

IN THE FEDERAL SHARIAT COURT

(Original Jurisdiction)

PRESENT:

**MR. JUSTICE AGHA RAFIQ AHMED KHAN, CHIEF JUSTICE
MR. JUSTICE RIZWAN ALI DODANI
MR. JUSTICE SHAHZADO SHAIKH**

SHARIAT PETITION NO.19/I OF 1998

Mst. Sakina Bibi & Sisters C/O Ch. Muhammad Sharif,
r/o Village & Post Office Bangial, Tehsil Kharian,
District Gujrat.

Petitioner

Versus

Government of Punjab.

Respondent

For the petitioner

:

Nemo

For Federal Government

:

Nemo

For Province of Punjab

:

Ch. Saleem Murtaza Mughal,
Assistant Advocate General

For Province of KPK

:

Mian Saadullah Jandoli,
Deputy Advocate General

For Province of Balochistan

:

Mr. Naseerullah Bangulzai,
Additional Advocate General
Balochistan.

For Province of Sindh

:

Nemo

Jurist Consults

:

Dr. Hafiz Muhammad Tufail &
Syeda Viquar-un-Nisa Hashmi

Date of Institution of Sh. Petition:

06.10.1998

Date of hearing

:

28.05.2013

Date of Judgment

:

18.06.2013

Justice Shahzado Shaikh, J.:- Petitioner Mst. Sakina Bibi and her sisters through Shariat Petition No.19/I/1998 has challenged Section 2-A of the West Pakistan Muslim Personal Law (Shariat) Act (Amendment) Ordinance XIII of 1983 as being repugnant to Injunctions of Islam as laid down in Holy Quran and Sunnah of the Holy Prophet (PBUH).

2. This petition was admitted to regular hearing vide order dated 19.11.1998 and Notices were issued to the Government of Punjab as well as Attorney General for Pakistan and the Advocates General of all the four provinces.

3. The petitioner stated in her Shariat Petition as under:-

“By virtue of section 5 of the Punjab Laws Act, 1872 Custom continued to be the rule of decision in the matters of succession amongst Muslims. The Shariat Application Act, 1937 excluded agricultural land from the operation of the Act. After the creation of Pakistan the West Pakistan Muslim Personal Law Shariat Application Act, 1962 enacted but section 5 of the Punjab Laws Act 1872 still was not done away with.

2. Ultimately, Article 203-B empowered the Federal Shariat Court to pronounce Section 5 of the Punjab Laws Act 1872 un-Islamic, and Custom, for all times to come was crushed in the Punjab.

3. In PLD 1983 S.C 273 the learned Judges of the Supreme Court upheld the direction of the Federal Shariat Court, that the necessary amendment should be carried out in the West Pakistan Muslim Personal Law (Shariat) Application Act 1962. Accordingly, West Pakistan Muslim Personal Law (Shariat) Act (Amendment) Ordinance 1983 was enforced on 1-8-1983. However there is need for further amendment, because Section 2-A of the said Ordinance has ✓

restricted the effect of the Ordinance to a male heir who acquired Agricultural Land through Custom before 16-3-1948, which is un-Islamic, because the restriction of any limitation on the operation of Islamic Law is unthinkable.

4. In the case in hand the property of one Kalu Khan has not yet been distributed amongst his heirs. The rule of decision should be the Islamic Law, when Kalu Khan died in the year 1940. His one son Allah Ditta, six daughters and a widow were in existence. Allah Ditta died in 1976.

5. If at the time of the death of Kalu Khan, Islamic principles are made applicable the six daughters and widow are not deprived and they get their due share according to Islamic dispensation and Allah Ditta will also get his one-fourth share according to the dictates of Holy Quran.

6. It is therefore, prayed that this learned Court be pleased to declares section 2-A of the Ordinance XIII of 1983 known as West Pakistan Muslim Personal (Shariat) Act (Amendment) Ordinance 1983 as violative of the Injunctions of Islam and the said Sections needs to be modified/amendment, so as to remove the un-Islamic restrictions and thus Holy Quran and Sunnah be implemented in letter and spirit.

