IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE MUSHIR ALAM
MR. JUSTICE YAHYA AFRIDI
MR. JUSTICE QAZI MUHAMMAD AMIN AHMED

Civil Petition No. 3249 of 2015
(Against the judgment dated 16.06.2015 passed by the Lahore High Court, Lahore in Civil Revision No. 428 of 2006)

Mst. Akhtar Sultana

...Petitioner

versus

Major ® Muzaffar Khan Malik (deceased) through his legal heirs, etc.

...Respondents

For the petitioner:	Mr. Muhammad Munir Paracha, ASC
For the respondents:	Mr. Wasim Sajjad, Sr. ASC Syed Nayyer Abbas Rizvi, ASC Mr. Osama Azeem Ch., Adv.
Date of hearing:	12.04.2021

JUDGMENT

Yahya Afridi, J.- The present petition for leave to appeal filed under Article 185(3) of the Constitution of the Islamic Republic of Pakistan impugns the judgment of the Lahore High Court dated 16.06.2015 passed in **Civil Revision No. 428/2006**, whereby the High Court has dismissed the revision petition filed by the petitioner and maintained the concurrent findings of the courts below in favour of the Respondents.

2. The dispute in hand relates to immovable property comprising 1017 *kanals* 2 *marlas* land situated in three villages

(muazajats) in Tehsil and District, Mianwali, and 14/40 share in House No. E.295-269 on 60 *kanals* land located in Mianwali City **("disputed property")**, admittedly inherited by one Bashir Khan Malik on the demise of his father, Malik Ahmad Khan**.** The present case relates to the contest over the propriety rights of the disputed property. On the one hand is Mst. Akhtar Sultana **("Petitioner"),** the divorced wife of Bashir Khan Malik, claiming her title over the disputed property based on the sale allegedly transacted by Bashir Khan Malik through his Attorney, Mian Mohammad Aslam, on the basis of Power of Attorney dated 18.06.1963 **(Ex.D6) ("disputed Power of Attorney")**, in her favour *vide* Mutation No. 5808 dated 26.06.1963 **(Ex.D5)** and Mutation No. 5430 dated 15.06.1963 **(Ex.D4) ("disputed mutations")** and the gift alleged made by him through the same Attorney by gift deed dated 22.07.1963 **(Ex.D27) ("disputed gift deed")**. On the other hand, are the mother and siblings of Bashir Khan Malik, namely, Mst. Zainab Khatoon (mother), Mst. Rashida Begum (sister) and Muzaffar Khan Malik (brother) **("Respondents"),** who claim their title over the disputed property based on their *Shari* share in the legacy of Bashir Khan Malik in pursuance of the statutory presumption of his death.

3. The Respondents, on 03.10.1970, instituted the suit against the Petitioner seeking joint-possession of the disputed property asserting their title thereto based on the statutory presumption[1] of death of Bashir Khan Malik whose whereabouts, as asserted therein, were unknown for a period of more than seven years since 30.06.1963, when he left the country, and asserting

[1] Previously Section 108 of the Evidence Act, 1872, now Article 124 of the Qanun-e-Shahadat, 1984.

that the disputed Power of Attorney allegedly executed by Bashir Khan Malik in favour of Mian Mohammad Aslam and the disputed mutations and gift deed in favour of the Petitioner were fraudulent. The Petitioner filed her written statement wherein she, after raising preliminary objections including that the suit was time barred, disputed the factual assertion of Bashir Khan Malik's whereabouts being unknown for the last seven years. She further claimed that the disputed property was legally transferred to her *vide* lawful and valid sale and gift transactions.

4. The suit of the Respondents was concurrently decreed by the trial court and the appellate court, and their judgments were affirmed by the revisional court (High Court) in the impugned judgment. Hence, the present petition.

5. Learned counsel for the Petitioner submitted that: Bashir Khan Malik, the former husband of the Petitioner, validly sold and gifted the disputed property to the Petitioner through his Attorney, Mian Mohammad Aslam; Bashir Khan Malik was alive, when the suit was instituted, and was living in U.K., where he died in the year 1997; the suit of the Respondents was time barred; and the courts below have granted the relief to the Respondents, which they had not even prayed for. With the said submissions, he contended that the courts below have legally and factually erred in decreeing the suit of the Respondents. On the other hand, learned counsel for the Respondents supported the impugned judgment, with the submissions that the revisional court has rightly

maintained the concurrent judgments of the trial court and the appellate court, finding no jurisdictional error therein.

6. We have heard the arguments of the learned counsel for the parties at length and perused the record of the case minutely.

7. It would be important to mention, at the very outset, that the parties differ only as to the date of death of Bashir Khan Malik, and not on the fact that the Respondents, being his mother and siblings, are his legal heirs. The stance of the Respondents is that his whereabouts being unknown for a period more than seven years was presumed to be dead since the year 1970. On the other hand, the Petitioner claims that he was alive when the suit was instituted and that he died in U.K. in the year 1997. Thus, the material defence to Respondents' claim to the legacy of Bashir Khan Malik was that Bashir Khan Malik had made a valid sale and gift of the disputed property in her favour in the year 1963, and thus, the disputed property was no more owned by him, to be inherited by the Respondents. The matter of validity and genuineness of the sale and gift of the disputed property in favour of the Petitioner was, thus, the most significant issue. We, therefore, take up and examine it at first.

