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SHARIAT PETITION NO. 32/I/1993.

Rahmat Khan Vs.Federation of Pakistan.

This Shariat Petition is filed by Rahmat Khan through his Counsel challenging section 4 of the Muslim Family Laws Ordiance 1961 on the ground of its being repugnant to the Injunctions of Islam as laid down in the Holy Quran and Sunna of the Holy Prophet(PBUH).

The impugned section provides that

"In the event of the death of any son or daughter of the propositus before the opening of the succession, the children of such son or daughter, if any, living at the time of the succession opens, shall per stripes receives a share equivalent to the share which such son or daughter as the case may be, would have recieved if alive. "

This provisions was for the first time challenged before the Shariat Bench of Peshawar High Court in a Petition titled Mst.Farishta Vs.State

and the August Court had declared it repugnant to the Injunctions of Islam. As a result of an appeal preferred before the Supreme Court Shariat Appellate Bench, the impugned judgment was set aside on the ground that section 4 of Muslim Family Laws comes within the purviewe of Muslim Personal Law and thus was beyond the jurisdiction of the High Court.

The petitioner has referred to a decision of Shariat Appellate Bench of Supreme Court, wherein it was held "All codified or statute laws which apply to the generel body of the Muslims will not be immuned from the scrutiny by the Federal Shariat Court in exercise of its power under Article 203D of the Constitution.Invoking assistance of this remark, the petitioner seeks declaration to the effect that the provision of section 4 of the Muslim Family Laws are repugnant to the Injunctions of Islam.

When we examine this issue on the touchstone of Islamic Injunctions,we find that commentators, Ulema and Fuqaha of all schools of thought are unanimously agreed on the point that Inheritance by offspring of predeceased

aon or daughter is contradictory to the Islamic Injunctions. While section 4 of the Muslim Family Laws 1961 providing for inheritance of predeceased offspring living at the time of opening succession. The Jurists, Ulema derive argument from the following Quranic Verses and the Traditions of the Holy Prophet :- It is appeared in the Holy Quran that :

يوصيكم في اولادكم للذكر مثل حظ الانثيين -

"Allah enjoins you concerning your children that the share of the male shall be twice that of female (4:11).

While elaborating this Quranic Verse the commentator Imam Abu Bakr Jarssab writes that :

ولم تختلف اهل العلم في ان المراد بقوله تعالى "يوصيكم في اولادكم" اولاد الصلب وانه اذا لم يكن ولد صلب ـــــ فالمراد البنين دون اولاد البنات فقد انتظم اللفظ اولاد الصلب و اولاد الابن اذا لم يكن ولد الصلب ـــــ

الجامع احكام القرآن للجصاص
ج ٢ ص ٩٦

"The Jurists are unanimously agreed on the point that the word " اولادكم " in the aforementioned Quranic Verse denotes only real son or daughter not the grandson. If there is no real son or daughter, the grandson shall inherit. In the presence of real son or daughter, the grandson shall not be included in the meaning of " اولاد " (يوصيكم في اولادكم). The same view point is expressed by the othere commentators of " مفسرين " Ulema and Jurists of Islam. Regarding distribution of inheritence, Islam has adopted the principles of " الاقرب فالاقرب " i.e. the nearest relation of the deceased person have the primary right to inherit. Distituteness or deservingness of the relative have not been taken into consideration. Under this principle, the grandson is excluded in the presence of real son. It is appeared in the Tradition of the Holy Prophet that :

عن ابن عباس قال رسول الله صلى الله عليه وسلم
الحقوا الفرائض باهلها فما بقى لاولى رجل ذكر.
صحيح بخاري ج ٢ ص ٩٧٤

Narrated Ibn Abbas the Holy Prophet said: Give the shares of the inheritence as prescribed in the Holy Quran to those who are entitled to receive it than whatever remains, should

be given to the closest male relative of the deceased,

(صحیح بخاری حدیث 724).

It is also appeared in the tradition that :

ولد الابناء بمنزلة الولد اذا لم یکن دونهم
ولد ذکرهم کذکرهم ونساءهم کنسائهم یرثون
کما یرثون ویحجبون کما یحجبون ولا یرث ولد
الابن مع الابن . بخاری جلد ۲ ص ۹۷۶

"The grand children are to be considered as one's children (in the distribution of inheritence) in case none of one's own children are still alive a grand son is as "son, a grand daughter as a daughter, inherit (their grand parents' property as their own parents would (where they alive) and they prevent the sharing of the inheritence with all those relatives who would have been prevented from the same, where their parents alive. So one's grand son does not share the inheritence with one's own son (if the son is alive).

The conclusion of the above discussion is that there is no single provision in the Holy Quran or Sunnah of the Holy Prophet which support the inheritence of predeceased son or daughter (when the real son is alive).

There has been consensus of opinion on the point and

Four Sunni Schools of thought including Saheitæ are unanimously agreed on the point that when the real son is alive the pre-deceased son or daughter has not right to inherit. However, some Modernist Ulema are of the opinion that the pre-deceased son or daughter must enjoy the right of inheritence. To meet the situation and keeping in viewe the importance of the issue, there must be legislation or special provision to remedies the grievances of the pre-deceased son.

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