7. The said Ordinance is great hindrance in implementation of Sura Nisa; Verses No.7, 11, 12 and 177."

4. The impugned Section 2-A of the West Pakistan Muslim Personal Law (Shariat) Act (Amendment) Ordinance, 1983 is reproduced as follows:-

"2-A. Succession prior to Act IX of 1948. -

Notwithstanding anything to the contrary contained in ✓

section 2 or any other law for the time being in force, or any custom or usage or decree, judgment or order of any Court, where before the commencement of the Punjab Muslim Personal Law (Shariat) Application Act, 1948; a male heir had acquired any agricultural land under custom from the person who at the time of such acquisition was a Muslim: –

(a) he shall be deemed to have become, upon such acquisition, an absolute owner of such land, as if such land had devolved on him under the Muslim Personal Law (Shariat);

(b) any decree, judgment or order of any Court affirming the right of any reversioner under custom or usage, to call in question such an alienation of directing delivery or possession of agricultural land on such basis shall be void, inexecutable and of no legal effect to the extent it is contrary to the Muslim Personal Law (Shariat) Act;

c) all suits or other proceedings of such a nature pending in any Court and all execution proceedings seeking possession of land under such decree shall abate forthwith:

Provided that nothing herein contained shall be applicable to transactions past and closed where possession of such land has already been delivered under such decrees.”

5. The Federal Government submitted written statement on 07.04.2001, which is reproduced as under:-

“PRELIMINARY OBJECTIONS

1. *The petitioner has challenged section 2 of the West Pakistan Muslim Personal Law (Shariat) Act (Amendment) Ordinance 1983 being opposed to the Injunctions of Quran and Sunnah. In the petition she* ✓

has sought the section to be amended in term of para 5 thereof. An estate which has not been distributed amongst the legal heirs of the deceased may be distributed according to their respective shares and section 2-(a) to be deemed to be in-effective from that date.

Section 2-(a) referred to above was incorporated by way of amendment in the West Pakistan Muslim Law (Shariat) Act 1962 which relates to succession prior to Act IX of 1948 wherein the male heir having acquired agricultural land under Custom shall be deemed to have become upon such acquisition, an absolute owner of such land as if such land had devolved upon under the Muslim Personal Law (Shariat), notwithstanding any decree order and Judgment of a court of law affirming the right of reversioner in that behalf.

The customary law in the Punjab restricted the right of succession and the power of alienation after the enactment of the West Pakistan Muslim Personal Law (Shariat) Application Act 1948 enforced on 16.3.1948. This was challenged before the Federal Shariat Court through Shariat Petition No.13 of 1980. After having exhaustively dealt with the question referred to above, allowed the petition and ordered necessary amendments in the West Pakistan Muslim Personal Law (Shariat) Application Act 1962 which by that time had been promulgated. The amendment was also held to be not "retrospective". Against this judgment, the Federation filed Shariat Appeal No.16/1981 before the Shariat Appellate Bench. The appeal was dismissed and the amendment was upheld directing the said amendment to be carried out by 30.5.83. In consequence thereof, section 2-(a) was ✓

inserted which clarifies that in the opening of succession before the commencement of the Punjab Muslim Personal Law (Shariat) Application 1948, if a male heir had acquired any agricultural land under custom he would be deemed to be absolute owner of the same as if such land devolved upon him under the Muslim Personal Law (Shariat).

There is no cavil that on the death of a Muslim, his estate vests in his or her legal heirs. The court is not concerned with one's personal matter. It has to see if the provisions of a particular act are opposed to the Injunctions of Quran and Sunnah of the Holy Prophet (PBUH) and if any amendment is found necessary, it can strike down the same with a prospective effect. The Federal Government will not support any legislation which offend Quranic principles relating to inheritance among the Muslims.

Section 2-(A) inserted in the West Pakistan Muslim Personal Law (Shariat) Act, 1962 in regard to agricultural land acquired before the Act IX of 1948 when the customary law was still the governing rule. It altered the course of succession and stopped operation of customary distribution of share nevertheless, the Act as per the judgment referred to above, was declared to be not retrospective.

It is therefore, respectfully prayed that the petition be dismissed."

