Akbar Ali v. State

Shabir Ahmad, J

I see no ground for reducing the sentence of death passed against Akbar Ali.

14. The result of what I have said above is that it must be held that *Fazal and others* v. *The State* does not lay down the law correctly and that the present appeal being dismissed in its entirety the sentence of death imposed by the learned trial Judge on Akbar Ali is confirmed.

S. A. Mahmood, J

S. A. MAHMOOD, J.—I agree.

A. R. Khan, J

A. R. KHAN, J.—I agree with the interpretation of section 342, Cr. P. C. and the confirmation of the death sentence passed against Akbar Ali in this case and the sentence passed upon Allah Ditta.

A. H. *Appeal dismissed.*

P L D 1960 (W. P.) Lahore 834

Before Shabir Ahmad, Muhammad Yaqub Ali and A. R. Changez, JJ

UMAR DRAZ ALI—Petitioner

versus

KHURSHID ALI AND OTHERS—Respondents

Writ Petition No. 72/R of 1959, decided on 11th May 1960.

Umar Draz Ali v. Khurshid Ali

Shabir Ahmad, Muhammad Yaqub Ali and Changez, JJ

(*a*) *Rehabilitation Resettlement Scheme* (*Punjab*), *Paras. 46 & 46-A—Refugee right-holders—Rules governing succession determining entitlement to allotment of land in Pakistan—Genesis of paras.* [p. 836]*A et seq*

(*b*) *Rehabilitation Resettlement Scheme* (*Punjab*), *Paras. 46 & 46-A—Law of inheritance to estate of deceased refugee right-holder who died before enforcement of West Punjab Personal Law* (*Shariat*) *Application Act* (*IX of 1948*); *or, where life-interest of female terminated before enforcement of that Act—Determined by paras. 46 and 46-A* (*as amended up to date*), *and not by custom or pure Muslim Law.*

Held, that the law of inheritance to the estate of a right-holder who died before the enforcement of the Shariat Act and in case of opening of succession to a right-holder on the termination of a life estate is governed by the provisions of paragraphs 46 and 46-A of the Resettlement Scheme as amended up-to-date. [p. 841]*B*

At no time was it the intention of the Government, or the Rehabilitation Commissioner, to apply the rule of customary law, or the provisions of Shariat Act or pure Muslim law to such cases . . . . . On the contrary, various amendments have been made to the paragraphs in question from time to time, as it suited the policy of the Government, to resettle and rehabilitate as large a number of refugees as was possible under the circumstances. [p. 841]*C*

Heeman and others v. *Fazal Muhammad and others dissented from.*

The Shariat law *as embodied in these paragraphs* has been made applicable to all cases of inheritance both to male and

female right-holders who had died or their life interest terminated before the coming into force of the Shariat Act. [p. 840]*D*

An allotment is a grant and no refugee has a vested right to obtain it. Under the law the Government has power to make such provisions as it deems fit to rehabilitate refugees and to apply such rule of inheritance as it considers expedient for determining how much land may be allotted to the heirs of a deceased right-holder. The argument that on the demise of the rightholder his heirs, whether under custom or Personal law, became vested with the estate and, therefore, were entitled to allotment of property in Pakistan in their own right and not as heirs has no force. [p. 840]*E*

The mutations sanctioned by the Rehabilitation or Revenue authorities in such cases do not pertain to the estates of deceased right-holders abandoned by them in India but are simply a measure for resettlement of refugees in Pakistan and no question of retrospective application of the provisions of paragraphs 46 and 46-A arises in these cases. [p. 840]*F*

Asad Ali Rizvi for Petitioner.

K. B. Mushtaq Hussain for Respondents Nos. 1 and 2.

Zahir Abbas for Respondent No. 3.

Dates of hearing : 11th and 12th January and 21st March 1960.

JUDGMENT

YAQUB ALI, J.—The questions of law referred to this Full Bench are :— *Yaqub Ali, J*

(1) What under the West Pakistan Rehabilitation Settlement Scheme is to be taken as the law of inheritance to the estate of a deceased refugee right-holder where succession has opened on his death, before the enforcement of the West Punjab (Shariat) Application Act of 1948, and

(2) where succession opens on the termination of a life interest which had intervened after the death of the last full owner (refugee right-holder), the life interest terminating before the enforcement of the West Punjab (Shariat) Application Act of 1948.

