court in Civil Appeal No.11 of 2016. The crucial issues as such are issues No.3, 4 and 9, which requires consideration by this Court, having consequential effects.

### “I S S U E S

1. Whether the plaintiffs and defendant No 4 are belonging to the same family?
2. Whether the suit land shown in Para No 2 of plaint is the ancestral property of the plaintiffs and the defendant No. 4?
- **3. Whether deceased Lakhano S/o Pariyo Nodani, the father of the plaintiffs was the co-sharer and co-owner to the extent of 0-9 paise total area 14-17 acres in the suit land in all three Dehs referred in Para No 2 of plaint?**
- **4. Whether after the death of deceased Lakhano S/o Pariyo (i.e. father of the plaintiffs) his share has been devolved and inherited by his L.Rs including the plaintiffs No 1 and 2 to the extent of 0-2 paise share to each of the plaintiffs and such entry has also been effected in their favour in Revenue Record of rights?**
5. Whether the defendant No 4 has occupied the shares of the plaintiffs No 1 and 2 area 6-0 acres since about last three years without any lawful authority?
6. Whether the Lakhadino and Mst Sami are the legal heirs of Bachoo?
7. Whether the Pariyo died prior to the death of his father namely Bachoo?
8. Whether the entry NO 659 kept on record of Form-VII is fake having no legal worth?
- **9. Whether the suit is not maintainable according to law?**
10. Whether the plaintiffs are not entitled the relief as prayed?
11. What should the decree be?”

I have heard learned counsel for the parties and perused the material available on record.

Lineage Chart / Tree of Ancestry.



Applicant in the written statement challenged the maintainability of Suit and got the issue framed as issue No.9. He maintained that Pariyo died in the year 1950, and after his death, his father Bacho died in the year 1959 from whom property devolved. Thus, Pariyo is a predeceased son of his father Bacho and his (Pariyo's) sons, including Lakhano, after his death are not entitled to a lawful share in the Bacho's property who died later, and revenue entries made in the record of rights were fake/unlawful. No claim of inheritance was lawful under the circumstances.

Although against these concurrent findings of two courts recorded below, but the primary legal point in the shape of issue No.3 & 4 which requires determination is whether Pariyo passed on any title to Lakhano and whether succession was opened to Pariyo and/or Lakhano after the death of his father/grandfather Bacho in the year 1959, since Lakhano's father died in 1950.

As I could peruse the evidence, applicant Wikiyo the defendant in the Suit deposed on oath that Bacho was the original owner of land measuring 160 acres situated in Deh Sanjar Chang, Deh Lutko, and Nundani. It is further stated on oath that he died in the year 1959 left three sons and widow as surviving legal heirs. The names of the sons as disclosed in the statement are Allahyar, Hamir, Kallo and a widow Mst. Sami. Whereas the fourth son Pariyo died much before the death of Bacho whereas the daughter Bano also expired earlier leaving no legal heirs as disclosed in the chart.

Mst. Aami and Mst. Eisan, two plaintiffs are claiming through Lakhano who is a son of predeceased (Pariyo) however, the predeceased son Pariyo was never devolved of any share in the property because he cannot be given benefit of Section 4 of the Muslim Family Laws Ordinance, 1961, since the law was not pronounced with retrospective effect in the year 1961.<sup>1</sup> The two courts below relied upon Section 4 without realizing that it has no effect to the situation in hand where Section 4 could not have been given effect in view of the death of a predeceased son prior to promulgation of law having its prospective effect only.<sup>2</sup>

The succession to the estate of a Muslim under Muhammadan Law is open only at the time of his/her death and legal heirs alive at such time could be entitled to inherit his/her estate. It is only Section 4 of the Muslim Family Laws Ordinance, 1961 which intervened with prospective effect. Thus the legal heirs of a predeceased son in the instant case were never devolved of any share or could not draw title by inheriting estate of his grandfather/ great grandfather under Muhammadan Law which bestow shares only upon the existing legal heirs of Bacho at the relevant time in the year 1959.

Grandfather died in 1959 whereas one of the son through whom rights are being claimed died in the year 1950 when there is no question of any devolvement of share to the legal heirs of predeceased son or daughter under Section 4 of the Muslim Family Laws Ordinance, 1961.

Statistics about death has been categorically stated on oath by Wikiyo, which piece of evidence was not at all taken into consideration by the two forums below. It seems that without realizing the effect of death of a predeceased son prior to promulgation of the Ordinance, 1961, the effect of Section 4 was applied which is not correct as per the record of the case. Thus, when the Suit was filed by Mst. Aami and Mst. Eisan for a declaration they had no locus standi in relation to the property in question as nothing was inherited by them through

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<sup>1</sup> Hassan Aziz 2022 SCMR 1131.

<sup>2</sup> Mst. Sarwar Jan PLD 2012 SC 217.

above lineage disclosed. They could not claim inheritance through Lakhano who was never devolved of any share in the property being a son of predeceased as the provisions of Section 4 were not available.

The succession to the legal heirs of Bacho was opened in the year 1959 when he died and that too to the surviving legal heirs; not the one who expired before him. It is only later in time when Section 4 came into being and served for the devolvement of share to the legal heirs of predeceased sons and daughters.

This being situation, the findings of issues No.3 and 4 by trial / appellate court could not have been reached as determined by two forums below. This is a clear case of misreading of evidence. The issues No.3 & 4 as such are decided in negative that after death of Pariyo, no share could have devolved upon his son and inherited by his legal heirs including plaintiffs No.1 and 2 and as such the Suit was incompetent in terms of issue No.9. The findings of two courts below are set-aside and the Suit is dismissed. The Revision Application is allowed in the above terms.

**J U D G E**

Irfan Ali