6. The Staff Officer to the Advocate General Punjab, Lahore vide his letter No.5498 AG/FSCB dated 13.08.2007 submitted para-wise comments on behalf of the Province of Punjab, which are as under:-

"1. That in the instant case Kalu Khan died in the year 1940 and his estate devolved upon Allah Ditta ✓"

(son) under Customary Law. Allah Ditta son of Kalu Khan died in the year 1976. The law applicable was section 5 of Punjab Laws Act IV 1872. It reads as under:-

“In questions regarding succession,.....

a) The rule of decision shall be any custom applicable to parties concerned which is not contrary to justice, equity or good conscience and has not been by this act or any other enactment altered or abolished, and has not been declared to be void by any competent authority”.

b) The Muhammadan Law in cases where the parties are Muhammadans, and the Hindu law, in cases where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment, or it opposed to the provisions of this Act, or has been modified by any such custom as is above referred to. (See Shariat Act, 1948 etc)

Therefore, the Personal Law Shariat Application, Act XXVI of 1937 was promulgated on the 7th of October, 1937, in which by virtue of Section 2, question relating to agricultural land were saved and excluded and Section 5 of Punjab Law Act 1872 was repealed vide Section 6 of Act XXVI of 1937.

It is pertinent to mention here that the West Punjab Muslim Personal Law (Shariat) Application Act IX of 1948 was promulgated on the 16th of March, 1948, and Section 2 of this Act was substituted by Punjab Act XI of 1951, which reads as, “Notwithstanding any rule of custom or usage to the contrary in all questions regarding succession (whether testate or intestate) special property of

females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, legitimacy or bastardy, family relations, wills, legacies, gifts, religious usages or institutions including waqf, trusts and trust property, the rule of decision shall be the Muslim Personal Law (Shariat) in cases, where the parties are Muslim”, whereafter Muslim Personal Law (Shariat) Application Act of 1962, was promulgated and the limited estates held by female were terminated with effect from 31.12.1962 by virtue of Section 3 thereof and the life estate so terminated were devolved upon such persons in accordance with Shariat, as if the last male owner from whom the life estate devolved upon female under Custom, has died at time of termination of life estates. Thus inheritance in such cases shall open and the persons alive at the time of the death of the propositus (last male owner) shall inherit the same under Muslim Personal Law as per their respective shares. It is pertinent to mention here that in the instant case there was no limited estate and there was no life estate in existence at the time of Shariat Application Act 1948, and at the time of Shariat Application Act 1962. In the instant case the last male owner was Allah Ditta son of Kalu Khan who inherited the estate of his father in 1940 under the relevant laws in force at that time i.e., under Customary Laws. Allah Ditta being the last male owner became the full owner of the estate on 16.03.1948 under Shariat Application Act, 1948. Shariat Application Act 1962 had no retrospective effect. Sub section (2) of Section 7 of the Act saves and protects rights of persons who inherited the property before commencement of the Shariat Application Act, 1948. So the petitioners' stance is misconceived. ✓

Reliance can be placed on 1988 SCMR 8, PLD 1985 SC 407, 1988 SCMR 293, PLD 1990 SC 982, 2004 CLC 1652.

2&3 – That Section-5 of the Punjab Laws Act 1872 was declared repugnant to the Injunctions of Islam in view of judgment of the August Court reported as PLD 1983 SC 273. The Shariat Application Act, 1962, was amended by Ordinance-XIII of 1983 and Section 2-A was added wherein any male heir who acquired agricultural land under custom, upon such acquisition became the absolute owner, as if such land had devolved upon him under the Muslim Personal Law (Shariat) and in case of his death his such property would be distributed amongst his heirs under Muslim Personal Law. Thus Section 2-A of Ordinance-XIII of 1983 is quite in consonance with the Injunctions of Islam. The plea taken by the petitioners is misconceived.

4. That property of one Kalu Khan devolved upon his son Allah Ditta in the year 1940 under the law prevalent at that time. Thus, the petitioners are not entitled to any share in such property. Only heirs of Allah Ditta who died in 1976 are entitled to inherit his property.

5. Incorrect.

6. That Section 2-A of Ordinance-XIII of 1983 is not violative of the Injunctions of Islam. Thus, the instant petition is liable to be dismissed.

7. Para No.7 is misconceived. Shariat is being applied in matters of inheritance since promulgation of Muslim Personal Law (Shariat) Application Act 1948 and the amendments and enactments made thereafter are in accordance with the Injunctions of Islam. Therefore, the said Ordinance does not display ✓

any hindrance for the implementation of verses of the Holy Quran.

The petition may very graciously be dismissed."