2. It is unnecessary to set out the facts of each individual case in which the above questions have been formulated, for after we have answered the reference they will have to be sent back to the learned Judge in Chamber for decision on merits. Suffice it to say that Partition and consequent mass migration of Muslims from East Punjab and certain adjoining provinces of India to Pakistan gave rise to novel questions of law relating to inheritance of those who had left behind agricultural land or other immovable property. In some cases the rightholders had died in India, but either no mutation relating to inheritance of their estates had been entered in revenue records by the 14th of August 1947, or if entered it had not been decided till then. In others, the right-holders had died long ago leaving no male descendants and females were in possession of their estates for life on usual customary basis.

Umar Draz Ali
v.
Khurshid Ali
—
Yaqub Ali, J

Again, from among those who migrated to Pakistan some had put in their claim forms for allotment of land in lieu of what they had abandoned in India and died, or their life estates terminated before verification of their claims and allotment of land in lieu thereof, while some died before they could even submit their claims. In all these cases it was necessary to determine who were the heirs of the deceased rightholders, and it is obvious that the revenue authorities of India where the estates were situated had, in the absence of the heirs, neither the means nor the necessity for deciding such cases of inheritance. In the result, the names of the deceased rightholders appeared in the column of owners in the revenue records exchanged between India and Pakistan for carrying out resettlement operations. In the meantime, the Muslim Personal Law (Shariat) Application Act (IX of 1948) (hereinafter referred to as Shariat Act) came into force in West Punjab and altered the rule of inheritance from custom to Muslim Law with certain modifications which it is unnecessary to set out for the purposes of these cases and this added to the "confusion" and "complexity" about which our learned brother has complained in the order of reference.

3. It will be recalled that initially every member of a refugee family was allotted one *killa* of agricultural land for temporary rehabilitation regardless of the extent of land abandoned by him or his predecessor-in-interest in India, or whether he had left any land or not. But when the first phase of resettlement was over, it was decided to compensate those refugees who had abandoned agricultural land in India by allotting to them equal area of land, with certain reservations, on *quasi* permanent basis, and a resettlement scheme was formulated for this purpose under section 7 (1) of the Pakistan Rehabilitation Ordinance (XIX of 1948). Under the Scheme, claims were to be invited from refugee rightholders and question arose what about those who had already died but in the revenue records received from India, instead of the names of their heirs, their own names appeared in the column of owners. The Shariat Act had come into force in the Province of West Punjab, but it is obvious that the provisions of this Act did not apply to properties abandoned by refugees or their predecessors-in-interest in India. Some rule of succession had, therefore, to be devised to determine the heirs of the deceased rightholders. To meet the situation, a high-level conference was held in early 1949 and as a result of its deliberations, following instructions were issued by the Government of West Punjab *vide* Memorandum No. 3083-R(L), dated the 6th of June 1949 :—

> "In continuation of West Punjab Government Circular Memorandum No. 534-R(L), dated the 14th February 1949, Government have decided that successors to the persons who have been killed during the disturbances should not be compelled to obtain a certificate of succession before their claims can be considered. The Settlement Officer should, on the other hand, deal with the claims himself after taking a summary evidence. As between the actual claimants the extent of their shares should be determined in accordance with Shariat Law."

This was followed by fresh instructions issued by the Rehabilitation Commissioner *vide* Memorandum No. 8505-R(L), dated the 8th of

November 1951, to the effect that as the earlier decision to apply Shariat Law to cases of inheritance had created hardship in the case of a grandson, whose father had died in the lifetime of his father, it was decided that grandsons of a deceased refugee owner should also be allowed to inherit the property of their grandfather if their father died during the lifetime of his father to the extent of their father's share. Eventually instructions issued by various Rehabilitation authorities and both the Provincial and Central Governments were incorporated in a Resettlement Scheme framed under section 7 (1) of the Pakistan Rehabilitation Ordinance (XIX of 1948), and first published in 1952. Provisions relating to inheritance of the deceased right-holders were laid down in paragraph 46 to which paragraph 46-A was added later on to provide for cases of inheritance which opened on the termination of the life estate held by females under custom.