Validity of Sale and Gift Transactions

8. The stance of the Petitioner is that Mian Muhammad Aslam **(DW7),** as an Attorney of Bashir Khan Malik on the basis of the disputed Power of Attorney, got the disputed sale mutations sanctioned, and executed the disputed gift deed in her favour.

Therefore, the said Power of Attorney was the foundation upon which the entire superstructure of the sale mutations and gift deed was erected, transferring to the Petitioner the title of the disputed property.

Principles on documentary evidence

9. Before considering the evidentiary value of the certified copy of the disputed Power of Attorney **(Ex.D6)** that the Petitioner so vehemently relies on, it would be pertinent to consider the principles of law of evidence as to: what material is "relevant"; when it is "admissible"; how it is to be "proved"; and finally, how its "evidentiary value" is determined.

(i) Relevant and admissible evidence

10. The Qanun-e-Shahadat, 1984 **("Qanun-e-Shahadat")** governs the law of evidence in our country. The expression "relevancy" and "admissibility" have their own distinct legal implications under the Qanun-e-Shahadat as, more often than not, facts which are relevant may not be admissible. On the one hand, a fact is "relevant" if it is logically probative or dis-probative of the fact-in-issue, which requires proof. On the other hand, a fact is "admissible" if it is relevant and not excluded by any exclusionary provision, express or implied.[2] What is to be understood is that unlike "relevance", which is factual and determined solely by reference to the logical relationship between the fact claimed to be relevant and the fact-in-issue, "admissibility" is a matter of law. Thus, a "relevant" fact would be "admissible" unless it is excluded from being admitted, or is required to be proved in a particular

[2] See Article 38 (express exclusion of confession of an accused before police officer), Article 71 (implied exclusion of hearsay evidence) of the Qanun-e-Shahadat.

mode(s) before it can be admitted as evidence, by the provisions of the Qanun-e-Shahadat. As far as the latter is concerned, and that too relating to documents, admissibility is of two types: (i) admissible subject to proof,[3] and (ii) admissible per se,[4] that is, when the document is admitted in evidence without requiring proof.

(ii) Mode of proof

11. Mode of proof is the procedure by which the "relevant" and "admissible" facts have to be proved, the manner whereof has been prescribed in **Articles 70-89** of the Qanun-e-Shahadat. In other words, a "relevant" and "admissible" fact is admitted as a piece of evidence, only when the same has been proved by the party asserting the same. In this regard, the foundational principle governing proof of contents of documents is that the same are to be proved by producing "primary evidence" or "secondary evidence".[5] The latter is only permissible in certain prescribed circumstances, which have been expressly provided in the Qanun-e-Shahadat.[6]

12. What is important to note is that, as a general principle, an objection as to inadmissibility of a document can be raised at any stage of the case[7], even if it had not been taken when the document was tendered in evidence. However, the objection as to the mode of proving contents of a document or its execution is to be taken, when a particular mode is adopted by the party at the evidence-recording stage during trial. The latter kind of objection

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[3] Article 79, Qanun-e-Shahadat 1984.
[4] Article 88, Qanun-e-Shahadat 1984.
[5] Article 72 and 75 of the Qanun-e-Shahadat.
[6] Articles 76, Ibid.
[7] in trial, appeal or revision

cannot be allowed to be raised, for the first time, at any subsequent stage.[8] This principle is based on the rule of fair play. As if the objection regarding the mode of proof adopted has been taken at the appropriate stage, it would have enabled the party tendering the evidence to cure the defect and resort to other mode of proof. The omission to object at the appropriate stage becomes fatal because, by his failure, the party entitled to object allows the party tendering the evidence to act on assumption that he has no objection about the mode of proof adopted.

13. It is also important to note that the objection as to "mode of proof" should not be confused with the objection of "absence of proof". Absence of proof goes to the very root of admissibility of the document as a piece of evidence; therefore, this objection can be raised at any stage, as the first proviso to **Article 161** of the Qanun-e-Shahadat commands that "the judgment must be based upon facts declared by this Order to be relevant, and duly proved". In other words, when the Qanun-e-Shahadat provides several modes of proving a relevant fact and a party adopts a particular mode that is permissible only in certain circumstances,[9] the failure to take objection when that mode is adopted, estops the opposing party to raise, at a subsequent stage, the objection to the mode of proof adopted. However, when the Qanun-e-Shahadat provides only one mode of proving a relevant fact[10] and that mode is not adopted, or when it provides several modes of proving a relevant fact and none of them is adopted, such a case

