A NEWANNESS @MEWAJANNESSA

v

SHAIKH MOHAMMAD @ AND ORS.

FEBRUARY 21, 1995

B [K. RAMASWAMY AND B.L. HANSARIA, JJ.]

Personal Laws—Muslim Law—Partition—Shares of classes of heirs in inherited property—Entitlement to.

C *Personal Laws—Delay in bringing LRs. on record despite notice—One heir already on record representing all other heirs—No question of abatement—Substitution allowed—No injustice.*

One HA died in 1955 leaving behind a widow P-1, who died pending suit in 1966, two daughters P-2 and D-5 and three sons JA, IA and Sh. JA
D **left behind a son D-1 and a daughter D-2. IA left behind a daughter D-3 who was married to D-1. SH pre- deceased IA, leaving behind two sons D-4 and L.**

The shares and extent were in controversy. The High Court found that the property purchased by HA in the name of his son SH belonged to
E **the latter alone. Since SH had pre-deceased IA, the question arose whether HA was sharer in the estate of SH and also whether P-2 was entitled to a share in estate of D-5 who died pending suit.**

Allowing the appeal, this Court

F **HELD: 1.1. On the basis of the inheritance provisions postulated in Mulla's Principles of Mohamedan Law IA's share was 1/6th out of which his widow P-I and daughter P-2 were to take equal respective share under law. [140-D]**

1.2. On the basis of the table in the said treatise, the two daughter of
G **D-5 were found entitled to 1/3rd share each as "shares" and the balance 1/3rd remained as "residue". Relying on the same table which dealt with "residuaries" P-2 was found entitled to take the entire 1/3 rd residue share. [140-E]**

2.1. Since one heir was already on record representing all the heirs
H **of the widow of D-1 who died in 1990 the question of abatement for not**

bringing the legal representatives on record until 1995 did not arise. Substitution is allowed as there is no injustice in bringing the legal representatives on record. [140-H, 141-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 888 of 1976.

From the Judgment and Order dated 8.6.73 of the Calcutta High Court in Appeal from Original Decree No. 652 of 1961.

P.S. Poti, M. Qamaruddin and Mrs. M. Qamarudin for the Appellant.

S.N. Misra, D.P. Mukherjee and Sanjay Kr. Ghosh for the Respondents.

The following Order of the Court was delivered :

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, untrammeled by the controversy which hinged in the trial Court and the High Court, we confined our consideration only to these two questions.

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 Mewannes 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 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,

A the question arose whether Haji Ishan Ali was a sharer in the estate of Sabul Hassan.

Section 61 in Chapter VII of the Mulla's Principles of Mohamedan Law, edited by M. Hidayatullah, former Chief Justice of this Court, postulates three classes of heirs, namely, (1) sharers,(2) residuaries, and (3) B 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 shares 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 C 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 (P-1) and P-2 the daughter would get equal respective share under law, which would be determined by the Trial Court. D

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 shares, or if there shares but there is residue left after satisfying their claim, E residuaries also inherit in the order set forth in the Table. D-5 left behind two daughters and as per the shares 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 F not available, then the descendants of the father takes in the order mentioned. The first if 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.

G 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 the letter dated November 154, 1990 and no proper explanation has been given for the inordinate delay. Therefore, the appeal as a whole should be dismissed as having been H abated. We find no force in the contention. Since the third defendant is

already on record 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 bringing the legal representatives on record. Thus the objection is over-ruled. The application for substitution is allowed. A

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. B

A.G. Appeal allowed.