

**JUDGMENT SHEET**  
**IN THE ISLAMABAD HIGH COURT, ISLAMABAD.**  
**JUDICIAL DEPARTMENT.**

C.R.No.73 of 2016

Sohail Ahmed Jan

**Versus.**

Siraj Ahmed Jan and others

**Date of Hearing:** 04.07.2017

**Petitioner by:** Mr. Taufiq Asif, Advocate.

**Respondents by:** Ch. Liaqat Ali, Advocate for respondent No.1,  
Mian Abdul Razzaq, Advocate for respondents  
No.2 to 4,  
Syed Masood Ahmad, Advocate for  
respondent No.10

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**MIANGUL HASSAN AURANGZEB, J:-** Through the instant civil revision petition, the petitioner, Sohail Ahmed Jan, impugns the judgment and decree dated 11.12.2015, passed by the Court of the learned Additional District Judge, Islamabad, whereby the petitioner's appeal against the judgment and decree dated 26.03.2012, passed by the Court of the learned Civil Judge, Islamabad, was partly accepted and the said judgment and decree passed by the learned civil Court was modified. Vide the said judgment and decree dated 26.03.2012, the learned civil Court had dismissed the suit for declaration, permanent and mandatory injunction, instituted by the petitioner against his brothers and sisters etc.

2. The facts essential for the disposal of this petition are that the petitioner is the brother of respondent No.1 (Siraj Ahmed Jan), respondent No.2 (Kamran Ahmed Jan), respondent No.3 (Rehana Gulzar), and respondent No.4 (Alia Khalid). Their father (Gulzar Ahmed) died in May, 1994, whereas their mother (Razia Sultana) died on 22.05.2005. The essential dispute in the case at hand is whether House No.26, Street No.55, Sector G-9/4, Islamabad ("suit property No.1") was gifted and transferred by Razia Sultana to her daughter, Rehana Gulzar/respondent No.3, and House No.AA/349, Mohalla Pir Harra, Jamiah Masjid Road, Rawalpindi, ("suit property No.2") was gifted and transferred by Razia Sultana to her son Kamran Ahmad Jan/respondent No.2.

3. On 11.08.2005, the petitioner instituted a suit for declaration, permanent and mandatory injunction before the learned civil Court, praying for *inter alia* a declaration to the effect that he was entitled to inherit and receive his share in the following properties:-

- (I) *House No.26, Street No.55, G-9/4, Islamabad.*
- (II) *Commercial Unit/Building No.B-I/352 Lower Bazaar, Murree, District Rawalpindi.*
- (III) *House No.AA/349, Mohalla Pir Harra, Jamiah Masjid Road, Rawalpindi.*
- (IV) *Defence Saving Certificates and Special Saving Certificates.*

4. Furthermore, in the said suit it was prayed that the transfer of Razia Sultana's abovementioned properties be declared as illegal, without any lawful authority and ineffective on the petitioner's rights. The petitioner also prayed for a mandatory injunction and a direction for the cancellation of the transfer and the reversion of the title in the said properties to Razia Sultana so that they are distributed amongst her legal heirs according to Islamic law. Respondents No.1 to 3 contested the said suit by filing a joint written statement. Respondent No.4 filed a separate written statement in which she prayed for the suit to be decreed. On 12.04.2010, the learned civil Court framed the following issues:-

- 1. *Whether the plaintiff is entitled to receive his share in the suit property being legal heir of deceased Gulzar Ahmed Khan? OPP*
- 2. *Whether the transfer of suit property in the name of defendant No.3 is illegal and unlawful and ineffective upon the rights of plaintiff? OPP*
- 3. *Whether the suit is not maintainable in its present form? OPD*
- 4. *Whether the suit of plaintiff is false and vexatious and as such defendants are entitled to recover special costs? OPD*
- 5. *Whether the suit is hit by order 7 Rule 11 of CPC? OPD*
- 6. *Relief"*

5. The petitioner entered the witness box as PW-1, whereas Mr. Abdali Shah, from the Estate Management Directorate of the Capital Development Authority ("C.D.A.") appeared as PW-2. Respondent No.4/Alia Gulzar appeared as DW-1; respondent No.3 (Rehana Gulzar) as DW-2; and respondent No.1 (Siraj Ahmed Jan) as DW-3. Vide judgment and decree dated 26.03.2012, the learned civil Court dismissed the suit. Against the said judgment and

decree, the petitioner preferred an appeal before the Court of the learned Additional District Judge, Islamabad. Vide judgment and decree dated 11.12.2015, the said appeal was partly accepted. The learned Appellate Court held that the petitioner was entitled to inherit and receive his Islamic share in the properties which were in Razia Sultana's name when she died. These properties were identified as building No.B-1/352, Lower Bazaar, Murree, and the saving certificates issued in Razia Sultana's name by the National Saving Centres at Markaz G-6, and Markaz G-9, Islamabad. As regards the saving certificates in which respondents No.1 to 3, were named as 'nominees' and which had already been en-cashed by the said respondents, it was held that the petitioner was also entitled to get his Islamic share in the amount so en-cashed by the said respondents. Suit property No.1 was held to have been validly gifted and transferred by Razia Sultana to respondent No.3, whereas suit property No.2 was held to have been validly gifted on 29.09.2003, by Razia Sultana to respondent No.2.

6. The petitioner in the instant civil revision petition has impugned the judgments and decrees passed by the learned Courts below. Even though the learned Appellate Court partly accepted the petitioner's appeal, respondents No.2 to 4 have not challenged the appellate judgment and decree.