[8] See Gulzar Hussain v. Abdul Rahman, 1985 SCMR 301.
[9] See Article 72, 75, 76 of the Qanun-e-Shahadat, 1984.
[10] See Article 59 and 71 of the Qanun-e-Shahadat, 1984.

falls within the purview of "absence of proof", and not "mode of proof"; therefore, the objection thereto can be taken at any stage[11], even if it has not earlier been taken.[12]

(iii) <u>Evidentiary value</u>

14. Once a fact crosses the threshold of "relevancy", "admissibility" and "proof", as mandated under the provisions of the Qanun-e-Shahadat, would it be said to be admitted, for its evidentiary value to be adjudged by the trial court. The evidentiary value or in other words, weight of evidence, is actually a qualitative assessment made by the trial judge of the probative value of the proved fact. Unlike "admissibility", the evidentiary value of a piece of evidence cannot be determined by fixed rules, since it depends mainly on common sense, logic and experience and is determined by the trial judge, keeping in view the peculiarities of each case.[13]

15. Having described these principles of law of evidence, we would now revert to the certified copy of the disputed Power of Attorney **(Ex.D6),** and consider its relevancy, admissibility, proof and evidentiary value.

16. To start with, it would be pertinent to note that the certified copy of the disputed Power of Attorney **(Ex.D6)** was tendered in evidence in the statement of Muhammad Hussain, *Registry Muharrar*, **(DW-8)** and its production in evidence was, at that time, objected to by the counsel for the Respondents. Thus, the production of the certified copy of the Power of Attorney **(Ex.D6)** was,

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[11] in trial, appeal or revision
[12] See Municipal Corporation v. Gandhi Shantilal, AIR 1961 Guj 196 (DB), per Raju, J.
[13] See R v. Madhub Chunder (1874) 21 W.R.Cr. 13, per Birch J.; Lord Advocate v. Blantyre (1897) 4 App. Cas. 770, 792, per Lord Blackburn; Sofaer v Sofaer [1960] 1 W.L.R. 1173.

from its very inception, disputed, and it was placed on record subject to that objection. Mian Muhammad Aslam **(DW7),** the nominated Attorney under the disputed Power of Attorney, when entered the witness box, baldly stated that he had lost the original deed. In view of the objection taken on the production of the certified copy of the disputed Power of Attorney **(Ex.D6)**, as secondary evidence, the Court has to first consider and resolve the question: whether the loss of the original document has been proved, and if finds it so proved then to move on to examine the intrinsic worth of the secondary evidence produced.[14] Failure on the part of the party tendering such evidence to prove the loss of the original would render the secondary evidence inadmissible. In the present case, Mian Muhammad Aslam **(DW7),** utterly failed to prove the loss of the original document, as he did not even explain when and how the same was lost. In fact, he admitted it in cross-examination that he had not reported the loss of the said document to the police. This being the position, the very admissibility of the certified copy of the disputed Power of Attorney **(Ex.D6)** remains unjustified in the eyes of law.

17. When confronted with the above position, the learned counsel for the Petitioner submitted that the Power of Attorney being a registered document is a "public document" within the contemplation of **clause 2 of Article 85** of the Qanun-e-Shahadat,[15] and therefore, the same could be proved in view of **Article 88** of the

[14] See Khurshid Begum v. Chiragh Muhammad (1995 SCMR 1237).
[15] Previously section 74 of the Evidence Act, 1872.

Qanun-e-Shahadat[16] by production of its certified copy as "secondary evidence".

18. We are afraid, this submission of the learned counsel for the Petitioner, in the circumstances of the present case, does not absolve the evidential deficiency to make the certified copy of the disputed Power of Attorney **(Ex.D6)** admissible in evidence. Indeed, public records kept of private documents, which may include a Power of Attorney registered under the Registration Act, 1908, as in the present case, would come within the purview of "Public Documents" under **clause (2) of Article 85** of the Qanun-e-Shahadat. However, in the present case, the execution of the registered Power of Attorney was vehemently disputed, alleging it to be a forged and fraudulent document. The moment the Respondents disputed the execution of the registered Power of Attorney, the same came within the mischief of **clause (5) of Article 85**, and therefore, did not remain a "Public Document". In such a situation, the Petitioner could not have proved the contents of the disputed Power of Attorney by tendering its certified copy as secondary evidence under **Article 88** of the Qanun-e-Shahadat. In fact, the Petitioner was to first produce evidence to account for non-production of the original and establish that the original had in fact been lost, as required under **Article 76(c)** of the Qanun-e-Shahadat. Once the execution of a registered document is disputed, it does not remain a "Public Document" and becomes a "Private Document"; therefore, any form of its secondary evidence, including its certified copy, cannot be produced in evidence to

[16] Previously section 77 of the Evidence Act, 1872.

prove its existence, condition or contents without complying with the requirements of **Article 76** of the Qanun-e-Shahadat.[17]