7. The Advocate General Sindh submitted written statement on behalf of Province of Sindh, which is reproduced below:

"1. That the petitioner has challenged Section 2-A of the West Pakistan Muslim Personal Law (Shariat) Act (Amendment) Ordinance, 1983 as to its vires on the touchstone of Quran and Sunnah. The petitioner seeks further amendment in West Pakistan Muslim Personal Law (Shariat) Act (Amendment) Ordinance, 1983 which was enforced on 01.08.1983. Section 2-A of the Ordinance ibid has dealt with the rights of a male heir who acquires agricultural land through custom before 16.03.1948.

2. That Article 2-A of the Constitution of Pakistan, which has been made substantive part of the Constitution and has been made to take effect accordingly guarantees that the Muslim of Pakistan shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah. All laws shall be framed and brought into the frame, which is not un-Islamic and against the Holy Quran and Sunnah. The restriction of any limitation on the operation of Islamic Law has to be struck down. The rule of inheritance shall be in accordance with Islamic Law. If any legislation offends the principles of Islamic laws that has to be removed from the statute book.

3. That as per decision of the Supreme Court of Pakistan reported in PLD 1990 Sc 1 Muslims' Estate vests immediately at the death in his or her heirs,

Brother, Father, Husband, Son or vice versa does not or cannot intervene as an intermediary. Heir in possession has to be considered to be in constructive possession of the property on behalf of the heirs inspite of his exclusive possession. Recognition and enforcement of law of inheritance by the state agencies including the Court, viz-a-viz the family heirs, is a matter of public policy in Islam. Relevant laws, therefore, need to be re-interpreted under the new right. Objectives Resolution being a part of the Constitution the new principles of public policy with Islamic Ethos/spirit would be defined and applied.

4. *That in the instant case as highlighted in the petition the inheritance has to be devolved and distributed in accordance with the principles of Islam and therefore, the legislation at present needs amendment to bring into folds the legal rights of the family heirs.*

5. *That in view of the above narration the grounds mentioned in the petition cannot be accepted on the touchstone of the famous judgment of the august Supreme Court mentioned above.*

It is prayed on behalf of Province of Sindh through Advocate General Sindh, that the petition is without merit and liable to be dismissed."

8. The Advocate Generals Balochistan and KPK relied upon and adopted the para-wise comments filed by Federal Government/Attorney General for Pakistan.

9. Dr. Hafiz Muhammad Tufail appeared as Jurist Consult and assisted the Court on the point of law of inheritance.

10. Syeda Viquar Nisa Hashmi, Advocate appearing as Jurist Consult has submitted her opinion which is as under: ✓

1. *That the petitioner has challenged the legality of Section 2-A of the West Pakistan Muslim Personal Law (Shariat) Act (Amendment) Ordinance, 1983 on the touchstone of Quran and Sunnah.*
2. *The key issue is whether Section 2 of the West Pakistan Muslim Personal Law Shariat Act, 1962 applies even in the cases where male legal heir has acquired any agricultural land under custom before the commencement of the Punjab Muslim Personal Law (Shariat) Application Act, 1948 (as barred under Section 2-A West Pakistan Muslim Personal Law (Shariat) Act (Amendment) Ordinance, 1983)?*
3. *The precise answer is yes and the reliance is placed on the following judgments of the Hon'ble Superior Courts of Pakistan:*
 - *Mst. Zainab Bibi & 2 others v/s Muhammad Yousaf & 4 others (1995 SCMR 868)*
 - *Mohib Shah & 3 others v/s Mst. Jannat Bibi & another (1997 CLC 659)*

4. **Zainab Bibi's case**

The Hon'ble Supreme Court of Pakistan held:

"Person who as "male heir" had inherited agricultural land before 15.3.1948 under custom would be deemed to have inherited such land under Shariat law. If such male person had inherited the agricultural land before 15.3.1948, his mother and two sisters would inherit $1/6^{\text{th}}$ and $2/3^{\text{rd}}$ shares respectively and the residue $1/6^{\text{th}}$ share would go to the person who was his paternal uncle."

5. **Mohib Shah's case**

In this case the daughters of last male owner claiming to be governed by Muslim personal law in matters of inheritance filed a suit for declaratory decree to this effect in respect of estate left by their deceased father. Defendants claimed that deceased having died before partition, his inheritance was governed by Custom. ✓

Plaintiffs' (daughters') suit was dismissed by Trial Court but decreed by Appellate Court which came to conclusion on basis of evidence that deceased in matters of inheritance was governed by Muslim personal law and not by Custom.

Wajib-ul-Araz of three villages where property of deceased was situated clearly mentioned that deceased being Syed was governed by Muslim personal law in matters of inheritance and such entries related to year 1927-28 about 11 years before death of deceased.