**CONTENTIONS OF THE LEARNED COUNSEL FOR THE PETITIONER:-**

7. Learned counsel for the petitioner submitted that suit property No.1 had been given to Razia Sultana by her late husband; that it had not been proved that suit property No.1 had been gifted by Razia Sultana to respondent No.3; that in fact respondent No.3 had obtained suit property No.1 fraudulently from Razia Sultana, when she was paralyzed; that respondent No.3 was the only witness who appeared before the learned civil Court to prove the transfer of suit property No.1 in her favour; that respondent No.4/DW-1 was in Karachi when the alleged gift regarding suit property No.1 was executed; that respondent No.4's stance in her written statement supports the petitioner's

case; that after filing the written statement, respondent No.4 was won over by respondent No.3, which resulted in respondent No.4's evidence to be contrary to her position in her written statement; that the ingredients of a valid gift had not been satisfied as regards suit property No.1; that possession of suit property No.1 had not been delivered by Razia Sultana to respondent No.3 when the said gift was allegedly made; that even now respondent No.3 is not in exclusive possession of suit property No.1; that a 'family transfer' at the C.D.A. cannot be recognized as a valid gift; that the word 'gift' has not been used in any of the documents on the basis of which suit property No.1 was transferred to respondent No.3's name in the C.D.A. records; that the transfer letter dated 26.08.2003, (Exh.P.8) cannot be termed as a gift deed; that a gift deed is required to be registered under the law; that if Razia Sultana wanted to gift suit property No.1 to respondent No.3, she should have executed a registered gift deed in respondent No.3's favour; that suit property No.1 belonged to Razia Sultana at all material times, and the petitioner is entitled to his inherited share in the said property; and that the petitioner was unlawfully denied the right to inherit his share in suit property No.1, which was owned by his mother.

8. Learned counsel for the petitioner further submitted that the learned trial Court had not framed the issues properly; that the onus in the issues has been wrongly placed by the learned civil Court; that the learned civil Court should have re-framed the issues; that the alleged donee of suit property No.2, did not appear as a witness; and that the concurrent findings of the learned Courts below are as a consequence of misreading and non-reading of evidence. Learned counsel for the petitioner prayed for the concurrent judgments and decrees of the learned Courts below to the extent of the findings with respect to suit property No.1 and suit property No.2 to be set aside, and for the petitioner's suit to be decreed. In support of his contentions, learned counsel for the petitioner relied on the following case law:-

- (i) Shabbir Hussain Vs. Asghar Hussain Shah (2007 SCMR 1884), wherein it has been held as follows:-

*“9. ... According to Article 78 of the Qanun-e-Shahadat, 1984, execution of a document is to be proved to be in the handwriting or signature or thumb-mark of the alleged executant, which would mean signing or putting thumb-mark over a document as consenting party thereto. Execution of document would not only mean mere signing or putting thumb-impression but something more than mere signing or putting thumb-impression by the executant. It must be proved that thumb-mark was made in the presence of witness in whose presence the document was written and read over and it was understood by the vendor and would not only be limited to merely signing a name or placing thumb-impression upon a blank sheet of paper so as to prove the document to have been executed whose identification should also be proved by reliable and authentic evidence that a person who has affixed thumb-mark or signature was the same person who owned the land and sold the same to the vendee. Execution would mean series of acts; which would complete the execution. Mere signing or putting thumb-mark would not amount to execution in terms of Article 78 of Qanun-e-Shahadat, 1984. A document which is not proved is inadmissible in evidence, unless strict proof of it is waived.”*

- (ii) Aurangzeb Vs. Muhammad Jaffar (2007 SCMR 236), wherein it has been held that in a transaction of gift, heavy onus lies on the beneficiary to prove by convincing evidence which satisfies the judicial conscience of the Court that the transaction shown to be a gift was executed by the donor in favour of the donee. Law to this effect has also been laid down in the case of Manzoor Vs. Bakhan Mai Khokhar (2010 CLC 328).
- (iii) Muhammad Idrees Vs. Zeenat Bibi (2005 SCMR 1690), wherein it has been held that the factum of gift had to be proved by the donee through cogent and concrete evidence. It was also held that the essential ingredients of a valid gift were (i) declaration of the gift, (ii) acceptance of the gift, and (iii) delivery of possession to the donee.
- (iv) Rabnawaz Vs. Ghulam Rasul (2014 SCMR 1181), wherein it has been held that when a gift was challenged, the burden lay on the donee to prove that all the essentials of a valid gift had been fulfilled. In the said case, the donor was very old, infirm and incapacitated, and was living at the mercy of the

donee, in the latter's house. The trial Court and the appellate Court had concurrently held that the gift was an outcome of undue influence. The Hon'ble Supreme Court agreed with the said findings, and also held that another reason militating against the validity of the gift was want of delivery of possession.

- (v) Rashida Bibi Vs. Mukhtar Ahmad (2008 SCMR 1384 = NLR 2008 Revenue 97), wherein it was held that a very heavy burden lay on the donee to prove that a valid gift had been made in his favour. In the said case, the donors were *pardanashin* illiterate ladies. It was also held that mere admission of making thumb impression or appearing before the Sub-Registrar was not sufficient to infer that the donors had declared their intentions to transfer their share in the property in question. It was also held that mere registration of a document in itself is not proof of its execution by a person by whom it is alleged to have been executed the same, if the execution of such a document had been denied by any of parties in the litigation.
- (vi) Mian Ghayassuddin Vs. Hidayatun Nisa (2011 SCMR 803). In the said case, a mutation of gift allegedly made by a mother in favour of her sons was disputed by her daughter, who claimed her Islamic share in the legacy of her deceased mother. The donor at the relevant time was ninety years of age and was held to have lost her faculty of memory and understanding. The alleged mutation of gift was made soon before the donor's demise. It was held that the sons/donees had not satisfactorily discharged the onus of proving that the gift was made without exercising undue influence over the donor or that she had been given independent advice at the relevant time or that she had made the gift with her free will and consent.
- (vii) Khan Muhammad Vs. Muhammad Din (2010 SCMR 1351), wherein it has been held that the initial burden to prove the execution of a document is on the party which relies on such a document, and once this onus is discharged, the

burden to prove the factum of fraud or undue influence or genuineness of the document shifts to the party which alleges fraud.