19. The Petitioner, in such circumstances, was to prove the disputed Power of Attorney (Ex.D6), as any other private document. This, the Petitioner was unable to effectively prove; as the witnesses and the scribe of the disputed Power of Attorney **(Ex.D6)** were stated to be dead, but no other available evidence in this regard was led by the Petitioner to prove the execution thereof by Bashir Khan Malik as required under **Article 80** of the Qanun-e-Shahadat,[18] while the testimony of Mian Muhammad Aslam **(DW7)** was not confidence inspiring. It was necessary for Mian Muhammad Aslam **(DW7),** and for the Petitioner to produce cogent evidence, to prove that Bashir Khan Malik and the attesting witnesses had signed the original Power of Attorney. They could have done so by adopting anyone of the several modes provided under the Qanun-e-Shahadat. But this the Petitioner failed to prove. In fact, there is no document produced in evidence, which has the signatures of Bashir Khan Malik affixed thereon. In such circumstances, the damage would bear upon the claim of the Petitioner, and not that of the Respondents.

20. From yet another perspective, if the execution of the disputed Power of Attorney **(Ex.D6)** is taken as proved, even then the same will not have much evidentiary value to effect, and prove, the sale on its basis, as it lacks the essentials of a valid power of attorney to confer the power on another person to sell or gift the

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[17] See Imam Din v. Bashir Ahmed (PLD 2005 SC 418).
[18] Previously section 69 of the Evidence Act, 1872.

disputed property. In the first instance, it is noted that the particulars of the disputed property have not been clearly stipulated in the Power of Attorney **(Ex.D6),** and further, Mian Muhammad Aslam **(DW7),** the named 'Attorney', was essentially authorized to deal on behalf of Bashir Khan Malik, the 'Principal', with litigation pertaining to his said undescribed property. Thus, the Power of Attorney (**Ex.D6)** does not stipulate with exactness, as required by the law, that it is meant for transferring the disputed property. For a valid Power of Attorney, it must expressly provide with particulars, not only the scope and extent of delegated power, but also the subject matter of delegation; an Attorney cannot assert any inherent or implied powers. It is for this reason that Power of Attorney has to be strictly construed. This Court in **Fida Muhammad v. Muhammad Khan**[19] has explained, how power of attorney is to be construed. The Court opined:

> "It is wrong to assume that every "general" Power of Attorney on account of the said description means and includes the power to alienate/dispose of property of the principal. In order to achieve that object it must contain a clear separate clause devoted to the said object. The draftsman must pay particular attention to such a clause if attended to the included in the Power of Attorney with a view to avoid any uncertainty or vagueness. The courts have to be vigilant particularly when the allegation by the principal is of fraud and/or misrepresentation."
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> (Emphasis provided)

21. Another important aspect of the Power of Attorney **(Ex.D6)** to note is that according to the testimony of Mian Muhammad Aslam **(DW7)**, the sole reason for his appointment as an "Attorney" by Bashir Khan Malik, was for him to transfer the disputed property to the Petitioner. However, the recital of the Power of Attorney **(Ex.D6)** states otherwise. In fact, the main object

[19] PLD 1985 SC 341.

of the Power of Attorney, as stated therein, was for Mian Muhammad Aslam **(DW7)** to act on behalf of Bashir Khan Malik in his present and future litigation pertaining to his property. In addition thereto, a more general authority was delegated upon Mian Muhammad Aslam **(DW7)** to deal with his property. It is a settled principle that a Power of Attorney must clearly set out the purpose for which the same was executed. In cases, where such power is not clear and there is a 'special' and 'general' authority stipulated therein, then the 'general' powers following the 'special' power are to be construed as limited to what is necessary for the proper exercise of 'special' powers. Similarly, where the authority is given to do a particular act followed by general words, the authority is deemed to be restricted to what is necessary for the purpose of doing that particular act. This principle was explained by this Court in **Imam Din v. Bashir Ahmed**[20], in the following terms:

> "In view of nature of authority, the power of attorney must be strictly construed and proved and further the object and scope of the power of attorney must be seen in the light of its recital to ascertain the manner of the exercise of the authority in relation to the terms and conditions specified in the instrument. The rule of construction of such a document is that special powers contained therein followed by general words are to be construed as limited to what is necessary for the proper exercise of special powers and where the authority is given to do a particular act followed by general words, the authority is deemed to be restricted to what is necessary for the purpose of doing the particular act. The general words do not confer general power but are limited for the purpose for which the authority is given and are construed for, enlarging the special powers necessary for that purpose and must be construed so as to include the purpose necessary for effective execution. This is settled rule that before an act purported to be done under the power of attorney is challenged as being in excess of the powers, it is necessary to show on fair construction, that the authority was not exercised within the four corners of the instrument."
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> (Emphasis provided)

22. In view of the peculiar features of the disputed Power of Attorney **(Ex.D6),** highlighted above, it cannot be accepted as a

[20] (PLD 2005 SC 418). Also see Moiz Abbas v. Latifa (2019 SCMR 74).

valid delegation of authority to Mian Muhammad Aslam **(DW7)**, the "Attorney", by Bashir Khan Malik, the "Principal", to transact sale and gift of the disputed property in favour of the Petitioner. Accordingly, we are in accord with the findings of the courts below in discarding the disputed Power of Attorney **(Ex.D6)** being not worthy of any legal credence or reliance.