As against such documentary evidence produced by plaintiffs, defendatn's oral evidence relating to applicability of Custom was of no significance and was insufficient to prove that deceased in matters of inheritance was governed by Custom. Defendants were required to prove not only that deceased in matters of inheritance was governed by Custom but also to establish as to what that particular Custom was. Defendants could not prove either of such factum. Shariat law in matter of inheritance of deceased thus governed parties and plaintiffs (daughters) were entitled to inherit their shares in accordance with Shariat law.

The Hon'ble High Court of Lahore held:

"The case of the Petitioners with regard to particular custom governing their succession and inheritance has not been proved by them while the evidence led by the respondent-plaintiffs is sufficient to believe that the parties were governed by the Muslim Personal Law as incorporated in Wajib-ul-Araz for the year 1927-28."

6. *Analysis of the relevant sections:* ✓

In my humble opinion the section 2 of the Shariat Act is an overriding provision explicitly provides that all matters including succession shall be governed by the Muslim Personal Law (Shariat) Application Act, 1948 in case where the parties are Muslim. The said Section reads:

“2. Notwithstanding any custom or usage, in all questions regarding succession (whether testate or intestate), special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, legitimacy or bastardy, family relations, wills, legacies, gifts, religious usages or institutions including waqf, trusts and trust property, the rule of decision shall be the Muslim Personal Law (Shariat) in cases, where the parties are Muslim”

7. The Section 2-A prevents the retrospective application of the provision of Section 2 of the Act in certain circumstances. This provision does not apply to the transaction past and close even after the promulgation of the West Pakistan Muslim Personal Law (Shariat) Act (Amendment) Ordinance, 1983, where possession of such lands in question have been delivered to avoid the chaos of any sort.

8. That the aforesaid intent of the legislature for inserting the provision of Section 2-A becomes clear by reading its proviso which provides that the said section cannot be applied retrospectively to the transaction past and closed. The relevant part of the section reads:

“.....to transactions past and closed where possession of such land has already been delivered under the decrees passed before coming into force of West Pakistan Muslim” ✓

*Personal Law (Shariat) (Amendment)
Ordinance, 1963."*

This provision is again meant to avoid the chaos where the property rights have been transferred and acquired under the law.

9. Facts and analysis of Kalu Khan's case:

Following are the key facts of the instance case:

- a. Kalu Khan, a person whose property is in-question passed away in 1940*
- b. The deceased left behind a widow, a son named Allah Ditta and six daughters*
- c. Allah Ditta also passed away in 1976*
- d. There appears to be no proof that Allah Ditta acquired the land under the customary law*
- e. The property has not yet been divided among his legal heirs of Kalu Khan.*

10. That according to the Petitioner, if the Islamic Laws are made applicable at the time of the death of Kalu Khan (year 1940), his widow and six daughters will get their share.

11. Factually, Kalu Khan acquired the agricultural land. The fact whether that was under the customary law or not is not on record. This particular transaction is not a closed transaction as since the death of Kalu Khan till today the property has never been divided among his legal heirs. In fact the property remained in possession of the female legal heirs of Kalu Khan i.e., his widow and sisters. Secondly the only male legal heir of Kalu Khan does not seem to have acquired the land through any decree or order or even the physical possession of land and he too has passed away. Further the Petitioners have right to acquire property as legal heirs of both Kalu Khan and Allah Ditta. Therefore no question of chaos seems to arise in this ✓

particular case. Accordingly the application of Shariah Law for the distribution of property of Kalu Khan is justified in this particular case.

12. In my humble opinion Islamization of the legal framework is a gradual process that takes place by softening the prevailing laws and customs having the force of law in the larger interest of the public.

13. The provision of Section 2-A does not validate the custom that is contrary to the Injunctions of Islam but it merely provides a strategic way to avoid chaos in closed transactions. In view of the forgoing discussion, the Petitioner has a right to get her share in inheritance under Shariah.”

