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are not the same, yet an issue decided in one suit would be *res judicata* in the other; and once we accept this proposition, it cannot consistently be urged that unless the same right is involved in the two suits the parties cannot be said to be litigating under the same title. At the same time, we have quoted above judgments showing that status once determined is *res judicata* and it would not be at all difficult to quote authorities where a matter decided in a suit for declaration by a reversioner was held binding on a subsequent suit for possession. If it could be argued that when a reversioner files a suit for a declaration the right involved is different from the right to possession of the property on the death of the alienor and, therefore, in the two suits the title under which the parties are litigating are not the same, then all those judgments would be wrong. We do not think it is necessary to labour the point further in view of the Privy Council case which we have cited above.

4. As a result of the finding with respect to *res judicata* the suit of Allah Rakha has to be dismissed. We have considered the question whether the other two plaintiffs may be entitled to a decree and we find that they are not so entitled. They are the first cousins of Muhammad Din and, therefore, only distant kindred. The mother of Muhammad Din was a sharer. In the presence of a sharer (except in the case of a husband or wife) distant kindred cannot succeed. The whole property, therefore, has to go to the heirs of *Mst.* Panah Bibi in case there be no collateral of Muhammad Din alive. Allah Rakha has, on account of *res judicata*, failed to prove that he is a collateral.

5. This appeal is accepted, but the parties will bear their own costs in both the Courts.

Appeal accepted.

K. M. A.

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Before Bashir Ahmad, J

Mirza ANWAR BEG and others—Petitioners

versus

Mirza ULFAT BEG and others—Respondents

Anwar Beg v. Ulfat Beg — Bashir Ahmad, J

Writ Petition No. 650/R of 1958, decided on 28th January, 1960.

(*a*) *Muhammadan Law—Succession—Punjab Rehabilitation Re-settlement Scheme, Part II, Para. 46—Grandson whose father has pre-deceased his own father—Inherits grandfather only in cases of allotment simpliciter and not where grandfather has filed his claim or allotment is on* quasi-*permanent basis—Genesis of rule.*

Held, that a grandson, whose father has pre-deceased his own father, is an heir in regard to property allotted to grandfather only where the allotment is allotment simpliciter and not where the grandfather has preferred his claim or the allotment is on a *quasi*-permanent basis.

An order of allotment simpliciter confers no right on the allottee except that of a licensee which is a personal right. But

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once a claim has been preferred then radically different considerations come into play. He has taken a step to treat a license as foundation for a claim to title to the land on the basis of his entitlement as determined according to law. In such cases the rule laid down is that the Muslim Law is to be the rule of decision. This fact gains further support from paragraph 14 of Chapter I of the Rehabilitation Re-settlement Scheme which lays down in the case of allottees on *quasi*-permanent basis that they may transfer by sale, exchange, gift, will, mortgage or any private contract their rights or interests to the land allotted to them under the Rehabilitation Scheme except in the specified categories. The present case does not fall in any one of those categories. This provision also would lead to the conclusion that the allotment to the refugee is now on a *quasi*-permanent basis and not on a licence basis which is purely personal in character. [p. 268]*A*

The licencor has every right to attach whatever conditions he considers necessary to the licence, and since it is personal in character, there is nothing to inherit and no provision of the Shariat Act is attracted to such a case. [p. 268]*B*

Succession postulates rights in property which the heirs are supposed to inherit and a simple allotment is not such a right under the Muslim Law. It is only an authority to use on the specific conditions property which admittedly belongs to another. [p. 268]*C*

Genesis of rules, operative under the Punjab Rehabilitation Re-settlement Scheme, as to succession of grand-children, whose father has pre-deceased their grandfather, to the property of grandfather, traced. [p. 267]*D et seq.*

Writ Petition No. 466/R of 1957 *ref.*

Sobho Gyanchandani v. *Crown* P L D 1952 F C 29 *mentioned.*

(*b*) *Writ—Petition not mentioning law point on which petition was ultimately decided—Omission not fatal to petition because Court is not relieved of obligation to interpret law correctly*: [Tariq Transport's case P L D 1958 S C (Pak.) 437 **not applicable**]. [p. 269]*E*

Muhammad Asghar Khadim for Petitioner.