23. To prove the sale of part of the disputed property to the Petitioner by Bashir Khan Malik, the Petitioner seeks reliance on the testimony of Muhammad Ameen **(DW5)** and Ghulam Yaqoob **(DW6)**, *Halqa Patwaris,* who had entered the initial report of the sale leading to the sanctioning of the disputed mutations. The said witnesses testified that Bashir Khan Malik personally came to report the sale transactions, and informed them that he had sold the said immovable property to the Petitioner for sale consideration and had transferred the possession of the said property to the Petitioner. When the learned counsel for the Petitioner was confronted to show any evidence reflecting the transfer of possession to the Petitioner or for that matter her deriving income therefrom from the date of transfer till the filing of the suit by the Respondents, the response was in the negative. Thus, the statements of these witnesses loses credibility when the Petitioner failed to prove not only the transfer of possession but also the transfer of sale consideration, which they claim was affected. In fact, the Petitioner was unable to satisfy all the courts below about her financial capacity to pay the stated sale consideration.

24. Further, it is an admitted fact that Bashir Khan Malik did not appear before the Revenue Officer for sanction of the disputed mutations, rather Mian Muhammad Aslam **(DW7),** the Attorney under the disputed Power of Attorney, appeared on his behalf. In view of above findings on the validity and legal worth of the disputed Power of Attorney on the basis whereof he acted, such sanction of the disputed mutations is also found invalid and of no legal effect. The position is much graver in the case of the disputed gift deed, when the essential consideration of a valid gift, that is, the love and affection of Bashir Khan Malik towards his recently divorced wife was being conveyed through the Attorney, and that too without any such authority expressly delegated to him in the disputed Power of Attorney. Thus, when admissibility, proof and evidential value of the disputed Power of Attorney, the very foundation of the disputed mutations and gift deed, is in serious peril, expecting for the superstructure built thereon to withstand the legal challenge would be jurisprudentially naïve. We, therefore, concur in the concurrent findings of three courts below as to the invalidity of the sale and gift of the disputed property in favour of the Petitioner.

Presumption of death of Bashir Khan Malik

25. Coming to the next main controversy in the present case, the statutory presumption of death of Bashir Khan Malik, we note that **Article 123** and **Article 124** of the Qanun-e-Shahadat[21] regulates rules of evidence relating to the presumption of a person, in given circumstances, to be alive or dead. **Article 123** provides that where a person is shown to have been alive within thirty

[21] Previously sections 107 and 108 of the Evidence Act, 1872.

years, the burden of proof is on the party that seeks to prove the contrary. This is subject to **Article 124**, which provides that the burden of proof shifts on the party that claims that the person not heard of for seven years is alive. Therefore, the party who asserts that a presumption of death as per **Article 124** should not apply, bears the burden of proving the same. In **Mansoor Akbar v. Fazal-e-Rab**,[22] this Court observed:

> "The provisions of Article 123 of the Qanun-e Shahadat Order 1984, speak about the burden of proof of the fact about a person known to have been alive, which Article is subject to the Article 124 of the said Order, in which it has been provided that when the question arises as to whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him, the burden of proving that such person is alive is shifted to the person who affirms it. The Article 124 clearly shifts the burden on the petitioner to establish that (a) the respondent No.1 is alive and (b) he intentionally has avoided to contest and or participate in the suit proceedings."
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> (Emphasis provided)

Therefore, Article 123 requires a party to provide evidence of death, unlike Article 124, which raises a presumption of death. In **Perveen Shoukat vs. Province of Sindh**, [23] this Court held:

> "[I]n terms of Article 123, it is to be proved for a fact before a court of law that a person who was alive in the last thirty years has actually died on the basis of positive evidence. This rule of evidence has an exception which is contained in Article 124 of the Qanun-e-Shahadat Order, 1984 ....So, without the proof of actual death as envisaged under Article 123, a missing person in terms of the legal fiction contained in Article 124 is to be presumed dead, if he is not heard for seven years by those who would have definitely heard of him had he been alive.

In the case of **Lal Hussain v. Sadiq Khan**,[24] the brother of the petitioner disappeared in the year 1947 and was never heard from again. The Court, applying **Article 124** of the Qanun-e-Shahadat, held that the inheritance of the disappeared individual opened in the year 1954, seven years from the date of his disappearance. It was held:

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[22] 2012 SCMR 540.
[23] PLD 2019 SC 710.
[24] 2001 SCMR 1036.

