JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

REGULAR SECOND APPEAL NO.09 OF 2018

MST. SHAHIDA PERVEEN *through* her LEGAL HEIRS.
VS.
SAEED AHMED and others

CIVIL REVISION NO.272 OF 2018

ARSHAD HUSSAIN.
VS.
SAEED AHMED and others

CIVIL REVISION NO.273 OF 2018

MST. SHAHIDA PERVEEN THROUGH LEGAL HEIRS.
VS.
SAEED AHMED and others

Appellants/Petitioners by : **Mr. Asad Hussain Ghalib, Advocate.**
(For Appellant in RSA No. 09/2018, for Petitioner in C.R. No.273/2018 and for Respondent No. 2 in C.R. No. 272/2018)

Mr. Zubair Aslam, Advocate.
(For Petitioner in C.R.No. 272/2018 and for Respondent No.2 in RSA No. 09/2018 and C.R. No. 273/2018).

Respondents by : **Mr. Naved Malik, Advocate.**
(For Respondent No. 1 in all cases).

Ch. Abdur Rehman Nasir, Advocate.
(For Respondent No.4in all cases).

Date of hearing : **12.08.2022.**

SAMAN RAFAT IMTIAZ, J. Through the instant judgment, I propose to decide all three of the above mentioned cases as similar questions of law and facts are involved between the same parties.

2. Briefly stated, the facts of the matter as per the Memo of Appeal/Petitions are that the Appellant [Mst. Shahida Perveen] in RSA No. 09 of 2018 who is the Petitioner in Civil Revision No. 273 of 2018 (herein after referred to as the **"Wife"**) was the wife of the Respondent No.2 [Arshad Hussain] who is also the Petitioner in Civil Revision No. 272 of 2018 (herein after referred to as the **"Husband"**). It is noted that the Wife expired on 21-02-2019 during pendency of this appeal/petitions whereafter her legal heirs were impleaded in her place.

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3. The Husband was an employee of Respondent No.3 [Quaid-e-Azam University, Islamabad]. The Plot No.535, St. No.38, Sector G-14/4, Islamabad (herein after referred to as the "**Suit Plot**") was allotted to the Husband by Respondents No.3 and 4 [Director General, Federal Government Employees Housing Foundation]. It has been alleged by the Wife that the Husband out of love and affection gifted the Suit Plot to the Wife vide *Hibanama* dated 30-01-2002 (**"Subject Gift Deed"**). The above said gift was allegedly accepted by the Wife and possession was also delivered to her which was still with the Wife at the time of filing of the instant RSA. Differences cropped up between the Wife and the Husband and the latter started claiming his ownership on the Suit Plot. Feeling aggrieved by the conduct of the Husband, the Wife filed civil Suit No.438/09/2008 for Declaration and Permanent Injunction on 27-06-2008. The Husband filed his written statement in the suit filed by the Wife and contended that the Subject Gift was the result of affection of the Husband but subsequently he was ousted by the Wife from the house and the behavior of the Wife changed altogether as if she was waiting to grab the lifetime earning of the Husband and prayed for dismissal of the suit and for direction to return the original documents of the Suit Plot with possession to the Husband. Subsequently the Respondent No.1 [Saeed Ahmed] in RSA No. 09 of 2018 and Civil Revision Nos. 272 & 273 of 2018 was impleaded as defendant No.2 in the said suit who also filed his written statement therein alleging that the Subject Gift Deed was backdated by connivance between the Husband and Wife.

4. The Respondent No.1 (hereinafter referred to as the **"Buyer"**) had already filed Suit No. 297/2012/2003 for Specific Performance of Sale Agreement and Mandatory / Permanent Injunction against the Husband alleging that he has entered into a sale agreement dated 22-07-2003 (**"Subject Sale Agreement"**) with the Husband. The Husband filed his written statement in the suit filed by the Buyer and also filed Suit No. 300/2012/2004 for Declaration and Cancellation of alleged Subject Sale Agreement contending that he entered into the such agreement with the Buyer through an employee of Respondent No. 3 namely Arshad Butt. However, subsequently earnest money was refunded to the Buyer in the presence of Arshad Butt and the above-said sale agreement was cancelled by mutual consent of the parties. The Buyer submitted his written statement in this suit filed by the Husband.

5. The Civil Suit No. 438/09/2008 filed by the Wife; the Civil Suit No.297/2012/2003 filed by the Buyer; and the Civil Suit No. 300/2012/2004 filed by the Husband were consolidated by the learned Trial Court and consolidated issues were framed. The parties led their evidence and submitted their arguments after which the learned Trial Court dismissed the Wife's and the Husband's suits and decreed the Buyer's suit vide Judgment and Decree dated 22.11.2014 **("Impugned Judgment and Decree I")**.