4. In 1953, attention was given to the cases of granddaughters of a deceased refugee right-holder and it was laid down that they should be allowed to inherit the property of their grandfathers to the extent of their father's share who had predeceased their grandfather. Again, a question arose whether the word "grand-daughters" was restricted to the daughters of the sons only or it included the daughters of daughters as well. By Memorandum No. 7508-R(L) dated the 23rd December 1953, the Rehabilitation Commissioner issued instructions that grand-daughters included both the daughters of the sons as well as of daughters of the original refugee owner. Towards the end of the same year doubts were expressed whether the provisions of Shariat Act could be made applicable to the cases of inheritance of refugee right-holders who had died earlier. In this connection the Punjab Government issued Memorandum No. 8932-R(L), dated 31st October 1953, which may be reproduced *in extenso* :—

"According to para. 46 of Chapter I, Part II of the Rehabilitation Settlement Scheme, cases of inheritance are to be decided according to Shariat Law and not according to the Provincial Muslim Personal Law (Shariat) Act, 1948, which is a Provincial Legislation, and does not cover cases of succession of deceased rightholders relating to property abandoned by them and stili held in their names in India. The provision in section 5 of the Shariat Act that it will have no retrospective operation is, therefore, not applicable to such cases. There is thus no legal conflict and, as such, the cases of the type in question should be decided in accordance with the instructions embodied in the Scheme framed by the Rehabilitation Commissioner (Land) under section 7 (1) of the Pakistan Rehabilitation Ordinance, 1948."

5. The question of inheritance to female right-holders was again mooted by the Provincial Government on the 15th of January 1954 and a memorandum was issued laying down that the principle contained in section 3 of the Shariat Act including its proviso should be applied to all cases of inheritance when the life interest of any existing rightholder terminates. In March 1954, the Rehabilitation Commissioner issued a further direction *vide* Memorandum No. 1323-54/2468-R(L), dated the 4th of March 1954,

Umar Draz Ali
v.
Khurshid Ali

Yaqub Ali, J

providing that the grandsons of a predeceased daughter should also be allowed to inherit the property of their grandfather to the extent of their mother's share if she had died during the lifetime of their grandfather. It will thus be seen that in the light of practical difficulties which arose from time to time periodical amendments were made in the Resettlement Scheme which were not intended to apply either pure Muslim law, or the Shariat Act or the rule of custom to cases of succession of deceased rightholders.

6. In *Heeman and others* v. *Fazal Muhammad and others* a Division Bench of this Court held that Shariat Law could not be applied to a case where succession had opened before the coming into force of the Shariat Act and in coming to this conclusion the learned Judges relied on what purported to be Paragraph 46-A of the Scheme as published in the Evacuee and Rehabilitation Laws by Qazi Muhammad Ashraf, 1957, Edition. It reads as follows:—

"In accordance with section 5 of the Punjab Muslim Personal Law (Shariat) Act, 1948, the Act will not have retrospective operation, *i.e.* before 1st April 1948. This being so it does not cover the cases of succession of deceased right holders relating to property abandoned by them and still held in their names in India. The cases of this type will, therefore, be decided in accordance with the instructions embodied in the preceding paragraph. The Punjab Muslim Law (Shariat) Act, 1948, will, however, become applicable in all cases of inheritance when the life interest of any existing right-holder terminates."

Paragraph 46-A in fact provides as under :—

"In respect of agricultural property held by a Muslim female as a limited owner under the Customary Law succession shall be deemed to open out on the termination of her limited interest to all persons who would have been entitled to inherit the property at the time of the death of the last full owner had the Shariat Law been applicable at the time of such death and in the event of the death of any of such persons before the termination of the limited interest mentioned above succession shall devolve on his heirs and successors existing at the time of the termination of the limited interest of the female as if the aforesaid such person had died at the termination of the limited interest of the female and had been governed by the Shariat Law.

"Provided that the share, which the female limited owner would have inherited had the Shariat Law been applicable at the time of the death of the last full owner, shall devolve on her if she loses her limited interest in the property on account of her marriage or re-marriage and on her heirs if her limited interest terminates because of death."