> The point can be conveniently determined in the light of the provisions of Article 124 of the Qanun-e-Shahadat Order and its interpretation made in Muhammad Sarwar and another v. Fazal Ahmad and another PLD 1987 SC 1. Article 124 of Qanun-e-Shahadat Order clearly spells out that where a person has not been heard of for seven years by those who would naturally have heard of him if he had been alive the burden of proving that he is alive is on the person who affirms it. In the case of Muhammad Sarwar and another (supra) it was held that section 108 of the Evidence Act, 1872 (Article 124 of Qanun-e-Shahadat Order) merely creates a presumption that the person who has not been heard of for seven years is dead 'at the date of the tiling of the suit and does not refer in any way as to the date of his death which was to be proved by positive evidence.....
> In the absence of positive evidence about the date of death of Roshan Din the period of seven years envisaged by Article 124 of the Qanun-e-Shahadat Order is to be reckoned- from the undisputed year of disappearance of Roshan Din Le, 1947. It would thus follow that the inheritance of Roshan Din had opened in the year 1954.
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> (Emphasis provided)

It is important to note that the Article 124 only raises a presumption of death without actually determining the exact date of death which, if required to be proved, would have to be proved by positive evidence. In **Muhammad Sarwar v. Fazal Ahmad,**[25] this Court held:

> [I]f a person has not been heard of for seven years there is a presumption of law that he is dead but this presumption does not extend to the date of death. Indeed, there is no presumption that he died at the end of the first seven years, or at any particular date. This fact has necessarily to be proved as a fact because section 108 does not direct the Court to presume that the person who has not been heard of for the last seven years had, in fact, died at the expiry of seven years. It only provides that such a person is presumed to be dead without fixing the time of death. It is for this reason that where it is necessary to establish that a person died at any particular time such a fact must be proved by positive evidence. Thus, notwithstanding the presumption of death it would be possible for the Court to give a finding that it occurred after the expiry of the period of seven years since the time when he was last heard of, if the evidence so warrants.
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> (Emphasis provided)

26. In the present case, we note that the Respondents, in their plaint, asserted this presumption of death of Bashir Khan Malik, and one of the plaintiffs, namely, Muzaffar Khan Malik, appearing in the witness box as **PW-1**, testified on oath that his brother, Bashir Khan Malik, had not been heard of for seven years

[25] Muhammad Sarwar v. Fazal Ahmad (PLD 1987 Supreme Court 1)

by them. The Respondents thus, discharged the initial onus of Article 124, and the onus shifted upon the Petitioner to rebut the said presumption of death and prove that Bashir Khan Malik was then alive.

27. The Petitioner, to rebut the said statutory presumption of death of Bashir Khan Malik, tendered through her counsel, on 30.01.2003, in trial court some foreign documents **("Ex.D18 to Ex.D26")**, particularly the documents relating to Bashir Khan Malik's marriage **(Ex.D18)**, divorce (**Ex.D19)** and death **(Ex.D23)**. On the basis of these documents, the Petitioner claims that Bashir Khan Malik was alive when the suit was instituted, and died in England in the year 1997. It is important to mention here that when the said documents were tendered by the counsel for the Petitioner in his statement without oath, the counsel for the Respondents objected to their production, and they were placed on record subject to that objection.

Foreign Documents

28. Given the objection made by the Respondents at the time of the tendering of the certified copies of foreign documents **("Ex.D17 to Ex.D26")**, particularly the documents relating to Bashir Khan Malik's marriage **(Ex.D18)**, divorce (**Ex.D19)** and death **(Ex.D23),** and in the light of the discussion on the principles on documentary evidence made above,[26] we may now consider the relevancy, admissibility, proof and evidentiary value thereof.

[26] Paragraphs 10-14.

29. To start off with the test of "relevancy", we note that the foreign documents **("Ex.D18 to Ex.D26")** pass the same, as they relate to a crucial fact-in-issue: the whereabouts of Bashir Khan Malik on and after 01.07.1970 when the suit was filed by the Respondents, seeking to invoke the presumption of his death under the law.

30. So far as the "admissibility" and "mode of proof" of foreign documents is concerned, we note that it is governed by the same general principles that are applicable to other documents. In case, the foreign document fulfils the essentials of a "Public Document" under **sub-clause (iii) of clause (1) of Article 85** of the Qanun-e-Shahadat, then a certified copy thereof would constitute "secondary evidence" within the contemplation of **clause (f) of Article 76.** However, special conditions have been prescribed for the certified copy of the foreign public document to be admissible and proof of that document. The said conditions precedent have been prescribed in **clause (5) of Article 89** of the Qanun-e-Shahadat,[27] which in essence are that: first, the certified copy must have been issued by the legal keeper of the document; second, a certificate is to be provided on that certified copy by a notary public or Pakistan Consul/diplomatic agent under his seal to the effect that the copy is duly certified by the officer having the legal custody of the original; and third, the character of the document is proved according to the law of the foreign country.

31. The learned counsel for the Petitioner, when confronted to address the said conditions, contended that in the

[27] Previously section 78(6) of the Evidence Act, 1872.

first place, there is no provision in the Qanun-e-Shahadat, excluding the these foreign documents **("Ex.D18 to Ex.D26")** from consideration and making them inadmissible and thus were they admissible, and further that when they are "public documents" within the contemplation of **sub-clause (iii) of clause (1) of Article 85** of the Qanun-e-Shahadat, production of their certified copies fulfilled the requirements of proof under **Article 89(5)** of the Qanun-e-Shahadat.