6. The Wife preferred an appeal against the said Impugned Judgment and Decree I in the Court of Additional District Judge (West) Islamabad ("**Lower Appellate Court**"). Thereafter, the Wife filed an application for additional evidence under Order XLI, Rule 27 C.P.C. The Husband filed cross objections under Order XLI, Rule 22 C.P.C. in the appeal filed by the Wife. The learned Lower Appellate Court vide judgment dated 26.10.2015 dismissed the said appeal filed by the Wife. The Wife assailed the said judgment before this Court through R.S.A. No.32/2015 and C.R.09/2016 contending that her application for additional evidence was not decided. Whereas the Husband also filed C.R. No.08/2016 against the judgment dated 26.10.2015 on the ground that his cross-objections remained undecided. This Court vide judgment dated 13.03.2018 allowed the R.S.A. as well as C.R. Nos. 08 & 09 of 2016 and the matter was remanded to the learned Lower Appellate Court with direction to decide the Wife's appeal along with the Husband's cross objections after deciding the Wife's application for additional evidence.

7. On remand, the Lower Appellate Court dismissed the application for additional evidence filed under Order XLI, Rule 27 C.P.C., by the Wife vide Order dated 04-06-2018 **("Impugned Order I")** as well as the cross objections of the Husband vide Order dated 04.06.2018 **("Impugned Order II")**. The appeal of the Wife was dismissed vide Judgment and Decree dated 04-06-2018 **("Impugned Judgment and Decree II")** and the Impugned Judgment and Decree I was upheld.

8. Now the Wife has assailed vide RSA No. 09 of 2018 both the Impugned Judgments and Decrees I & II passed by the learned Trial Court and the learned Lower Appellate Court respectively and vide Civil Revision No. 273 of 2018 the Impugned Order I whereby the application for additional evidence was dismissed.

9. Whereas, through the Civil Revision Petition No.272/2018 the Husband has assailed Impugned Judgments and Decrees I & II passed by the learned Trial Court and the learned Lower Appellate Court respectively as well as Impugned Order II whereby his cross-objections were dismissed.

10. The learned counsel for the Wife submitted that the Courts below erred in not considering the examination-in-chief of the second witness of the Subject Gift Deed for lack of cross-examination given that cross-examination could not be conducted due to his death. He argued that there is no proof that the Subject Gift Deed was fake and as such dismissal of the Wife's suit was not warranted. He also submitted that the grant of specific relief in favour of the Buyer is inequitable as time was of the essence as per the Subject Sale Agreement and closing was to be performed on 31-08-2003 whereas suit was filed on 27-08-2003 despite which the balance sale consideration was not deposited by the Buyer till 11-05-2007 pursuant to an order passed by the learned Trial Court. He highlighted various contradictions in the evidence of the Buyer including discrepancy in the quantum of earnest money as stated in various exhibits. The learned counsel objected that the stamp vendor was not produced by the Buyer and even otherwise the Subject Sale Agreement provides for liquidated damages and as such specific performance should not have been granted. The learned counsel also pointed out that admittedly the developmental charges were not paid by the Buyer as required under the sale agreement. He further mentioned that Suit Plot was not transferable and pointed to Ex-P1 in this regard. The learned counsel for the Wife admitted that the Suit Plot is still in the name of the Husband and was never mutated in favour of the Wife as the same was not transferable at the time of execution of the Subject Gift Deed. Further that according to the cross-examination of the Buyer he admitted that he was buying the Suit Plot for his younger brother who was never produced as a witness nor any power of attorney was produced on his behalf. The learned counsel argued that no detailed findings were given in respect of Issues No. 6, 7, 8, and 9 in the Impugned Judgment II despite the fact that the Wife had filed an appeal within time in which case the cross-objections filed by the Husband should have been taken into consideration as per settled law and that as such it is a fit case for remand. Coming to the application for additional documents, the learned counsel for the Wife submitted that it was simply the record of the stamp vendor which shows that as per Entry No.3830 it was not obtained by the Buyer