Saeed Akhtar for Respondents 1 to 6.

Dates of hearing : 26th and 27th January, 1960.

JUDGMENT

The petitioners before me are heirs of one Taj Beg who was allotted land on *quasi*-permanent basis and died 3½ years ago. He left also children from a pre-deceased son Fazal Beg who are respondents to this petition. On the death of Taj Beg, the land was mutated in favour of the petitioners. The heirs of Fazal Beg, the pre-deceased son, went in appeal, and the Deputy Rehabilitation Commissioner by his order dated the 19th of August, 1957, upset that decision and allowed the respondents also to be treated as heirs to the property left by Taj Beg deceased. This order was also affirmed on revision. The petitioners then filed a civil suit which was dismissed on the

finding that the Civil Court had no jurisdiction to upset the decision of the Rehabilitation Authority. The present petition is directed against the order of the Rehabilitation Commissioner dated the 12th of September, 1957, by which the respondents were also treated as heirs to the property left by Taj Beg.

2. In order to decide this petition, it may be necessary to reproduce paragraph 46 of Part II of the Rehabilitation Re-settlement Scheme, Punjab, which reads :—

"46 (1) Cases of inheritance should be decided according to Shariat Law. This decision may, however, cause some difficulty and hardship in the case of a grandson who cannot inherit the property of his father if he dies in the lifetime of his grandfather. The Deputy Rehabilitation Commissioner (Lands) will, therefore, allow the grandsons of a deceased refugee owner to inherit the property of their grandfather if their father died during the lifetime of their grandfather to the extent of their father's share. (Reference Punjab Government Memo. No. 8595-R (L) dated the 6th November, 1951). He will also allow the grand-daughters of a deceased refugee owner to inherit the property of their grandfather to the extent of their shares in their father's share. The widow of a deceased son who died during the lifetime of his father will similarly be allowed to inherit her share.

(2) The grandson of predeceased daughter will also be allowed to inherit the property of their grandfather to the extent of their mother's share if their mother died during the life-time of their grandfather."

3. The learned counsel for the petitioners has argued that under paragraph 7 of Rehabilitation Act XII of 1957, the evacuee property was pooled but this conferred no right on the Rehabilitation Authority to divert the course of succession against the laws of the land. His second line of attack is that if paragraph 46 does produce such a result, it is *ultra vires* the provisions of the Act for it amounted to delegation of legislative functions to the Rehabilitation Authority, and in support of this proposition he has referred to *Sobho Gyanchandani* v. *Crown* (1).

4. Before examining the argument addressed, it is necessary to ascertain what the precise law is as laid down under the Rehabilitation Laws. The law on the subject has been in a fluid state and has formed the subject-matter of several writ petitions. The brief history of the law will not be out of place in that context.

5. The Government of the Punjab, by Memorandum No. 3083-R (L), dated the 6th of June, 1949, directed that cases of inheritance were to be decided according to Muslim Law. A difficulty, however was experienced in the cases of grandsons who could not inherit the property of their father who had predeceased his father. This led to another Memorandum No. 8595-R (L), dated the 6th of November, 1951, to be issued, in which the Rehabilitation Commissioner took the decision that the grandsons of a deceased evacuee owner should also be allowed to inherit the property of their grandfather if their

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father died during the lifetime of their grandfather to the extent of their father's share. The benefit of this provision was later extended to the grand-daughters of a deceased refugee owner by letter No. 132-R(L) dated the 8th of January, 1953, and by a subsequent letter No. 7058-R(L), dated the 23rd of September, 1953, the word "grand-daughter" was extended to the daughters of the daughters as well. The situation gave rise to certain anomalies and in order to make the rule more workable the Rehabilitation Commissioner by letter No. 4953-54/3917-R dated the 14th of April, 1954 clarified the matter by stating that the instructions referred to above were to be applied only to cases of inheritance of such refugee right-holders as had died either in India or Pakistan before they could file their claims for allotment of land under the Rehabilitation Re-settlement Scheme. When once a claimant had filed his claim and died thereafter before securing an actual allotment, the normal rule of succession laid down by the Shariat Law should be applied in its entirety without any deviation. The same should be done in subsequent mutations of inheritance of allottees as already laid down in clause 67 of Chapter I, Part II of the Resettlement Scheme. In order to remove any further ambiguity it was clearly stated that the deceased right-holder under clause 67 referred to above means a right-holder who had died before putting in his claim.