32. We are afraid, the above contention of the learned counsel for the Petitioner is misplaced in fact and law. A careful review of these foreign documents **("Ex.D18 to Ex.D26")** reveals that they all are not "public documents", as many of them have been issued by the private persons, and not by the public officers. However, the vital documents, i.e., the documents relating to Bashir Khan Malik's marriage **(Ex.D18)**, divorce (**Ex.D19)** and death **(Ex.D23)** ostensibly appears to have been issued by the public officers in England, and therefore, on the face of it, they qualify to be "public documents". However, for the certified copies of the originals to be admissible as "secondary evidence" they had to fulfil the three conditions[28] prescribed in **Clause 5 of Article 89** of the Qanun-e-Shahadat. This, the learned counsel for the Petitioner was unable to effectively demonstrate that the said three condition precedents were complied with by the Petitioners, especially the condition of bearing the certificate under the seal of a notary public, or of a Pakistan Consul or diplomatic agent, to the effect that these copies are duly certified by the officer having the legal

[28] Mentioned in Para 30 above.

custody of the original; none of the copies of the foreign documents bears such certificate. Thus, all the certified copies of the foreign documents **("Ex.D18 to Ex.D26")** tendered on behalf of the Petitioner including the documents relating to Bashir Khan Malik's marriage **(Ex.D18)**, divorce (**Ex.D19)** and death **(Ex.D23)** do not fulfil the very essential conditions prescribed under **Article 89(5)** of the Qanun-e-Shahadat[29] to be admissible as proof of the contents of these documents.

33. Due to lack of such requisite certificate, an alleged certified copy of the record maintained by Ajmair Sharif Municipality in India relating to births (a foreign public document) was held inadmissible by a Division Bench of the Karachi High Court in **Muhammad Usman v. Lal Muhammad,**[30] and that decision of the High Court was upheld by this Court in **Lal Muhammad v. Muhammad Usman**.[31] The learned Chief Justice Tufail Ali A. Rahman, speaking for the Division Bench held:

> "What section 78 requires is the certificate under the seal of a Notary Public that "the copy is duly certified by the officer having the legal custody of the original". In other words from the notorial attestation is being derived the guarantee that the copy is indeed certified by that officer. .....The Notary Public in this case even if he had put a stamp upon Exh. 49A itself could not have and did not give such a certificate. In the absence of any certificate the utmost that the attestation amounts to is a certificate that he has compared the photostat copy with the document from which it has been made and that the photostat copy is accurate. This by no means complies with section 78 and I am quite unable to hold, therefore, that Exh. 49A was admissible either.

34. Given the serious objection raised by the Respondents on the very genuineness of certified copies of the foreign documents **("Ex.D18 to Ex.D26")** tendered on behalf of the Petitioner, including the documents relating to Bashir Khan Malik's marriage

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[29] Previously section 78(6) of the Evidence Act, 1872.
[30] PLD 1975 Karachi 352.
[31] Lal Muhammad v. Muhammad Usman (1975 SCMR 409).

(Ex.D18), divorce (**Ex.D19)** and death **(Ex.D23),** and the lack of the requisite certificate of their validity available thereon, it was necessary for the Petitioner to examine the person who had obtained those certified copies from public offices in the U.K., and sent the same to the Petitioner, thereby giving the Respondents an opportunity to test the veracity of that person and genuineness of the documents tendered, or at-least the Petitioner should have appeared herself in the witness-box to answer the questions of the Respondents about the genuineness of these documents. No such course was adopted by the Petitioner; therefore, the record of the case is silent as to who issued these certified copies from the public offices in the U.K., and who received and sent the same to the Petitioner. This Court has time and again emphasised that the disputed documents cannot be tendered in evidence in statement of the counsel for a party, because such procedure deprives the opposing party to test the authenticity of those documents by exercising his right of cross-examination.[32]

35. Keeping in view the factual position as to the absence of the requisite certificate on the said certified copies of the foreign documents and their production in evidence in statement of the counsel without providing an opportunity to the Respondents to test their authenticity, it would be safe to conclude that the alleged certified copies of the foreign documents **("Ex.D18 to Ex.D26")** tendered in evidence did not cross the legal threshold of "admissibility" and "proof", as mandated under **clause 5 of Article 89** of the Qanun-e-

[32] See Manzoor Hussain v. Misri Khan (PLD 2020 SC 749); Hameeda Begum v. Irshad Begum (2007 SCMR 996).

Shahadat. Hence, these documents cannot be relied upon to determine that Bashir Khan Malik was alive when the suit was instituted and died in the year 1997 as claimed by the Petitioner, and to rebut the presumption of death of Bashir Khan Malik under **Article 124**[33] of the Qanun-e-Shahadat. We find that the courts below have rightly excluded the said documents from consideration, having not been proved in accordance with the provisions of the Qanun-e-Shahadat.