- (viii) Mst. Shafqat Parveen Vs. Muhammad Iftikhar Amjid (2012 SCMR 1602), wherein it has been held that under Islamic law, offer, acceptance, and delivery of possession were the three essential ingredients of a valid gift and the onus was on the donee to prove the said components.
- (ix) Riaz Mehmood Vs. Altaf Hussain (2011 YLR 1674), wherein it has been held that when a fact renders the physical and mental capacity of a donor to make a gift highly doubtful, it is for the beneficiaries to prove that the donor was in mentally fit condition, and that he had independent advice available to him, and that he had made a valid offer of a gift which had been accepted by the donee. In the said case, the donor was suffering from a serious illness and was paralyzed. His thumb impression was obtained through a local commission who appeared as a witness before the trial Court and admitted that two witnesses did not sign the gift deed in his presence. He had also deposed that the two witnesses were not present when he went to get the donor's thumb impression on the gift deed. The gift was held not to have been validly executed.
- (x) Miraj Din Vs. Mst. Sardar Bibi (2010 MLD 843), wherein it has been held that where a gift was made to the exclusion of legal heirs, the absence of reason or justification for the same adversely affected its validity. It was also held that where an oral gift was recorded through a mutation, and the Revenue Officer attesting the same was not examined as a witness, a serious doubt as to its validity would arise.
- (xi) Khaliqdad Khan Vs. Zeenat Khatoon (2010 SCMR 1370), wherein it has been held that the onus to prove a transaction embodied in a gift mutation would essentially be upon the beneficiary, who would be required to establish that the gift was the result of a conscious application of the donor's mind, and not the result of undue influence or fraud

played on him. It was also held that the beneficiary of the gift must prove the mutation by producing evidence in accordance with the accepted principles and in terms of the *Qanun-e-Shahadat* Order, 1984.

**CONTENTIONS OF THE LEARNED COUNSEL FOR RESPONDENTS NO.2 TO 4:-**

9. Learned counsel for respondents No.2 to 4 submitted that suit property No.1 was given to Razia Sultana by her parents, and not by her husband; that Razia Sultana died in 2005, whereas suit property No.1 was gifted and transferred to respondent No.3 in 2003; that Kamran Ahmad Jan/respondent No.2 accompanied his mother to the C.D.A. where she transferred property No.1 to respondent No.3; that the indemnity bond executed by Razia Sultana had also been signed by respondent No.2 as a witness; that Razia Sultana was mentally alert when she transferred suit property No.1 to respondent No.3; that at no stage was any application under the provisions of the Mental Health Ordinance, 2001, filed regarding Razia Sultana's mental health; that Razia Sultana was not paralyzed as asserted by the petitioner; that Razia Sultana would go herself to receive her pension; that in the plaint, the petitioner had not alleged that his mother's signature on the transfer documents was forged; that the petitioner, in his appeal, had not taken a ground regarding non framing of an issue; that respondents No.1 to 3 had filed a joint written statement; that after filing the written statement, respondent No.1 changed his stance and sided with the petitioner; that respondent No.1 could not take a position contrary to the one taken by him in the written statement; that respondent No.1 did not file an application to transpose himself as a co-plaintiff; that respondent No.4, in her written statement, had taken a position adverse to the interests of respondent No.3; that the evidence adduced by respondent No.4 contradicts her pleadings in her written statement; that since the evidence adduced by respondent No.4 did not support her pleadings in her written statement, the contents of her written statement are of no consequence; and that respondent No.4 did not sign the written statement in the presence of her counsel; that



respondent No.4's written statement was attested and verified at Karachi.

10. Learned counsel for respondents No.2 to 4 further submitted that a Muslim had unfettered powers to gift away his property to one of his legal heirs to the exclusion of the others. In this regard, he placed reliance on the law laid down in the case of Ghulam Muhammad Vs. Mian Muhammad (2007 SCMR 231). He further submitted that the petitioner, in his suit, had not sought the relief of possession of suit property No.1; and that a simple declaratory suit by a plaintiff without seeking the consequential relief of possession when such a plaintiff was out of possession of the suit property, would not be maintainable. In this regard, reference was made to the law laid down in the cases of Abdur Razzaq Vs. Zahoor Ahmad (2005 CLJ 955), Muhammad Saeed Vs. Munawar Shah (PLD 1973 Peshawar 80), and Farmanullah Vs. Qalandar (1999 YLR 1610).

11. Learned counsel for respondents No.2 to 4 further submitted that the petitioner was bound to annex with this civil revision petition, certified copies of the pleadings, the complete evidence, orders and judgments/decrees, and that non-filing of such documents rendered the revision petition incompetent. Reference in this regard was made to the law laid down in the cases of Mst. Banori Vs. Jilani (PLD 2010 SC 1186), Saleem Khan Vs. Province of Punjab (2013 MLD 1618), Raja Muhammad Kamran Vs. Shaheer Constructions (2013 MLD 118), and Abdul Hafeez Vs. Shaukat Ali (2014 MLD 555). Learned counsel for respondents No.2 to 4 prayed for the revision petition to be dismissed.

