

PETITIONER:
NEWANNESS ALIAS MEWAJANNESSA

Vs.

RESPONDENT:
SHAIKH MOHAMAD ALIAS & ORS.

DATE OF JUDGMENT 21/02/1995

BENCH:
RAMASWAMY, K.
BENCH:
RAMASWAMY, K.
HANSARIA B.L. (J)

CITATION:
1996 AIR 702 1995 SCC Supl. (2) 529
JT 1995 (2) 652 1995 SCALE (2) 243

ACT:

HEADNOTE:

JUDGMENT:
ORDER

1. This appeal by special leave arises from the judgment of the Division Bench of the Calcutta High Court in appeal from original decree No.652/61 and cross objections dated June 8, 1973. This Court while granting leave limited the appeal to the questions raised in ground Nos.II and VI dealing with inheritance of property belonging to Sabul, Liaquat and Mahujammusa. Therefore, untrammelled by the controversy which hinged in the trial court and the High Court, we confined our consideration only to these two questions.

2. This appeal arises out of a partition suit. The genealogy table before us has not been disputed. It would show that Haji Ishan Ali died in 1955 leaving behind his widow Samudanusa, plaintiff No.1 (P-1), who also died pending suit in 1966; his two daughters, plaintiff No.2 (P-2) Bibi Mewannesa and Bibi Mahujammusa, defendant No.5 (D-5) and three sons Jabar Ali, Isabul Ali and Sabul Hassan. Jabar Ali left behind defendant No.1 (D-1), a son and defendant No.2 (D-2), a daughter. Isabul Ali left behind him defendant No.3 (D-3), a daughter. D-3 was married to D-1. Sabul Hassan pre-deceased Isabul Ali, leaving behind defendant No.4 (D-4). a son and Liaquat also a son, who too died

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before the death of Isabul Ali. The trial court granted preliminary decree which was affirmed in appeal. The shares and extent are in controversy. The High Court found that the property purchased by Haji Ishan Ali in the name of his son Sabul Hassan belong to the latter alone. Since Sabul Hassan had pre-deceased-Isabul Ali, the question arose whether Haji Ishan Ali was a sharer in the estate of Sabul Hassan.

3. Section 61 in Chapter VII of the Mulla's Principles of Mohammedan Law, edited by M. Hidayatullah, former Chief

Justice of this Court, postulates three classes of heirs, namely, (1) sharers, (2) residuaries, and (3) distant kindred. Sharers are those who are entitled to a prescribed share in inheritance, residuaries are those who take no prescribed share, but succeed to the 'residue' after the claims of the sharers are satisfied; and distant kindred are all those relations by blood who are neither sharers nor residuaries. The Table at page 72-A of the 18th Edition prescribes that a father who is under Item No. 1, gets 1/6th share, where there is child or children of a son; and when there is no child or children of a son, the father inherits as residuary. Since Sabul Hassan left behind D-4 son, Isabul Ali got 1/6th share. Out of this 1/6th share got from the estate of Sabul Hassan, his widow (P1) and P-2 the daughter would get equal respective share under law, which would be determined by the Trial Court.

4. The next question is whether P-2 is entitled to a share in the estate of Bibi Mahujammusa, D-5, who died pending suit. Section 65 dealing with residuaries, read with the Table at page 72A, indicates that if there are no sharers, or if there sharers but there is residue left after satisfying their claim, residuaries also inherit in the order set forth in the Table. D-5 left behind two daughters and as per the sharers two daughters are, entitled to 1/3rd share each i.e. 2/3rd share. In other words, 1/3rd remained as residue. Table at page 72A dealing with residuaries indicates that where descendants like son, son's son, and ascendants like father and grand father are not available, then the descendants of the father takes in the order mentioned. The first is full brother. then sister; in default, a daughter or son's daughter or daughter's son. In this case since only two daughters were left behind by D-5, the full sister, namely P-2, takes the entire residue, which is 1/3rd share.

5. It is next contended that since D-1 died in March 1990, steps were not taken to bring the legal representatives on record until 27th January, 1995 despite notice given to the appellant by a letter dated November 14, 1990 and no proper explanation has been given for the inordinate delay. Therefore, the appeal as a whole should be dismissed as having been abated. We, find no force in the Contention. Since the third defendant is already on representing all the heirs of the first defendant widow, the question of abatement does not arise. Even otherwise we find that substitution should be allowed, since no injustice would be done in bring the legal representatives on record. Thus the objection is over-ruled. The application for substitution is allowed.

6. The appeal is accordingly allowed. The matter is remitted to the Trial Court for determining the shares of all the contesting parties and for distribution of the estate in proportion to shares. This would be done according to the law declared hereinbefore. No costs.