Inheritance Rights of a Childless Widow of a Shia Husband

Khalida Shamim Akhtar v Ghulam Jaffar
PLD 2016 Lahore 865

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Introduction

Inheritance laws, unlike other areas of Islamic family law, are particularly well-defined and explained in the primary sources of Islamic law – the Qur'an and the Sunnah. The Qur'an significantly transformed the law regarding women's right to inheritance. In pre-Islamic Arabia, females were not allowed to inherit property; rather, females were themselves considered property, inheritable by males. Under Islamic reforms of inheritance, females were generally given half the share of the males. Despite the relatively more detailed instructions provided in the Qur'an, room for interpretation regarding various provisions remained, which led to the development of the Sunni and Shia schools, both providing complete and coherent schemes of Islamic inheritance law. With reference to the inheritance of females, the Shia school is generally more favourable and gender-sensitive. However, under the Athna Asharia Shia School, a childless widow is not entitled to any share in immovable property. This rule has been perpetuated by frequently-cited books on Islamic family law and has been consistently relied upon by the judiciary in South Asia. The Supreme Court of Pakistan ('SC') deliberated upon this matter in two cases. In the first case, it held that it did not have the authority to reform this rule;[1] and in another case it held that a childless widow of a Shia husband is not entitled to any share in the immovable property of her husband.[2] In *Khalida Shamim Akhtar v Ghulam Jaffar*,[3] Justice Ibad-ur-Rehman Lodhi of the Lahore High Court ('LHC'), took a different position, holding that such a widow is entitled to a one-fourth share in the immovable property of her deceased husband.

This case note examines the LHC judgment in the *Khalida Shamim* case, in light of the judgments of the SC on the same issue. It argues that the judgment of the LHC in this case is the latest in a string of judgments whereby judges have disregarded principles of classic Islamic family law to

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[1] *Syed Muhammad Munir v Abu Nasar, Member (Judicial) Board of Revenue* PLD 1972 SC 346.
[2] *Mst. Noor Bibi v Ghulam Qamar* 2016 SCMR 1195.
[3] PLD 2016 Lah 865.

creatively interpret the Qur'an and Sunnah for the protection of the rights of women and children.

Facts and Judgment

In the *Khalida Shamim* case, a childless widow of a Shia man was not granted her share of inheritance in the immovable property of her deceased husband. The civil court declared the widow to be entitled to the share in her deceased husband's estate, but the first appellate court reversed the decree of the civil court by following the traditionally applicable law. Consequently, the case came up in appeal before the LHC. The counsel for the respondents mainly based his contentions on a pamphlet entitled '*Beevi Ki Meeras'* by Allama Mufti Syed Tyeb Agha Musavi Jazairi. Reliance was also placed on a case from the SC, *Syed Muhammad Munir v. Abu Nasar, Member (Judicial) Board of Revenue*,[4] wherein the issue of whether an issueless Shia widow is entitled to inheritance was discussed in detail.

In the *Syed Muhammad Munir* case, the heirs of the respondent, Mst. Fatima, had been allotted land in Pakistan after the Partition in lieu of the land she had inherited after her husband's death in Patiala. Counsels for the appellants contended that Mst. Fatima, being a childless widow of Syed Ghulam Shabbir, who was an Athna Asharia Shia, could not inherit any portion of her husband's lands under Shia law. The respondents argued that the meaning of the term 'childless widow' has not been settled, and that a childless widow was someone who had borne no children in a marriage, not a person who had no living child at the time of her husband's death. Reliance was primarily placed on Fyzee's *Outlines of Muhammadan Law*,[5] Tayabji's *Muhammadan Law*[6]and Shama Churun Sircar's *Tagore Law Lectures on*

[4] PLD 1972 SC 346.

[5] Asaf Ali Asghar Fyzee, *Outlines of Muhammadan Law* (5th edn, Oxford University Press 1949) 354. Fyzee cites Tayabji to observe: 'A childless widow does not take her share from the immovable property of her husband; but she is entitled to her proper share in the value of household effects, trees, buildings, and movable property, including debts due to the deceased. The exact meaning of the expression 'childless widow' is in doubt. Does it mean a woman who has had no children, or does it merely imply that the widow has no children living at the time of the death of her husband? This question has not yet been finally settled'.

[6] Faiz Badruddin Tyabji, *Muhammadan Law* (3rd edn, N. M. Tripathi & Co. 1940) 908. Tayabji quotes Baillies' translation of the 'Sharai-ul-Islam' to observe: 'This passage indicates a conflict of opinion. If the translation is accurate the rule is limited to cases where the widow has had no child by the deceased. But the Allahabad High Court has followed Syed Ameer Ali's dictum that "when she has no child, or when a child was born but died before the decease of her husband, then she is entitled to 1/4th share in the personal estate only, including household effects, trees, buildings etc., she takes no interest in the landed property. On referring to the mere wording of the Shahrai-ul-Islam in the original Arabic, it

Muhammadan Law,[7] to demonstrate the uncertainty regarding the implications of the term 'childless widow'. It was further argued that the exclusion of issueless widows was not in conformity with the text of the Qur'an.

