

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1592 of 2010

[Mst. Shamim Akhter and another *versus* Mst. Nazar Bhari and another]

Date of hearing : 10.08.2023.
Plaintiffs : In person.
Defendant No.1 : Mst. Nazar Bhari, through Mr. Sikandar Khan, Advocate.
Defendant No.2 : Nemo.

DECISION

Muhammad Faisal Kamal Alam, J. Maintainability of this *Lis* is to be decided.

2. Plaintiff No.1 appears in person. She has pointed out that Written Arguments are filed, *whereas*, Counsel for Defendant No.1 has relied upon the case law reported in **P L D 2012 Supreme Court 217-Mst. Sarwar Jan and others versus Mukhtar Ahmad and others {Sarwar Case}**, that proceeding of the nature is not maintainable in terms of Section 4 of the Muslim Family Law Ordinance, 1961 [the “**Ordinance 1961**”].

3. The controversy is in respect of a built-up Property on Plot No.RC-4-116/2, measuring 139 Square Yards, also known as ‘Imam Bux Building’ on Nabi Bux Road, Ranchoreline, Karachi – **Suit Property**. Grievance is that Defendants surreptitiously got their names mutated in the Record of Rights claiming to be the Legal Heirs of Imam Bux, who was the owner of the above Property-**the Propositus**. Plaintiffs are the son and daughter of Ayub Ali and grandsons and granddaughters of Imam Bux. Averred in the plaint that even widow of said Imam Bux (that is Grandmother) was also

left out and her name was not mutated. Plaintiffs have invoked Section 4 of the Ordinance 1961 [*ibid*] in support of their arguments that pre-deceased son also has the equal share in the inheritance of his father like the surviving children. Stated that Defendants are usurping the rental income from the Shops situated in Suit Property to the exclusion of Plaintiffs and their Legal Heirs. According to Plaintiffs, they inherited 50% [fifty percent] shares in the Suit Property.

4. In the pleadings of Defendants, the claim of Plaintiffs is vehemently denied, *inter alia*, that mutation of the Suit Property was done in favour of Defendants, after their Father [Imam Bux-the Propositus] died on 04.08.1957, *whereas*, Father of the Plaintiffs passed away on 02.03.1948 [pre-deceased son]. As per the record, mutation was done in favour of predecessor of present Defendants, namely, Mst. Nazar Bhari and her sister Mst. Zubaida, the original Defendant No.2, on 29.08.1962.

5. Twice, the matter went in the Appeal. Earlier High Court Appeal No.147 of 2017 was disposed of vide Order dated 08.12.2017, by observing that since preliminary decree is passed, thus, Appeal has become infructuous; *whereas*, subsequent High Court Appeal No.80 of 2021 was disposed of by observing that maintainability of this Suit is to be decided in view of the case law and *status quo* is to be maintained in respect of the Preliminary Decree.

6. Earlier, by Order dated 05.12.2016, an Application under Order VII Rule 11 of CPC [preferred by the Defendants] was dismissed. The question was framed on 06.04.2021 that “. . . . *if a son dies in the lifetime of his father, would son's legal heirs have right to inherit property left by the grandfather?*”.

7. Arguments heard and record perused.
8. With their Written Arguments, the Plaintiffs have filed Death Certificate of their father Ayub Ali, according to which, he passed away on 10.03.1948. Plaintiffs have relied upon the Judgment of the Honourable Supreme Court – **2015 S C M R 869** [*Mahmood Shah versus Syed Khalid Hussain Shah and others*] – Mahmood Case.
9. Earlier present Plaintiffs instituted a Suit No.516 of 1997 in the Court of learned VIIth Senior Civil Judge [Karachi South], which was contested by the Defendants through a detailed Written Statement. Subsequently the above Suit was withdrawn on the ground of pecuniary jurisdiction, followed by filing of present *Lis*.
10. The basic facts are not disputed, that [Late] Ayub Ali, the Father of Plaintiffs, predeceased his Father [Imam Bux-Propositus]; that is, the Grandfather of Plaintiffs and Father of the original Defendants who are now represented by their legal heirs.
11. With the above Facts, the cited Judgments are considered. The facts of Sarwar Case [*ibid*] are similar as mentioned in the present *Lis*; that the Plaintiffs being legal heirs of Pre-deceased son [Ayub Ali] are claiming inheritance in the estate left by Imam Bux-the Propositus, by invoking the above Ordinance 1961. The above Sarwar Case is considered by the Honourable Supreme Court in the subsequent Case of **Khan Muhammed-2017 SCMR 1476** [*Khan Mohammed and others versus Mst. Khatoon Bibi and others*]; and the rule laid down in respect of prospective applicability of Section 4 of the above Ordinance 1961, has been maintained. In Khan Muhammad Case, the Hon'ble Supreme Court has discussed various Decisions, in particular, the earlier reported Case of *Sardar versus Nehmat Bi and others-1992 S C M R 82* [*Sardar case*] and the above Sarwar case,

in order to answer the arguments of those litigants, including the Parties of Khan Muhammed case, who rely on the Sardar case [*supra*] for claiming the share of pre-deceased children in the inheritance. Relevant part of the above Decision in Sarwar Case is_