11. From above discussion, the following major points emerge for consideration:

12. The customary law in the Punjab restricted the right of succession and the power of alienation after the enactment of the West Pakistan Muslim Personal Law (Shariat) Application Act 1948. This was challenged before the Federal Shariat Court through Shariat Petition No.13/R of 1980 (Muhammad Ishaq vs State). The Court vide its judgment dated 19-5-1981 allowed the petition and ordered necessary amendments in the West Pakistan Muslim Personal Law (Shariat) Application Act, 1962. The Federation of Pakistan through Secretary, Law & Parliamentary Affairs filed Shariat Appeal No.16/1981 before the Shariat Appellate Bench of Supreme Court. The appeal was dismissed and the amendment was upheld directing the said amendment to be carried out by 30.5.83. In consequence thereof, section 2-(a) was inserted which clarifies that in the opening of succession before the commencement of the Punjab Muslim Personal Law (Shariat) Application 1948, if a male heir had acquired any agricultural land under custom he would be deemed to be absolute owner of the same as if such land devolved upon him under the Muslim Personal Law (Shariat). ✓

13. While challenging section 2-A of the West Pakistan Muslim Personal Law (Shariat) Act (Amendment) Ordinance 1983 as contrary to the Injunctions of Quran and Sunnah, the Petitioner has sought this section to be amended accordingly.

14. However, the facts of the case have been reported as under:

- a. Kalu Khan died in the year 1940 and his estate devolved upon Allah Ditta (son) under Customary Law, prevalent at that time. Thus, the petitioners were not entitled to get any share in that property. Allah Ditta died in 1976, as *Kallaalaa*.

The above may be presented in more clear terms, as follows:

Kalu Khan, a person whose property is in question passed away in 1940,

The deceased left behind a widow, a son named Allah Ditta and six daughters,

Allah Ditta also passed away as *Kallaalaa* in 1976.

- b. The property has not yet been divided among legal heirs of Kalu Khan.
- c. If the Islamic Law was applied at the time of the death of Kalu Khan (year 1940), his widow and six daughters would have got their share.
- d. It is claimed that this particular transaction is not a closed transaction as since the death of Kalu Khan till today the property has never been divided among his legal heirs.
- e. The property has all along remained in possession of the female legal heirs of Kalu Khan i.e., his widow and daughters. ✓

- f. The only male legal heir of Kalu Khan did not acquire the land through any decree or order or even the physical possession of land and he too has passed away.
- g. Based on above facts, the Petitioners claim that they have right to acquire property as legal heirs of both Kalu Khan and Allah Ditta.

15. The Petitioner has prayed that the estate which has not been distributed amongst the legal heirs of the deceased may be distributed according to their respective shares and section 2-(a) be deemed to be in-effective, being repugnant to Injunctions of Islam. This amounts to seeking relief in personam, which is beyond the jurisdiction of this Court.

16. However, it is noteworthy that in the above circumstances, no question of chaos seems to arise in this particular case. Furthermore, the Petition for relief in personam for distribution of property of Kalu Khan in this case, is beyond jurisdiction of this Court.

17. The key point is that Section 2-A of the West Pakistan Muslim Personal Law Shariat Act, 1962 applies even in the cases where male legal heir has acquired agricultural land under custom before the commencement of the Punjab Muslim Personal Law (Shariat) Application Act, 1948.

18. The following may also be relevant to be examined:

Zainab Bibi's case (1995 SCMR 868)

The Hon'ble Supreme Court of Pakistan held:

“Person who as “male heir” had inherited agricultural land before 15.3.1948 under custom would be deemed to have inherited such land under Shariat law.”

19. Muslim Personal Law (Shariat) Application Act, 1948, explicitly provides that succession shall be governed by this Act, where the parties are Muslim. Section 2 reads as follows: ✓

سَلَفٌ وَأَمْرُهُ إِلَى اللَّهِ وَمَنْ عَادَ فَأُولَئِكَ أَصْحَابُ النَّارِ هُمْ فِيهَا

خَالِدُونَ ﴿٢٧٥﴾

Those who take riba (usury or interest) will not stand but as stands the one whom the demon has driven crazy by his touch. That is because they have said: Sale is but like riba., while Allah has permitted sale, and prohibited riba. So, whoever receives an advice from his Lord and desists (from indulging in riba), then what has passed is allowed for him, and his matter is up to Allah. As for the ones who revert back, those are the people of Fire. There they will remain forever.(2:275).