According to the court, the main difference of opinion regarding the first argument had arisen due to Bailie's translation of the *Sharai-ul-Islam*.[8] The court, however, relied on *Mst. Asloo v Mit. Umdutoonissa*[9], where the correctness of Bailie's translation was questioned and ultimately rejected in favour of the Official Court Translator's version and Syed Ameer Ali's opinion.[10] Accordingly, it held that a widow who had no living children from her marriage to the deceased at the time of his death was not entitled to inherit his estate. The court, thus, preferred Ameer Ali's opinion, who was an eminent Shia scholar himself, over that of Bailie and Shama Churun's, both of whom were non-Muslims. In response to the second argument, the court examined various translations of verse 12:4 of the Qur'an[11] and Shia works, and found that it could not issue a ruling on the matter. It was held:

> In view of this difference in the interpretation of the Quranic text itself, we feel that it would not be proper on our part at this stage to attempt to put our own construction in opposition to the express ruling of commentators of such great antiquity

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seems that the point may not be without some doubt; and there is little to throw light on it even in the very exhaustive commentary, the Jawahir-ul-Kalam'.

[7] Shama Churun Sircar, *Tagore Law Lectures on Muhammadan Law 1874* (Rare Books Club 2012) 260. 'If there is no such child, she takes nothing out of the (deceased's) land (arz), but her share of the household effects (alat), and buildings is to be given to her'.

[8] Neil B. E. Bailie, *Digest of Moohummudan Law* (Premier Book House 1958) 295. 'When the wife has had a child by the deceased she inherits all that he has left; and if there was no child she takes nothing out of the deceased's land, but her share of the value of the household effects and buildings is to be given her. It has been said, however, that she is to be excluded from nothing except the mansions and dwellings; while Moortuza (may God be pleased with him) has expressed a third opinion to the effect that the land should be valued and her share of the value assigned to her. But the first opinion is that which appears to be best founded on traditional authority'.

[9] 20 WR 297.

[10] Syed Ameer Ali, *Mahommedan Law* (Imran Law Book House 2012) 972. 'The husband takes a share in all kinds of property left by his deceased wife and so does the widow when she has a child "born of her womb", or child's child. But when she has no child, or when a child was born to her, but died before the decease of her husband, then she is entitled to a fourth share in the personal estate only, including household effects trees, buildings, etc. She takes no interest in the landed property.'

[11] The Holy Qur'an 12:4: 'And for them shall be a fourth of what ye leave if ye have no issue, and if ye have an issue then for them (shall be) the eighth of what ye leave after paying the bequest ye had bequeathed and the debt'.

> and high authority. To depart from a rule of succession which the Shia community has universally been following ever since the days of Imam Jafar Sadek, as evidenced by the unanimous opinions of the Shia jurists on this point, would be wrong. It is not open to us to change a settled rule of succession, having the force of Ijma' behind it at this late stage. If a change is desired to be made this work should be undertaken by the Legislature itself after consulting the Shia Community.[12]

The court further noted that such a question had been raised in the West Pakistan Legislative Assembly, but no amendment was made in the relevant law because the Shia community had opposed it. It is noteworthy that it was Allama Jazairi, author of the above-cited pamphlet titled '*Beevi Ki Meeras*', who had seriously controverted against the Parliament's efforts to legislate on the issue; consequently, the Parliament did not promulgate any law on this matter.

The LHC, in *Khalida Shamim* case, observed the failure of the legislature to resolve the issue, which had led to the deprivation of an entire class from their inheritance. It issued a public notice inviting Shia *ulema* to assist the court. In response, Allama Syed Iftikhar Hussain Naqvi Najafi, a sitting Member of Council of Islamic Ideology, Government of Pakistan, appeared and rendered assistance to the court. He referred to his own collection on this point, *Kitab-e-Meeras*, which states that a childless widow belonging to *Fiqa-e-Jafariya* is entitled to inherit one-fourth share from the leftover estate of her deceased husband. Allama Najafi argued that those who belong to the *Ahl-e-Tashih* or *Fiqa-e-Jafariya* sect place a higher regard on their identity as Muslims and cannot deviate from a ruling in the Qur'an.