12. I have heard the contentions of the learned counsel for the contesting parties, and have perused the record with their able assistance. The facts leading to the filing of the instant petition have been set out in sufficient detail in paragraphs No.2 to 6 above, and need not be recapitulated.

13. The main contest in this case is between the petitioner (who claims his inherited share in suit property No.1) and respondent No.3 (who claims that the said property was gifted and

transferred to her by her mother, Razia Sultana, two years before the latter's demise).

14. The petitioner in his suit has *inter-alia* pleaded that Razia Sultana, after her husband's death, became seriously ill and also got an attack of paralysis rendering her incapable of performing "*ordinary functions of life*". It was also pleaded that she had to be continuously nursed, and remained in a state of ill-health until her death on 25.05.2005. The petitioner asserted that the transfer of suit property No.1 in respondent No.3's favour was the consequence of fraud on the part of respondent No.3, who took undue advantage of Razia Sultana's mental incapacity and illness. In his suit, the petitioner *inter-alia* pleaded that "*the documents of transfer were false and manipulated without any free will and consent of the transferor.*"

15. The petitioner said assertions were denied by respondents No.1 to 3 in their joint written statement. In the said written statement, it was pleaded that other than diabetes, for which Razia Sultana was being treated, she suffered from no other serious disease. It was also pleaded that she was mentally quite perfect and until February 2005, she would go to the bank to receive her pension. Respondents No.1 to 3 in their written statement have pleaded that their mother, Razia Sultana, transferred suit property No.1 in respondent No.3's favour with her free will and consent. It was also pleaded that all of respondent No.3's siblings, including the petitioner, had given their consent to the said gift; and that suit property No.1 was transferred by Razia Sultana in respondent No.3's name on 26.08.2003, whereas suit property No.2 was transferred in respondent No.2's name on 29.09.2003.

16. Respondent No.4/Mst. Alia Khalid had filed a consenting written statement in which she admitted all that was pleaded in the petitioner's civil suit.

17. The petitioner appeared as PW.1 before the learned trial Court and buttressed his pleadings in the civil suit by deposing in his examination-in-chief that after his father's demise, his mother became seriously ill and got an attack of paralysis; that she could

not write, and that all her affairs were dealt with by the petitioner. In his cross-examination, the petitioner deposed *inter-alia* that his mother had herself received her pension on 22.03.2005 and that he had accompanied her; that when his mother would receive her pension, the bank officials would take her signature and thumb impression; that his mother had not given an authority letter to anyone for receiving her pension; that he or his brothers had not approached any Court with a plea that his mother was incapable of carrying out official work (*daftri kaam*) due to her illness; that her mother used to reside in suit property No.1; that respondent No.3 was divorced and used to live with her mother; that respondent No.3 is still unmarried; and that respondent No.3 used take care of her mother.

18. The petitioner does not dispute the fact that the suit property No.1 was transferred by Razia Sultana to respondent No.3, but asserts that *“the documents of transfer were false and manipulated without any free will and consent of the transferor”*. Other than this, there is no other pleading as regards the allegation of fraud against respondent No.3. It is essential that in a case where fraud, undue influence, or coercion is put at the forefront, the complainant party should set out the facts in full and give essential particulars instead of making general allegations. This is a legal requirement enshrined in Order VI, Rule 4 of C.P.C and reiterated by the superior Courts in several cases including Faizum alias Toor Vs. Nander Khan (2006 SCMR 1931), Mst. Sahib Noor Vs. Haji Ahmed (1988 SCMR 1703), and Pakistan Banking Council Vs. Ali Maohtaram Naqvi (1985 SCMR 714). Recently in the case of Lanvin Traders, Karachi Vs. Presiding Officer, Banking Court No.2, Karachi (2013 CLD 1581), the Hon'ble Supreme Court has held that it is an elementary principle of pleadings that where allegations of fraud, misrepresentation, collusion or *malafide* are attributed, necessary particulars and the details in that context are to be unfolded in the pleadings, and that bald or vague statements to that effect are of no legal consequence. It is also well settled that a Court must scrutinize the pleadings to find out that a plea has been made out and that

full particulars thereof have been given before examining whether fraud or undue influence was exercised. In the case at hand, the petitioner's pleadings in his suit regarding the falsehood and manipulation of the transferred documents are not so appealing and telling, so as to invalidate the validity of the oral gift of suit property No.1 by Razia Sultana in favour of respondent No.3, duly recorded in the Capital Development Authority records.

19. The thrust of the petitioner's case in his suit was that Razia Sultana could not have transferred any of her properties because she was "*seriously ill*", "*incapable*", "*not mentally conscious*", and "*could not perform any normal functions of life*". The petitioner (PW-1) in his cross-examination admitted that Razia Sultana had not given an authority letter to any of her children to receive her pension, and that she had herself received her pension for the last time on 22.03.2005. He also deposed that none of Razia Sultana's children filed any application before any forum regarding her inability to perform any official work. The petitioner's testimony regarding his mother's health is not in consonance with his pleadings in the suit. In the absence of any independent proof as to the mental incapacity of the donor/Razia Sultana, it could not be held that the transfer of the suit properties was unlawful or void. In the case of Muhammad Khan Vs. Mst. Hayat Bibi (1987 CLC 1187), the petitioner (donor's son) had challenged the validity of a gift made by the donor in favour of the donee/respondent (donor's daughter), alleging that the donor was coerced and defrauded by the donee to gift away his property when the donor, due to illness, was not in his senses. The donee had served the donor during his illness. The petitioner failed to prove the allegation of fraud and coercion. It was held by the Hon'ble Lahore High Court that losing senses due to illness does not necessarily mean entertaining an apprehension of imminent death, which indeed is *sine qua non* for striking down any transaction made in that state of mind. The petitioner's challenge to the gift made in favour of the petitioner's sister by his father was concurrently dismissed. Furthermore, in the case of Mashooq Ali Vs. Shah Zaman (2017 YLR 957), an issueless female donor was alleged to be of an unsound mind at

the time of making a gift of land in favour of her sister-in-law. The gift was concurrently held to be valid. In the said report it was held as follows:-