وَلَا تَنْكِحُوا مَا نَكَحَ آبَاؤُكُمْ مِنَ النِّسَاءِ إِلَّا مَا قَدْ سَلَفَ إِنَّهُ كَانَ

فَاحِشَةً وَمَقْتًا وَسَاءَ سَبِيلًا ﴿٢٨﴾

Do not marry those women whom your fathers had married except what has passed. It is indeed shameful and detestable, and it is an evil practice. (4:22)

21. Maulana Mawdoodi commented on this verse as follows:

“While forbidding the wrong ways of ‘ignorance’, the Holy Qur’an usually ends the instruction with such words as: ‘though what has happened in the past is excepted.’ It has two meanings in view. First, that no action will be taken in regard to those wrong things that one did in ignorance, provided that one mended ones ways and gave them up after the receipt of a particular Commandment. Second, that those words meant to give reassurance that the new instructions had no retrospective effect....” (The Meaning of the Quran Abul-A’la Maudodi; Vol-II P.109. Pan Islamic Publishers Lahore (1976).

حَرِّمَتْ عَلَيْكُمْ أُمَّهَاتِكُمْ وَبَنَاتِكُمْ وَأَخَوَاتِكُمْ وَعَمَّاتِكُمْ وَخَالَاتِكُمْ وَبَنَاتِ
الْأَخِ وَبَنَاتِ الْأَخِ وَأُمَّهَاتِكُمُ اللَّيِّئِ أَرْضَعْتِكُمْ وَأَخَوَاتِكُمْ مِنَ الرِّضَاعَةِ
وَأُمَّهَاتُ نِسَائِكُمْ وَرَبَائِبُكُمُ اللَّيِّئِ فِي حُجُورِكُمْ مِمَّنْ نِسَائِكُمُ اللَّيِّئِ دَخَلْتُم بِهِنَّ
فَإِنْ لَمْ تَكُونُوا دَخَلْتُم بِهِنَّ فَلَا جُنَاحَ عَلَيْكُمْ وَحَلَائِلُ أَبْنَائِكُمُ الَّذِينَ

مِنْ أَصْلَابِكُمْ وَأَنْ تَجْمَعُوا بَيْنَ الْأُخْتَيْنِ إِلَّا مَا قَدْ سَلَفَ إِنَّ اللَّهَ كَانَ
غَفُورًا رَحِيمًا ﴿٢٣﴾

Prohibited for you are your mothers, your daughters, your sisters, your paternal aunts, your maternal aunts, daughters of brother, daughters of sister, your mothers who suckled you, your sisters through suckling, mothers of your wives and your step-daughters under your care who are born of your women with whom you have had intercourse, though if you have not had intercourse with them, there is no sin on you, and the wives of your sons from your loins, and that you combine two sisters (in wedlock), except what has passed. Surely, Allah is Most-Forgiving, Very-Merciful..(4:23)

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَقْتُلُوا الصَّيْدَ وَأَنْتُمْ حُرْمٌ وَمَنْ قَتَلَهُ مِنْكُمْ مُتَعَدًّا
فَجَزَاءٌ مِمَّا قَتَلَ مِنَ التَّعْمِ بِحَسَبِ ذَوِّ عَدْلٍ مِنْكُمْ هَدْيًا بَلِغَ الْكَعْبَةِ أَوْ
كَفَّارَةٌ طَعَامُ مَسْكِينٍ أَوْ عَدْلٌ ذَلِكَ صِيَامًا لِيَذُوقَ وَبَالَ أَمْرِ عَفَا اللَّهُ عَنْهَا
سَلَفٌ وَمَنْ عَادَ فَيَنْتَقِمُ اللَّهُ مِنْهُ وَاللَّهُ عَزِيزٌ ذُو انْتِقَامٍ ﴿٩٥﴾

O you who believe, do not kill game when you are in Ihram (state of consecration for Hajj or Umrah). If someone from among you kills it deliberately, then compensation (will be required) from cattle equal to what one has killed, according to the judgment of two just men from among you, as an offering due to reach the Ka'bah, or an expiation, that is, to feed the poor, or its equal in fasts, so that he may taste the punishment of what he did. Allah has forgiven what has passed, but whoever does it again, Allah shall subject him to retribution. Allah is Mighty, Lord of Retribution.(5:95)

قُلْ لِلَّذِينَ كَفَرُوا إِنْ يَتَّعَبُوا يُعْذَرُوا لِمَا قَدْ سَلَفَ وَإِنْ يُعْوَدُوا فَقَدْ مَضَتْ
سُنَّةُ الْأَوَّلِينَ ﴿٣٨﴾

Say to those who disbelieve that if they desist (from infidelity), they shall be forgiven for what has passed (of their sins), and if they repeat, then, the precedent of the earlier people is already established (that the infidels are punished(8:38).