“From the language of section 4 ibid we do not find such to be the intention of the legislature, therefore, in our considered view, the application of the section for all intents and purposes is prospective in nature and by no rule of interpretation can it be given a retrospective effect, so as to undo or reopen the past and closed settlements of inheritance, which had been concluded prior to the coming into force of the Ordinance, otherwise, there shall be no sanctity and conclusiveness attached to all or any of the successions, which have been settled under the Mohammedan Law, much before the enforcement of the Ordinance, 1961, even those successions finalized 50 or 100 years prior thereto shall have no protection. This has never been the object of section 4 ibid and the intendment of the legislature. Thus, considering this case in the light of the above rule and criteria, Ilam Din in the case died in 1956 and the legal heirs of his pre-deceased son would not be entitled to inherit his estate, under the Mohammedan Law. As the learned High Court and the trial court have erred in construing the said section and have passed the impugned judgments and decrees in favour of the respondents by misapplying the same, therefore, such decisions being illegal and violative of law cannot sustain.”

12. It is held in the subsequent Khan Muhammad Case:

“The ratio which comes out of the above two referred judgments is that when there is a question of limited estate holders and the legal heirs of pre-deceased son or daughter, the legal heirs of pre-deceased son or daughter would become entitle on termination of the limited estate in view of section 3 of the Act V of 1962 as section 4 of the Ordinance VII of 1961 would be in field and in simple case of inheritance, the legal heirs of pre-deceased son or daughter, prior to promulgation of the Ordinance VII of 1961, would not be entitled to get any benefit under section 4 of the Ordinance VII of 1961 as it will have no retrospective effect rather it will take effect prospectively.”

13. In the above context, the cited judgment of Mahmood Case [relied upon by Plaintiffs in their Written Arguments] is perused. It is

distinguishable for the reasons that it has mainly dealt with the issue, that no limitation will be applicable concerning challenge to the mutation entry, in which children of pre-deceased daughter were not included; *secondly*, it is held that the Judgment handed down by the learned Federal Shariat Court in the case of *Allah Rakha and others versus Federation of Pakistan and others* – P L D 2000 FSC 1 – Allah Rakha Case, declaring the Section 4 of the above Ordinance 1961, as against the Injunction of Islam, would have an effect from the date of that judgment, that is, 31.03.2000 and not to the earlier transactions; *thirdly*, the above cited Judgment has not discussed the Judgment of the Honourable Supreme Court in Sarwar Case [*ibid*]. It is clarified that the effect of Allah Rakha Case [*supra*] has been elaborately discussed in Khan Muhammad Decision, that since an Appeal has been preferred, therefore, operation of verdict [in Allah Rakha Case] is automatically suspended in terms of Article 203-D of the Constitution of the Islamic Republic of Pakistan, 1973; *fourthly*, the applicability of Section 4 of the Ordinance 1961 has not been discussed in the above Mahmood Case, which is a core issue in present *Lis* and on this law point, the entire case of present Plaintiffs is based, which has been decided in the above two Judgments, that Section 4 of the Ordinance 1961, has no retrospective application, which means that if pre-deceased child has died before coming into force of the above Ordinance 1961, the children of such pre-deceased son or daughter cannot take advantage of the said provision.

14. Admittedly, in the present case, the question of limited share in the estate left by the grandfather, the original owner-Propositus [Imam Bux] is not involved and Plaintiffs are claiming share in the inheritance as direct legal heirs of the pre-deceased son [Ayub Ali] of Imam Bux, hence, the benefit extended under Section 4 of the Ordinance 1961, for legal heirs of pre-deceased children, cannot be applied to the case of Plaintiffs, as

undisputedly, their predecessor-in-interest, the above named son, died on 10.03.1948, that is, before the promulgation of the Ordinance 1961. *Secondly*, the first Suit [*ibid*] was filed after four decades after the death of the Propositus, and 35 years after the mutation was done in favour of the above two daughters of the Propositus, therefore, the above observation in the Sarwar Case (*ibid*) about sanctity and conclusiveness attached to Succession matters, is also applicable, portion of which is already reproduced in the foregoing paragraphs.

15. Answer to the above question, framed on 06.04.2021 by this Court, is, that since in the present case the above Ordinance 1961 is not applicable, therefore, Plaintiffs will not inherit anything. Earlier Preliminary Decree is recalled. On this ground the *Lis* is not maintainable.

However, at the same time the Defendants should also realize that the Plaintiffs being undisputedly the direct legal heirs of their pre-deceased brother [Ayub Ali] and part of the same lineage [Propositus], should be treated with affection, in accordance with the teachings of Islam. The Islamic Law encourages bequeathing and gifting of property [both, moveable and immoveable]. Defendants should also consider this aspect of the Sharia, and may gift / transfer a portion of the Suit Property to the Plaintiffs or start sharing the rental income accruing from the Suit Property.

16. The Suit is disposed of accordingly.

Judge

Karachi.

Dated: 28.09.2023.

Riaz / P.S.