*“9. Even if it is presumed that the Donor was of unsound mind, then the burden of proof lies on the petitioner to prove her mental illness and incapability by producing strong oral as well as documentary evidence but he failed to substantiate by producing Medical Expert who was treating her (Donor) being his patient. Mere oral assertion regarding mental health condition of a person is not sufficient proof until and unless it was corroborated by strong, confidence inspiring evidence which is lacking in the instant case therefore, petitioner failed to discharge the burden on him.”*

20. The petitioner, in his suit, had pleaded *inter-alia* that his mother was seriously ill after his father's death. The petitioner/P.W-1 in his evidence deposed that his mother had been suffering from paralysis and blood pressure. Such an illness cannot form the basis of invalidating the gift and transfer of suit property No.1 to respondent No.3. In the case of Mst. Chand BiBi Vs. Muhammad Shafaat (PLD 1977 SC 28), it has been held that it was wrong to suggest that stroke of paralysis is immediately dangerous to life and or that merely because a donor was suffering from paralysis it must be inferred that he was under pressure of the sense of the imminence of death. Furthermore, it was held that mere prolonged suffering from paralysis or gout per se was insufficient to sustain plea of *marzulmaut*.

21. It has been consistently held that in order that a declaration of a gift is established, it must be shown that the donor, either in the presence of witnesses or otherwise, made a public statement that he or she gifted the property in favour of the donee and that he divested himself of the ownership of the property by delivering such possession as the property is capable of to the donee, who accepted it. In the case at hand, the gift of suit property No.1 made by Razia Sultana in favour of respondent No.3, was not made within the confines of a house, but in the offices of the Capital Development Authority. Razia Sultana/donor submitted an application (Exh.P/5) for the transfer of suit property No.1 in favour of respondent No.3. The said application bears the certificate of Syed Ali Akber Rizvi, APV/Manager, Allied Bank of

Pakistan Limited, who had certified that Razia Sultana had signed the said application in his presence. The said application bears three thumb impressions and specimen signatures of respondent No.3, as the transferee. On 10.05.2004, Razia Sultana had also executed an indemnity bond (Exh.P/6), wherein it was clearly stated that she had “gifted/transferred” suit property No.1 to respondent No.3. Vide indemnity bond dated 10.05.2004 (Exh.P/7), respondent No.3 declared that she had obtained suit property No.1 from her mother, Razia Sultana. Vide letter dated 26.08.2003 (Exh.P/8), the Capital Development Authority (Estate Management Directorate), informed Razia Sultana that on her application dated 30.06.2003, suit property No.1 had been transferred to respondent No.3. Since Razia Sultana had herself appeared before the offices in the Capital Development Authority for the transfer of suit property No.1, it could not be said that the transfer documents were “*false and manipulated*”, or executed without Razia Sultana’s free consent.

22. Under Regulation No.18 (2) of the Islamabad Land Disposal Regulations, 2005, which have been framed in exercise of the powers under sections 49 and 51 of the Capital Development Authority Ordinance, 1960, provides that in case of transfer of plots within the family, a token fee shall be charged by the Capital Development Authority. The documents brought on record by PW-2 show that the transfer of suit property No.1 from Razia Sultana to respondent No.3 was a ‘family transfer’, which is a recognized mode of transfer of property under the law, as mentioned above.

23. As mentioned above, respondents No.1 to 3 had filed a joint written statement. In the said written statement, it was *inter-alia* pleaded that suit property No.1 had been gifted and transferred to respondent No.3 by Razia Sultana with respondent No.1’s consent. Respondent No.1 gave evidence as DW-3. In his evidence, respondent No.1 took a dramatic U-turn by deposing that respondent No.3 had had suit property No.1 transferred in her favour through fraud. He did not give any particulars of the fraud alleged to have been exercised by respondent No.3. DW-3’s testimony was in stark contradiction to his written statement. He

admitted his signatures on the written statement which was jointly filed by him along with respondents No.1 and 2. He also admitted that at no stage had he challenged the transfer of suit property No.1 in the Capital Development Authority. The inconsistent positions taken by respondent No.1 in his written statement and his evidence are not worthy of any consideration. It is well settled that a party/witness who takes inconsistent positions loses credibility. Reference may also be made to the maxim, *allegans contraria non set audiendus* (a person alleging contradictory facts should not be heard).

24. The antipathy between respondent No.1 and respondent No.3 is understandable. After the filing of the joint written statement by respondents No.1 to 3, disputes and differences developed between respondent No.1 and respondent No.3. On 02.11.2013, respondent No.3 filed a suit for possession, recovery of compensation and permanent injunction against respondent No.1 before the Court of the learned Civil Judge, Islamabad. In the said suit, respondent No.3 had prayed for *inter-alia* a decree for possession of the ground floor of suit property No.1. In the written statement, respondent No.1 had admitted that he was in possession of the ground floor of suit property No.1. Apparently, the said suit is still pending adjudication.