This misquotation is, however, not attributable to the learned author but to an incorrect correction slip No. 64-R (L) dated the 21st May 1954 issued by the Government. It is interesting to note that two Punjab Government Mamorandums on which the correction slip purports to be based *viz.* No. 8932-R (L) dated the 31st October 1953 and No. 9668/53-506-R (L) dated the 15th of January 1954 are to the contrary and are correctly reproduced

in para 46-A in the 1957 Edition of the West Pakistan Rehabilitation Settlement Scheme published by the Rehabilitation Department. On the basis of this incorrect reproduction of para 46-A, the learned Judges were of the view that a contrary intention could not be attributed to it and the preceding paragraphs as they, *inter alia* provided that "the Punjab Muslim Personal Law (Shariat) Act, 1948, will, however, become applicable in all cases of inheritance when the life interest of any existing right-holder terminates." In consequence of this decision the Rehabilitation Commissioner further amended paragraphs 46 and 46-A and provided that all cases of inheritance before the commencement of Shariat Act shall be decided according to custom, which meant even those cases in which the rule of inheritance was Muslim Law before the passing of the Shariat Act. As this was not the law laid down in *Heeman's case*, another Division Bench of this Court pointed out the anomalous situation created by the amendment of paragraphs 46 and 46-A upon which the Rehabilitation Department took fresh stock of the situation and a further amendment was under contemplation when the present bunch of petitions was filed in this Court.

7. The question involved in all these cases is what is the law of inheritance in case of a right-holder who died or in the case of a female whose life interest terminated before the coming into force of the Shariat Act, *i.e.* whether succession is governed by the rule contained in the Resettlement Scheme or by law which was applicable to the parties before Partition and whether the provisions of paragraphs 46 and 46-A have application to those cases in which inheritance opened before the formulation of the Resettlement Scheme. It was vehemently contended before us that before Paragraphs 46 and 46-A were brought into existence, heirs of the deceased rightholders had already become vested with the estate of their predecessors-in-interest and, as such, the question of regulating their inheritance did not arise and the Resettlement Scheme could not be given a retrospective effect. At first sight the argument has an appeal but when analysed it has no force. If the land in relation to which mutations of inheritance are sanctioned by the Rehabilitation authorities under Resettlement Scheme were situated in Pakistan, then certainly the provisions of the Shariat Act or Paragraphs 46 and 46-A of the Scheme could not be made applicable to them. That, however, is not the case, for the estates left by the deceased rightholders are situated in India over which the Rehabilitation and the revenue authorities of Pakistan have no jurisdiction. It was, therefore, not intended to determine the rights of the heirs of deceased rightholders in the estates abandoned by them in India while deciding the impugned mutations. These mutations are in fact a measure to determine who shall be allotted land in Pakistan in lieu of the land abandoned by deceased rightholders. The directions issued by the Government and the Rehabilitation Commissioner from time to time, referred to above, unmistakably show an intention to rehabilitate a larger number of refugees than would have been possible if custom or pure Muslim law were made applicable to cases of inheritance in question. There were also innumerable difficulties in adopting custom as the rule of inheritance, for

Umar Draz Ali
v.
Khurshid Ali
—
Yaqub Ali, J

custom is not a codified rule of law, and it differs from tribe to tribe and region to region. Custom itself is of three kinds, namely, general, special and family, and it would have taken decades to decide difficult questions of fact and law as to who were the customary heirs of a deceased right-holder. The safest and the speediest course in these circumstances therefore was to adopt the law of Shariat with certain modifications reproduced above.

8. As to the validity of the provisions of Paragraphs 46 and 46-A and their application to cases in which inheritance opened out before the formulation of the Resettlement Scheme, it is clear that an allotment is a grant and no refugee has a vested right to obtain it. Under the law the Government has power to make such provisions as it deems fit to rehabilitate refugees and to apply such rules of inheritance as it considers expedient for determining how much land may be allotted to the heirs of a deceased right-holder. The argument that on the demise of the rightholder his heirs, whether under custom or Personal Law, became vested with the estate and, therefore, were entitled to allotment of property in Pakistan in their own right and not as heirs has similarly no force. Cases in which the estate of a deceased rightholder had already been mutated in the names of his heirs in revenue records stand on a different footing, for no question for determining the law of inheritance arose in such cases. But in cases in which mutations had either not been entered or not sanctioned, the Rehabilitation authorities in Pakistan had to determine the heirs of the deceased right-holder for making allotment of land to them and the mode for determining it has been provided in Paragraphs 46 and 46-A of the Scheme. It is thus clear that the mutations sanctioned by the Rehabilitation or Revenue authorities in these cases do not pertain to the estates of deceased right-holders abandoned by them in India but are simply a measure for resettlement of refugees in Pakistan and no question of retrospective application of the provisions of Paragraphs 46 and 46-A arises in these cases.