6. It is not difficult to assess the reason for the rule. An order of allotment simpliciter confers no right on the allottee except that of a licensee which is a personal right. But once a claim has been preferred then radically different considerations come into play. He has taken a step to treat a license as foundation for a claim to title to the land on the basis of his entitlement as determined according to law. In such cases the rule laid down is that the Muslim Law is to be the rule of decision. This fact gains further support from paragraph 14 of Chapter I of the Rehabilitation Re-settlement Scheme which lays down in the case of allottees on *quasi*-permanent basis that they may transfer by sale, exchange, gift, will, mortgage or any private contract their rights or interests to the land allotted to them under the Rehabilitation Scheme except in the specified categories. The present case does not fall in any one of those categories. This provision also would lead to the conclusion that the allotment to the refugee is now on a *quasi*-permanent basis and not on a licence which is purely personal in character. If this were a case of simple allotment, I would not have hesitated in upholding the impugned order for the licencor has every right to attach whatever conditions he considers necessary to the licence, and since it is personal in character, there is nothing to inherit and no provision of the Shariat Act is attracted to such a case. Succession postulates rights in property which the heirs are supposed to inherit and a simple allotment is not such a right under the Muslim Law. It is only an authority to use on the specific conditions the property which admittedly belongs to another. The rule now operative, therefore, is logical and equitable, and in the face of this provision, it should present no difficulty whatever upsetting the conclusion reached by the Rehabilitation Commissioner.

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7. Mr. Saeed Akhtar, for the respondents, has stated that this point finds no mention in the petition, but I am enjoined to interpret the law as it is notwithstanding what the parties may have contended.

8. He has argued on the basis of *Tariq Transport's case* reported as (1) that I could not assume writ jurisdiction *suo motu*. The present, however, is not such a case to which this authority will apply. The law applied by the Rehabilitation Commissioner is no longer law, and his order on that ground could not be sustained. Whatever view of the law may be propounded by the parties, the Court is not relieved from the obligation to interpret the law correctly.

9. In this case I had the feeling that the law had changed, and in a writ petition decided by a Division Bench of this Court (W. P. No. 466/R of 1957), I discovered the necessary material which has been incorporated in this order. This being the state of the law it is unnecessary to examine the points raised by the learned counsel for the petitioner.

10. The petition is accordingly allowed and a writ of *certiorari* is directed to issue certifying as in excess of jurisdiction the order by which respondents were declared to be heirs in the property left by Taj Beg deceased. Since the necessary material had not been placed by the petitioner, there will be no order as to costs.

A. H. *Petition allowed.*

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Before Bashir Ahmad, J

Haji MUHAMMAD YUSUF—Petitioner

versus

IZHAR ELAHI and another—Respondents

Muhammad Yusuf v. Izhar Elahi

Bashir Ahmad, J

Writ Petition No. 303/R of 1959, decided on 12th January 1960.

Pakistan Rehabilitation Act (XLII of 1956), S. 7 (2) (b) read with r. 6, Pakistan Rehabilitation Rules, 1951—Show-cause notice—Out of question, where claim of person to be ejected had been negatived after full inquiry—Benefit of notice taken to have been waived when objection not raised before Rehabilitation Authorities—Affidavit that objection was raised but not noticed by Rehabilitation Authorities not allowed to be raised at argument stage of writ petition.

The allotment order in favour of H was made the subject of an appeal by I. The A. R. C. allowed the appeal and allotted the premises to I. The matter was taken by H before the R. C. in revision, who, after holding a further probe, affirmed the decision of the A. R. C. and dismissed the revision petition.

H then preferred a writ petition in the High Court where it was argued for him that show-cause notice, as required under