25. The relationship between Kamran Ahmad Jan (respondent No.2) and the petitioner has also been swinging like a pendulum. Respondent No.2 had also filed his written statement jointly with respondents No.1 and 3. By doing so, respondent No.2 had taken the position that suit property No.1 had been gifted by his mother to his sister, respondent No.3. Learned counsel for the petitioner drew the attention of the Court to an *Iqrarnama* allegedly executed by respondent No.2 (Kamran Ahmad Jan) and submitted that respondent No.1 had resiled from the position taken by him in the written statement filed in the suit. It is perhaps for this reason that the learned counsel for the petitioner hardly made any submissions regarding the transfer of suit property No.2 by Razia Sultana in favour of Kamran Ahmad Jan. The said *Iqrarnama* was allegedly executed on 19.11.2008. Kamran Ahmed Jan did not

appear as a witness in the case. The said *Iqrarnama* was not produced in the proceedings before the learned civil Court. Therefore, no evidentiary value can be given to the said *Iqrarnama* by this Court in revisional jurisdiction.

26. During the pendency of the instant civil revision petition, respondent No.2 transferred suit property No.2 to one Sher Zaman Butt. Vide C.M.No.965/2016, the petitioner applied for impleadment of said Sher Zaman Butt as a party to this petition. Since the said sale has been made *pendente lite*, the same is subject to the doctrine of *lis-pendens*. Since the learned counsel for the petitioner hardly made any submissions to question the validity of the transfer of suit property No.2 by Razia Sultana in Kamran Ahmad Jan's favour, the said application stands dismissed.

27. Respondent No.3 gave evidence as DW-2 in reiteration of her pleadings in her written statement. She deposed *inter alia* that she was in possession of suit property No.1. Furthermore, she deposed that her mother was ill for two months prior to her demise; that her mother was a retired Government servant who would go to receive her pension; that after her marriage broke down, she lived with her mother. She denied having transferred the suit property No.1 in her name through fraud and deception. Her testimony was in consonance with her pleadings in the written statement.

28. Mst. Alia Khalid (respondent No.4) entered the witness box as DW-1. The position taken by respondent No.4 is no less contradictory than the one taken by her brother, respondent No.1. In her written statement, respondent No.4's stance was consistent with the one taken by the petitioner in suit. However, in her examination-in-chief, she deposed that suit property No.1 belonged to her mother, who in her lifetime transferred the same to respondent No.3. She also deposed that her mother was in good health and that other than diabetes and a problem with her thyroid, her faculties of thinking and understanding were in order. In her cross-examination, she deposed *inter-alia* that when she filed the written statement, she had developed differences with



respondent No.3; and that she did not understand or know what was written in the written statement; that she did not know whether the written statement had been sent from Karachi, or whether it was verified at Karachi. About her mother's health, DW-1 deposed that prior to her death she used to be ill; that since she had diabetes, her kidneys would suffer when the sugar level would rise; that her mother was 76 years of age when she died; and that the petitioner was wrong in contending that her mother was physically and mentally incapacitated prior to her death. About her changing stance, she deposed that at the time of the filing of the suit, she sided with the petitioner, and subsequently she was with respondent No.3.

29. Since there are marked contradictions between respondent No.4/DW-1's written statement and her evidence, the learned Courts below were correct in not giving credence to her testimony. Her pleadings in her written statement were not supported by her oral testimony, therefore, the veracity of such pleadings dwindled, and were not worthy of consideration. It is by now well settled that pleadings are treated as a foundation in civil matters and a point having not been taken regarding a factual position cannot be allowed to be taken at subsequent stage or during evidence. A party could not make a departure from its pleadings and was bound by the same. No evidence contrary to the pleadings could be permitted to be adduced by a party to the suit. Law to this effect has been laid down in the cases of Jannat Bibi Vs. Sher Muhammad & others (1988 SCMR 1696), Major (Retd.) Barkat Ali and others Vs. Qaim Din and others (2006 SCMR 562), Rehmatullah and others Vs. Saleh Khan and others (2007 SCMR 729), and Muhammad Iqbal Vs. Mehboob Alam (2015 SCMR 21).

30. Mr. Abdali Shah, a senior officer from the Estate Management Directorate of the Capital Development Authority appeared as PW-2, and produced Razia Sultana's application for the transfer of suit property No.1 in respondent No.3's favour. He also produced the other documents through which the said transfer had taken place as Exh.P.5 to Exh.P.8. Exh.P.8 was the

allotment letter dated 26.08.2003 in respondent No.3's favour. Although he deposed that the transaction was a simple transfer and not a gift, the exhibited documents show that the transaction was not a sale. PW-2 did not seem to have been familiar with the contents of the documents that he had produced in his evidence. Had he read the said documents, he would have realized that the indemnity bond executed by Razia Sultana had clearly mentioned that she had "gifted" suit property No.1 to respondent No.3. However, in his cross-examination, PW-2 deposed that the officer at the Capital Development Authority transferred suit property No.1 after taking the statements of Razia Sultana and respondent No.3. He also deposed that there were two witnesses, namely, Kamran Ahmed Jan (respondent No.2), and Mudassar Ahmed Bhatti, to the indemnity bond. He also deposed that suit property No.1 was transferred in favour of respondent No.3 in accordance with the Capital Development Authority laws. As mentioned above, the petitioner in his suit had pleaded that the documents of transfer were false and manipulated. PW-2 was produced at the instance of the petitioner. From the testimony of the said witness, it could not be gauged that the transfer documents were false or manipulated.