Tradition of the Holy Prophet (S.A.W.S) also support the view that past and closed transaction should not be re-opened for the reason of elimination of Harm. The following Traditions are worth mentioning:

حَدَّثَنَا حَجَّاجُ بْنُ أَبِي يَعْقُوبَ حَدَّثَنَا مُوسَى بْنُ دَاوُدَ حَدَّثَنَا مُحَمَّدُ بْنُ مُسْلِمٍ عَنْ عَمْرِو بْنِ
دِينَارٍ عَنْ أَبِي الشَّعَثَاءِ عَنْ ابْنِ عَبَّاسٍ قَالَ قَالَ النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ كُلُّ قَسْمٍ قَسِيمٍ فِي
الْجَاهِلِيَّةِ فَهُوَ عَلَى مَا قَسِمَ لَهُ وَكُلُّ قَسْمٍ أَذْرَكُهُ الْإِسْلَامُ فَهُوَ عَلَى قَسْمِ الْإِسْلَامِ (سنن
ابوداؤد: جلد دوم: حدیث نمبر 1140 حدیث مرفوع)

حجاج بن ابی یعقوب، موسیٰ بن داؤد، محمد بن مسلم، عمرو بن دینار، ابی شعثاء، حضرت ابن عباس سے روایت ہے کہ رسول اللہ صلی اللہ علیہ وآلہ وسلم نے فرمایا جو تقسیم زمانہ جاہلیت میں ہو چکی وہ زمانہ اسلام میں علیٰ حالہ قائم رہے گی اور

جو تقسیم اسلام کے زمانہ تک نہیں ہوئی اب وہ اسلام آجانے کے بعد اسلامی اصولوں کے مطابق تقسیم ہوگی۔

حَدَّثَنَا مُحَمَّدُ بْنُ رُمْحٍ أَنبَأَنَا عَبْدُ اللَّهِ بْنُ لَهِيْعَةَ عَنْ عَقِيلٍ أَنَّهُ سَمِعَ نَافِعًا يُخْبِرُ عَنْ عَبْدِ اللَّهِ بْنِ عُمَرَ أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ مَا كَانَ مِنْ مِيرَاثٍ قَسِمَ فِي الْجَاهِلِيَّةِ فَهُوَ عَلَى قِسْمَةِ الْجَاهِلِيَّةِ وَمَا كَانَ مِنْ مِيرَاثٍ أُذِرَكَ الْإِسْلَامَ فَهُوَ عَلَى قِسْمَةِ الْإِسْلَامِ (سنن ابن ماجه: جلد دوم: حدیث نمبر 2749 حدیث مرفوع ص 38 جلد 4)

محمد بن رمح، عبد اللہ بن لہیعہ، عقیل، نافع، عبد اللہ بن عمر، حضرت عبد اللہ بن عمر سے روایت ہے کہ اللہ کے رسول صلی اللہ علیہ وآلہ وسلم نے ارشاد فرمایا جو میراث دور جاہلیت میں تقسیم ہوچکی تو وہ تقسیم جاہلیت برقرار رہے گی اور قانون اسلام آنے کے بعد ہر میراث اسلامی اصولوں کے مطابق تقسیم ہوگی۔ (اب قانون اسلام کے مطابق از سر نو اس کی تقسیم نہ ہوگی کیونکہ اس میں بہت حرج ہے)

22. Islamization of the legal framework is a gradual process, in the larger interest of the public, that takes places by reforming the prevailing laws and customs having the force of law.

23. The provision of Section 2-A does not validate the custom that is contrary to the Injunctions of Islam and at the same time it provides a strategic way to avoid chaos in closed transactions.

24. In view of the forgoing discussion, if the Petitioner still needs to pursue her right to get her share in inheritance under Shariah, she may seek such relief in personam from the appropriate forum. But so far this Shariat Petition to the extent of declaring Section 2-A of the Muslim Personal Law (Shariat) Application Act, 1948, is concerned, as discussed above, is dismissed being devoid of merit in this regard.

Justice Shahzad Shaikh

Justice Agha Rafiq Ahmed Khan
Chief Justice

Justice Rizwan Ali Dodani

Announced
Dated, Islamabad the
18.06.2013
M. Imran Bhatti/*

Fit for reporting.

Justice Shahzad Shaikh