9. Earlier we have mentioned that after the decision in *Heeman's case* the Rehabilitation Commissioner made certain amendments in Paragraphs 46 and 46-A which created further confusion and complexity in determining the issue in hand, but during the course of hearing of these petitions the Central Government has further amended these paragraphs and deleted the earlier correction slip No. 2-R. S. S. dated the 22nd of November 1958, and added the following clause at the end of Paragraph 46 :—

"The provisions of this paragraph shall apply and shall be deemed to have always applied to all cases of inheritance of refugee right-holders whether decided under this or any other like scheme which had at any time been in force."

In Paragraph 46-A the words "Shariat Law" occurring at places is substituted by "provisions of Paragraph 46" and the footnote below that paragraph given within the brackets has been deleted. The sum and substance of these amendments is that Shariat law as embodied in these paragraphs has been made applicable to all cases of inheritance both to male and female rightholders who

had died or their life interest terminated before the coming into force of the Shariat Act. The decision in *Heeman's case* is based on misprint of Paragraph 46-A in the Resettlement Scheme of the P. L. D. Publication and nothing more need be said about it except to observe that at no time was it the intention of the Government, or the Rehabilitation Commissioner to apply the rule of customary law, or the provisions of Shariat Act or pure Muslim law to cases of inheritance contemplated in the questions referred to this Full Bench. On the contrary, various amendments have been made to the paragraphs in question from time to time as it suited the policy of the Government, to resettle and rehabilitate as large a number of refugees as was possible under the circumstances. With utmost respect we, therefore, beg to differ with the decision in *Heeman's case*.

Umar Draz Ali v. Khurshid Ali
Yaqub Ali, J

10. In the light of the observations made above, our reply to the questions referred to the Full Bench is that the law of inheritance to the estate of a right-holder who died before the enforcement of the Shariat Act and in case of opening of succession to a right-holder on the termination of a life estate is governed by the provisions of Paragraphs 46 and 46-A of the Resettlement Scheme as amended up-to-date. The reference is answered accordingly, and the cases are remitted to the learned Judge in Chambers for decision on merits.

A. H.

Reference answered.

P L D 1960 (W. P.) Lahore 841

Before Shabir Ahmad, B. Z. Kaikaus and A. R. Changez, JJ

NOOR MUHAMMAD—Petitioner

versus

(1) THE COLLECTOR, JHELUM AND (2) MUHAMMAD SADIQ—Respondents

Writ Petition No. 89 of 1960, decided on 22nd July 1960

Noor Muhammad v. Collector Jhelum
Shabir Ahmad, Kaikaus and Changez, JJ

Elective Bodies (Disqualification) Order (13 of 1959), Para. 5 (2)—Excludes only those cases from purview of Para. 5 (1) (b) in which orders were passed under S. 107, Criminal Procedure Code (V of 1898) or other similar law.

Sub-paragraph (2) of Para. 5, Elective Bodies (Disqualification) Order, 1959, was meant to exclude those cases from the purview of clause (*b*) of sub-paragraph (1) of paragraph 5 of the Order, in which orders had been passed under section 107 of the Code of Criminal Procedure or some similar provision in some other law and not those cases in which orders were passed under the Pakistan Security Act, 1952, or other similar legislative measures [*e.g.* section 3 Punjab Public Safety Act (XVIII of 1949)] which aimed at keeping in detention, without orders from a Court, of persons believed by the executive authorities to be persons whose detention was necessary in the interests of the country. [p. 845]*A*

If the order was vacated by a competent Court or authority on the ground that it was not justified, it shall be deemed not to