31. As regards the contention of the learned counsel for the petitioner that the gift of suit property No.1 in favour of respondent No.3 should have been through a registered document, suffice it to say that it is well settled that under Islamic law, writing is not essential for the validity of a gift either of moveable or immoveable property. In this regard paragraph 147 of Mulla's Principles of Mohammadan Law, is reproduced as under:-

*"147. Writing not necessary.—Writing is not essential to the validity of a gift either of movable or of immovable property."*

32. The three essentials of the gift under Islamic law are (i) a declaration of gift by the donor; (ii) an acceptance of the gift, express or implied, by or on behalf of the donee, and (iii) delivery of possession of the subject matter of the gift by the donor to the donee. If these conditions are fulfilled, the gift is complete.

33. Section 123 of the Transfer of Property Act, 1882, provides that a gift of immoveable property must be effected by a registered instrument signed by the donor and attested by at least two witnesses, and that a gift of moveable property may be affected either by a registered instrument or signed as the aforesaid, or by delivery. However, the provisions of Section 123 do not apply to gifts under Islamic law. Section 129 of the Transfer of Property Act, 1882, exempts Muslims from certain provisions of the Transfer of Property Act, 1882, and that the said Act does not apply to gifts made by Muslims. Under Islamic law, all that is necessary is declaration, acceptance and delivery of possession. A gift can be made orally. Gift by a Muslim would be complete, even if there is no writing, but the three ingredients have to be proved. It is not necessary that there should be a deed of gift to make it a valid gift. Reference in this regard may be made to the following case law:-

- i) In the case of Muhammad Ejaz Vs. Mst. Khalida Awan (2010 SCMR 342), it has been held as follows:-

*“6. Under the Mahommedan Law, a gift, in order to be valid and binding upon the parties, must fulfil the following three conditions:-*

- (a) a declaration of gift by the donor;*
- (b) acceptance of gift by the donee; and*
- (c) delivery of possession of corpus.*

*On the fulfilment of the above three ingredients, a valid gift comes into existence. A valid gift can be effected orally, if the pre-requisites are complied with. Written instrument is not the requirement under the Muslim Law nor is the same compulsorily registrable under the Registration Act, 1908.”*

- ii) In the case of Nagina Akhtar Vs. Tahzim Akhtar (2009 SCMR 623), the Hon'ble Supreme Court held *inter-alia* as follows:

*“A declaration of gift cannot be equated with a gift-deed, which has different dimensions and parameters as compared to the former. It is true that gift-deed is a document, which is compulsorily required by law to be attested by two witnesses, but it is equally true that in the instant case the declaration of gift cannot be termed as gift-deed.”*

- iii) In the case of Maulvi Abdullah Vs. Abdul Aziz (1987 SCMR 1403), it has been held as follows:-

*“The next question which arises is whether an oral gift of immovable property could be made by a Muslim in favour of*

*a Muslim son of a predeceased son. If so, whether such a gift has in any way to be effected also through an instrument of writing; and lastly whether in case an instrument of writing is made whether it is ineffective without registration.*

*In our view all these questions stand resolved by the judgment of this Court in Mst. Umar Bibi and 3 others v. Bashir Ahmad and 3 others 1977 SCMR 154. Though the facts in which the judgment was rendered are slightly distinguishable, yet in so far as the resolution of questions of law posed above is concerned, the answers are, of course, concise but very clear. An objection based on section 123 of the Transfer of Property Act to the effect that a gift of an immovable property cannot be made except through a registered instrument was raised but it was repelled with reference to section 129 of the Act which provided that nothing in the chapter in which section 123 fell would affect any rule of Muslim Law. It was held that according to Muslim Law an oral gift of an immovable property could be made provided other conditions for a Muslim gift were satisfied. The observations made at page 158 of the report, in this behalf, are as follows:-*

*“The objection founded on section 123 of the Transfer of Property Act is also misconceived. Vide section 129 ibid the provisions of the Transfer of Property Act, gifts made under Muslim Law, are expressly excluded from the operation of the Act. It is firmly established proposition that under Muslim Law a valid gift could be affected orally if the formalities prescribed by the Muslim Law are complied with even if the instrument of gift is not registered. See Muslim Law by Soksena, 3rd Edn. pp. 368-369 and the precedent cases noticed at the foot of these pages. Among these formalities are, the passing of the possession from the donor and the acceptance of the same by the donee. These are amply satisfied in the instant case.”*

- iv) In the case of Muhammad Amin Vs. Mst. Shaista (2015 MLD 295), the Hon'ble Peshawar High Court has held as follows:-

*“A valid gift could be effected even orally and under an un-registered instrument. Written instrument is not the requirement under the Muslim Law nor is the same compulsory registerable under the Registration Act, 1908. A written instrument in any case would not create a gift but was a mere evidence of the gift and as such would not require registration.”*

- v) In the case of Abdul Hameed Vs. Abdul Ghafoor (2011 MLD 1836), the Hon'ble Peshawar High Court has held as follows:-

*“There is no denial to the contentions that under Muhammadan Law a Muslim can make a valid gift either*

*verbally or through execution of a gift deed and registration of gift deed is not essential under sections 123 and 129 of the Transfer of Property Act, 1882 but for a valid gift the beneficiary of the alleged gift is charged with heavy burden to establish the three essential ingredients of the deed (i) offer of the donor, (ii) acceptance by the donee and (iii) delivery of possession.”*

- vi) In the case of Hakim Bibi Vs. Rab Nawaz Khan (2011 YLR 2980), one of the objections of to the validity of the gift deed was that same was unregistered. The Hon'ble Peshawar High Court held that such an objection was of no avail because under the Muslim Law there was no mode prescribed for a gift, which could also be made orally.
- vii) In the case of Mst. Jan Rana Vs. Commissioner Income Tax, Peshawar (2006 PTD 529), the Division Bench of the Hon'ble Peshawar High Court held as follows:-