The LHC observed that the applicable law which excludes a childless widow of a Shia husband from inheritance to immovable property is against the explicit injunctions of verse 12:4 of the Qur'an.[13] The verse does not differentiate based on the nature of property to which the widow would be entitled. D. F. Mulla's often-cited book, the *Principles of Muhammadan Law*, declared that a childless widow takes no share in her husband's lands. However, she is entitled to one-fourth share in the value of trees and buildings standing thereon as well as in his movable property including the debts due to him, though they may be secured by a usufructuary mortgage or

[12] (n 1) 353.
[13] (n 11).

otherwise.[14] It is peculiar that Mulla provides no explanation for this rule except stating that it is a rule of Shia *fiqh*. However, it has continuously been held as an authority on this issue. With reference to Mulla and its articulation of the impugned rule, the LHC, relying on a judgment of the Federal Shariat Court,[15] observed that this book should not be considered as an enacted law, particularly when any of its articulations are found to be contrary to the injunctions of Islam. It was further held that the propositions in the book are not applicable, if in the opinion of the court, they are found opposed to justice, equity and good conscience. Finally, Justice Lodhi, noting that neither the Parliament had legislated on the issue nor the judiciary had issued a definitive ruling, declared that a childless widow belonging to *Fiqa-e-Jafariya* would be entitled to claim one-fourth share from the leftover estate of her husband.[16] Before parting with the decision, Justice Lodhi further observed:

> It is expected that, the Government of Pakistan in Ministry of Law, would take legislative measures to promulgate a codified law in this regard in order to protect the rights of childless widows from Ahl-e-Tashih, in getting their due shares from the inheritance of their deceased husbands.[17]

Analysis

Khalida Shamim case is significant for many reasons. Firstly, the LHC bypassed decades old precedents including that of the SC, to deliver its ruling. Judgments upholding this principle can even be found in various cases from colonial India.[18] The Privy Council had also discussed this issue in the case of *Aga Mahomed Jaffer Bindanim v Koolsom Beebee*[19] where the Privy Council had to deal with issues arising out of the administration of the deceased husband's estate. The testator's nephew, the plaintiff in that case, had been appointed as the executor and trustee of the estate. Along with other instructions, the plaintiff had been instructed to pay the respondent's dower amount and any inheritance which she would be entitled to under

[14] Dinshah Fardunji Mulla, *Principles of Mahomedan Law (*20th edn, LexisNexis 2012) 131.
[15] *Muhammad Nasrullah Khan v The Federation of Pakistan and another* (Shariat Petition No.06/I of 2013).
[16] (n 3) 871.
[17] (n 3) 872.
[18] *Umardaraz Ali Khan v Wilayat Ali Khan* (1896) ILR 19 ALL 169; *Mir Alli Hussain v Sajuda Begum* (1897) ILR 21 Mad 27; *Muzaffar Ali Khan v Parbati* (1907) 29 All 640; *Durga Das v Muhammad Nawab Ali Khan* (1926) ILR 48 All 557.
[19] (1897) 25 Cal 9.

Muhammadan law. One of the questions before the Privy Council was: whether a widow, under Shia law, was entitled to a share from land and the value of building upon that land. In accordance with this question, one of the arguments put forth by the counsel of the respondent, who had relied on Baillie's translation of the *Fatawa Alamgriri,* was that the principle of non-inheritance of a childless Shia widow only applied to the extent of agricultural land. The Privy Council rejected this argument, holding thereby that the widow of the testator was not entitled to any share in the immovable property of her husband. Even though the question of the exclusion of widows of Shia husbands was only briefly discussed, this case went on to become an authority on the matter in both Pakistan and India.[20]

As explained above, the SC, in *Muhammad Munir* case, declared that the rule disentitling a Shia widow from her husband's estate had gained the force of an *ijma*; therefore, it was not proper for the court to issue a ruling on the matter. In *Mst. Noor Bibi v. Ghulam Qamar*,[21] a full bench of the SC affirmed this principle by referring to the works of Mulla, Syed Ameer Ali and N.J. Coulson. In *Mst. Noor Bibi,* an appeal from a judgment of the LHC, the court discussed whether a Shia widow was entitled to inheritance from the estate of the husband. The LHC had erroneously relied on *Syed Muhammad Munir*[22] to hold that the appellant, the widow of the deceased who had borne children during the marriage, was not entitled to any inheritance from her husband's estate. The SC reversed the judgment, clarifying and further affirming that the *Muhammad Munir* judgment was in reference to the principle of non-inheritance by a childless widow. Widows, under the Shia school, who were not issueless, were entitled to receive inheritance. Mian Saqib Nisar, J., wrote a concurring note and relied on the work of Ameer Ali and N.J. Coulson to further explain that even if a widow had given birth to a child out of her wedlock with the deceased, but such a child had died prior to the death of the husband, the widow would not be entitled to inherit the immovable property of the deceased, as she would be considered a childless widow under Shia personal law. This principle has continuously been recognized and upheld in other judgments of the superior Courts.[23] However, in this instance, the LHC disregarded this well-settled precedent to hold that childless Shia widows are entitled to inherit from their