Time Limitation in Instituting the Suit

36. Another challenge to the impugned judgment made by the learned counsel for the Petitioner, was that the suit of the Respondents filed on 03.10.1970 was time barred. In support of this contention, it was argued that the Respondents, contrary to their pleadings, were well aware of the sale transactions, and in fact on 10.04.1968, Muzaffar Khan Malik, one of the Respondents, had challenged the disputed mutations before the District Collector, Mianwali alleging that they were sanctioned against the provisions of Martial Law Regulation No. 64.

37. The above contention of the learned counsel for the Petitioner does not have legal merit. The Respondents have based their claim of inheritance over the disputed property on the presumption of death of Bashir Khan Malik, within the contemplation of Article 124 of Qanun-e-Shahadat. It is the case of the Respondents that Bashir Khan Malik was legally alive till 30.06.1970 and thus, they did not have any legal right in his property or any *locus standi* to challenge the disputed mutations

[33] Previously section 108 of the Evidence Act, 1872.

and gift deed, before that date. The seven-year period contemplated by Article 124 commenced from the date when Bashir Khan Malik was last seen and completed seven years thereafter; therefore, it can safely be stated that on 03.10.1970, when the Respondents filed the suit, a cause of action had accrued in their favour to claim presumption of death of Bashir Khan Malik. And thus, they had the *locus standi* to challenge the disputed mutations and gift deed, on but not before 30.6.1970, from when the limitation period began to run against them, notwithstanding their earlier knowledge of the said mutations and gift deed.

38. We have found the explanation put forth by the Respondents is legally valid: The Petitioner failed to successfully rebut, by reliable and cogent evidence, the presumption of death of Bashir Khan Malik under Article 124 of the Qanun-e-Shahadat; therefore, the cause of action accrued to the Respondents to claim their title in the disputed property, as legal heirs of Bashir Khan Malik, and to challenge any alleged illegal interference therein from 30.06.1970 and not before this date; and finally, as for the prior knowledge of the Respondents *qua* disputed mutations are concerned, the same would have no bearing on the legal right of the Respondents to challenge the same in a court of law. Thus, the suit filed by the Respondents was not time barred.

Relief granted beyond prayer

39. The learned counsel for the Petitioner also raised another objection that the Respondents have not sought any declaration as to, or cancellation of, the disputed mutations and gift deed in the prayer clause of their plaint, therefore, the relief in

this regard has wrongly been granted by the courts below beyond the relief prayed for.

40. Such an objection has earlier been agitated before, and decided by, the superior Courts of our jurisdiction in several cases. And the judicial consensus that has evolved is that courts are to look at the substance of the plaint not its form, and in appropriate cases the courts can mould the relief within the scope of the provisions of Order VII, Rule 7, Code of Civil Procedure Code, 1908 ("**CPC"**). The courts are empowered to grant such relief as the justice of the case may demand, and for purposes of determining the relief asked for or the relief to which the plaintiff is entitled, the whole of the plaint is to be looked. The provisions of Order VII, Rule 7 of the CPC empowers the courts to grant an effective or ancillary relief even if it has not been specifically prayed for.[34]

41. In the present case, we note that the prayer clause of the plaint of the Respondents mentioned the relief of the joint possession of the disputed property based on their inheritance rights. However, the pleadings of the parties specifically stated their respective assertions regarding the fraud and denial thereof in the sanction of the disputed mutations and in the registration of the disputed gift deed and Power of Attorney; the trial court framed specific issues thereon;[35] the parties adduced evidence in support of their respective stance; and finally definite findings were recorded thereon by the trial court and appellate court which were

[34] See Ahmad Din v. Muhammad Shafi (PLD 1971 SC 762); Samar Gul v. Central Government (PLD 1986 SC 3); Javaid Iqbal v. Abdul Aziz (PLD 2006 SC 66); Phool Badshah v ADBP (2012 SCMR 1688); Mushtaq Ahmad v. Arif Hussain (1989 MLD 3495).

[35] Issue No. 6. Whether the sale in dispute by Bashir Malik in favour of Akhtar Sultana defendant No.1 was for consideration? Issue No. 7. Whether the sale in dispute in favor of defendant No.1 is result of fraud, and had for the reasons mentioned in para-11 and grounds (a) to (h) of the plaint?

affirmed by the revisional court. In such circumstances, the relief granted by the courts below is within the contemplation of Order VII, Rule 7, of CPC. Hence, this objection of the learned counsel for the Petitioner warrants no positive consideration.

42. Having examined all the contentions made on behalf of the Petitioner in the interest of justice, we find that the present petition is bereft of factual and legal merit, and the concurrent findings recorded by the three courts below does not call for any interference by this Court. Hence, the petition is dismissed, and leave refused.

Judge

Judge

Judge

Islamabad
12.04.2021
Approved for reporting.

Arif