*“8. It is pertinent to mention here that under section 138 of Muhammadan Law by Mulla a gift is complete when there is a declaration of gift by the donor, acceptance of gift, express or implied by or on behalf of the donee and delivery of possession of the subject of the gift by the donor to the donee. Unregistered gift deed, notwithstanding the amendment of section 49 of Registration Act by Registration Amendment Ordinance, 1962 was admissible in evidence. Donor and the donee being brother and sister were governed by Muslim Law and as mentioned above the registration of the document was not sine qua non for validity of the gift.”*

- viii) In the case of Muhammad Rafiq Saigol Vs. Trust Modarba (2003 CLD 646), the Hon'ble Lahore High Court has held as follows:-

*“... section 129 of the Transfer of Property Act provides that gifts made under the Muslim Law are expressly excluded from the operation of the said Act. If sections 123 and 129 of the Transfer of Property Act are read together, the obvious conclusion therefrom is that the provisions of section 123 does not apply to a gift under Muhammadan Law and no writing of such gift is essential. It has been held in Mst. Umar Bibi and 3 others v. Bashir Ahmad and 3 others 1977 SCMR 154 that the gift made under the Muslim Law is expressly excluded from the operation of the Transfer of Property Act and that as soon as the formalities prescribed by Muslim Law, are complete, a valid gift could be effected even orally or under an unregistered instrument.”*

- ix) In the case of Muhammad Sharif Vs. Mst. Aisha Bibi (1994 MLD 677), the Hon'ble Lahore High Court has held as follows:-

*“It is well-established legal proposition that a gift by a Muhammadan can be created even orally and even if some document is written either as gift or as an acknowledgment of gift it does not require registration and it is definitely a very strong piece of evidence in favour of the transaction of gift.”*

34. Since in the case at hand, the gift of suit property No.1 was made by Razia Sultana in favour of her daughter, respondent No.3, orally and not through any written instrument, the question of registration does not arise. The process of transfer of ownership of suit property No.1 from Razia Sultana to respondent No.3 in the records of the Capital Development Authority was in recognition of such an oral gift. The appearance of Razia Sultana and respondent No.3 in the offices of the Capital Development Authority for the transfer of suit property No.1 is ample proof of declaration of oral gift and its acceptance by respondent No.3. It is not disputed that respondent No.3 is in possession of suit property No.1. Therefore, the three essential ingredients for a valid gift have been satisfied in this case. After the transfer of suit property No.1, the donor and the donee lived in the said property until the former's demise. When a parent/donor gifts a property to a child/donee, in which both the donor and the donee reside, constructive possession of the gifted property needs to be given to the donee. For the validity of such a gift, it is not required for the donor or other family members to move out of the gifted property so as to show that possession had been delivered to the donee.

35. As regards the contention of the learned counsel for the petitioner that the petitioner could not have been deprived of his inheritance rights due to the transfer of suit property No.1 in favour of respondent No.3, we must not lose sight of the fact that the petitioner's mother, as a Muslim donor, had gifted and transferred suit property No.1 in respondent No.3's favour during her lifetime. Under Islamic law the holder of a property can gift the whole or any part of his property to one of his children in his lifetime. Islamic law permits a man to gift away his entire property during his lifetime so as to even disinherit his heirs. In this regard,

paragraph 142 of Mulla's Principles of Mohammadan Law, is reproduced as under:-

*"142. Extent of donor's power.-- A gift as distinguished from a will, may be made of the whole of the donor's property, and it may be made even to an heir."*

36. Reference may also be made to the following case law:-

- i) In the case of Muhammad Bashir Vs. Allah Ditta (1994 SCMR 1870), it has been held that a Muslim donor has unfettered power to alienate his property by way of gift or otherwise during his lifetime provided he is in proper state of health and in exercise of his independent voluntary discretion.
- ii) In the case of Mst. Nusrat Zohra Vs. Mst. Azhra Bibi (PLD 2006 SC 15), it was held *inter-alia* that a preferential gift made in favour of one or two children by the donor in his lifetime can, by no stretch of imagination, be termed as void. Furthermore, it was held that the powers of a Muslim to dispose of his property by way of gift are unfettered, and that a gift cannot be invalidated only because the heirs are deprived of their shares.
- iii) In the case of Ghulam Muhammad Vs. Mian Muhammad (2007 SCMR 231), a suit filed by the appellant/plaintiff challenging the gift made by his father, donor, in favour of the appellant/plaintiff's brother, was held to be incompetent and not maintainable, because a Muslim could gift away his property to anyone of his heirs to exclusion of others, and such a gift was invalid or void.
- iv) In the case of Safi Ullah Vs. Ghulam Jabbar (PLD 1955 Lahore 191), it was held that a Muslim he has unfettered powers to gift away his property to any one of his heirs to exclusion of others and such gift cannot be invalid or void. Furthermore, it was held that the only restraint upon a Muslim in the matter of alienating his property imposed by the Muslim Law relates to wills and gifts on death-bed.

37. Finding no jurisdictional infirmity, non-reading or misreading of evidence in the concurrent findings of the learned Courts below regarding the gift and transfer of suit property No.1 and suit

property No.2, this revision petition is liable to be dismissed, and is dismissed with no order as to costs.

**(MIANGUL HASSAN AURANGZEB)  
JUDGE**

**ANNOUNCED IN AN OPEN COURT ON \_\_\_\_\_/2017**

**(JUDGE)**

**APPROVED FOR REPORTING**

Qamar Khan\*

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