[20] *Syed Muhammad Munir v Abu Nasar, Member (Judicial) Board of Revenue* PLD 1972 SC 346. In India, the case has been cited as an authority in *Syid Murtaza Husain vs Musammat Alhan Bibi* 2 Ind Cas 671.
[21] 2016 SCMR 1195.
[22] (n 1).
[23] *Ghulam Shabbir v Bakhat Khatoon* 2009 SCMR 644; *Muhammad Hussain v Ghulam Qadir* 2012 CLC 298.

husband's estates. In other instances, a lower court's divergence from well-established precedent could have perhaps signaled a worrying trend. However, the manner in which the LHC arrived at its decision is sufficient to dispel any concerns regarding its divergence from precedent. The LHC not only based its decision on the primary source of Islamic law – the Qur'an, but also relied on the expertise of the sitting Shia scholar of the Council of Islamic Ideology who supported the court's eventual interpretation.

This case also serves as another example of the growing trend in the decisions of cases of Islamic family law, whereby the Pakistani courts have moved beyond the renowned works on the subject, and have relied directly upon the Qur'an and the Sunnah to deliver rulings. This principle of a childless Shia widow not being entitled to inheritance from her husband's estate has most notably been articulated by Fyzee,[24] Baillie,[25] Coulson,[26] Syed Ameer Ali,[27] and Mulla.[28] The SC, in the *Noor Bibi* case,[29] treated the articulations in these books as authorities and did not make an effort to examine the original sources of the law, i.e. the Qur'an and the Sunnah. However, in the case of *Khalida Shamim*, Mulla's book was only used as a reference. It was observed by the LHC that the book was in fact just a reference book and not statutory law applicable in Pakistan. It is an option for the court to consult the same on the basis of equity and refer to the principles mentioned therein at rare occasions.[30] The LHC completely disregarded Mulla's book and held it in contravention to the Qur'an with regard to the principle of denying the childless widow her share of inheritance in immovable property. Instead, the LHC relied on the Qur'anic verse itself to deliver its ruling. This approach has been consistently relied upon for the past few years by various courts in the country,[31] demonstrating

[24] (n 5).
[25] (n 8).
[26] Noel J. Coulson, *Succession in the Muslim Family* (Cambridge University Press 1971) 113.
[27] (n 10).
[28] (n 4).
[29] (n 7).
[30] (n 3) 870.
[31] *Mst. Balqis Fatima v Najmul Ikram Qureshi* PLD 1959 (W.P.) Lah 566. The West Pakistan High Court diverged from Mulla on the issue of the wife's right to seek *khula* through the court without the consent of her husband. According to Mulla, a *khula* could not be affected unless the husband consented to it. The Court interpreted the verse 2:229 of the Qur'an to hold that the consent of the husband was not required for *khula*. The Supreme Court affirmed the LHC's divergence from Mulla on this issue in *Mst. Khursheed Bibi v Muhammad Amin* PLD 1967 SC 97. The court held that in cases where the husband disputes the right of the wife to obtain separation by *khula*, it is obvious that a third party has to decide the matter and, consequently, the dispute will have to be adjudicated upon by the

their intent and ability to creatively interpret principles of Islamic family law or to move away from them if needed in order to secure the rights of women and children.

Conclusion

In the *Khalida Shamim* case, the LHC delivered a landmark judgment: it made a significant contribution towards the protection of the right of inheritance of widows of Shia husbands by diverging from an authoritative precedent. It is the latest in a string of judgments delivered by the Pakistani superior courts where judges have refused to blindly follow the opinions of classical jurists and the judicial precedents laid down during the colonial period. Pakistani judges have relied upon the original sources of Islamic law – the Qur'an and Sunnah, to resolve issues in Islamic family law in a manner that best protects the rights of women and children. While this judgment is undoubtedly a positive step, there is no certainty that this judgment will be upheld by the SC. Therefore, this issue is far from resolved, and the childless widows of Shia husbands may still be at risk of not receiving inheritance in the immovable properties left behind by their husbands. However, considering that the LHC interpreted a Qur'anic verse to deliver its ruling, future rulings on the same issue will require an alternative interpretation of what is a fairly clear verse of the Qur'an. Hence, the possibility that this ruling has conclusively altered the law on this issue cannot be denied. However, an authoritative judgment from the SC that affirms the ruling of the LHC or, preferably, legislation on this matter as directed by the LHC is still required to conclusively determine the inheritance rights of issueless widows of Shia husbands in Pakistan.

Qazi. Any other interpretation of the Qur'anic verse regarding *khula* would deprive it of all efficacies as a charter granted to the wife. Finally, the Federal Shariat Court adjudicated upon the same issue in *Saleem Ahmad v Government of Pakistan* PLD 2014 FSC 43. The Court relied upon various verses of the Qur'an and multiple Ahadith to hold that none of these sources barred a Qazi to decree a *khula* without the consent of the husband.