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with his own signature and there is no signature of the Husband and as such the learned Lower Appellate Court erred in passing the Impugned Judgments and Decrees as well as the Impugned Orders I and II. He relied upon *Aslam Khan Vs. Khushdin Khan*, 2015 MLD 213, *Mst. Bachoo Vs. Abdul Qayyum Khan alias Habib Ullah*, 2015 CLC 805, *Mushtaq Ul Aarifin Vs. Mumtaz Muhammad*, 2022 SCMR 55, *Federation of Pakistan Vs. Javed Iqbal*, ILR 2022 IHC 186, *Muhammad Amin Vs. Mst. Shaista*, 2015 MLD 296, *Muhammad Yousaf Vs. Allah Ditta*, 2021 SCMR 1241, *Muhammad Riaz Hussain Vs. Zahoor Ul Hassan*, 2021 SCMR 431, *Mudassar Ali Vs. M. Zafar Iqbal Pirzada*, ILR 2022 IHC 113, *Aqeel Feroz Vs. Shahid Jamil Sethi*, 2020 MLD 1669, *Amjad Ikram Vs. Mst. Asiya Kausar*, 2015 SCMR 1, *Sher Muhammad Vs. Muhammad Bakhsh*, 2017 YLR Note 296 and *Faiz Bukhsh Vs. Rab Nawaz*, 2017 YLR Note 352.

11. The learned counsel for the Husband simply adopted the arguments submitted by the learned counsel for the Wife.

12. The learned counsel for the Buyer on the other hand argued that no illegality has been pointed out by the learned counsel for the Husband and Wife in the Impugned Judgments or the Impugned Orders; that execution of the Subject Sale Agreement is admitted by the Husband and as such there was no need to produce the stamp vendor; that cross-objections can only be filed within 30 days of an appeal whereas the cross-objections filed by the Husband were time barred; and that the instant appeal and revision petitions are liable to be dismissed.

13. Arguments advanced by the learned counsel for the parties have been heard and the record has been examined.

Civil Revision Petition No.272/2018

14. This revision petition has been filed by the Husband in respect of the dismissal of his cross-objections vide the Impugned Order II. Yet strangely enough the learned counsel for the Husband did not submit any arguments rather arguments were submitted by the learned counsel for the Wife which were simply adopted by the learned counsel for the Husband despite the fact that the stance of the parties before the trial court appeared to be adverse to each other.

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15. Be that as it may, it was contended that the learned Lower Appellate Court erred in dismissing the cross-objections filed by the Husband as time barred in view of the fact that the Wife had filed the appeal within time. However, the learned counsel for the Buyer has rightly pointed out that such cross-objections could only be considered if they have been filed within 30 days from the date of service of notice of the date fixed for hearing the appeal under Order XLI, Rule 22, CPC. Whereas the record shows that the Impugned Judgment I was passed by the learned Trial Court on 22.11.2014 against which the Wife filed the appeal on 19.01.2015 before the learned Lower Appellate Court. The dairy sheet further shows that the Husband entered appearance in the appeal filed by the Wife on 09.02.2015 which shows that notice has been received by him prior thereto, however, the cross-objections were not filed by the Husband till 20.03.2015 and as such were filed beyond the limitation period provided in Order XLI Rule 22 of CPC. In view of the foregoing, the learned Lower Appellate Court correctly concluded that the Husband's cross-objection were time barred vide the Impugned Order II.

Civil Revision No. 273 of 2018

16. This revision petition has been filed by the Wife in respect of the dismissal of her application for additional evidence vide the Impugned Order I. Interestingly, the additional evidence sought to be produced through this application was the purported record of the stamp vendor in relation to the Subject Sale Agreement entered into by and between the Husband and the Buyer yet it was the Wife who moved this application and not the Husband. This appears to be due to the fact that the execution of the Subject Sale Agreement was not denied by the Husband in his written statement filed in Suit No.297/2012/2003 instituted by the Buyer against the Husband for specific performance . In fact the Husband himself filed a suit for cancellation of the said Subject Sale Agreement, which fact by itself confirms its execution. It is an established principle of law that admitted facts need not be proved. In case any authority is required, *Mst. Rehmat Vs. Mst. Zubaida Begum*, 2021 SCMR 1534 may be referred to. In view thereof, there was no need to produce the record of the stamp vendor sought to be produced by the Wife by way of the application for additional evidence. As such the learned lower Appellate Court correctly dismissed the Wife's application for additional evidence vide the Impugned Order I.

17. This is the appeal filed by the Wife against the Impugned Judgments and Decrees dismissing the Wife's Suit for Declaration and Permanent Injunction in respect of the Subject Gift Deed and granting specific performance of the Subject Sale Agreement in favor of the Buyer. First and foremost, the scope of a Second Appeal under Section 100 of the CPC has to be kept in mind. In this regard the Honourable Supreme Court in the case titled *Bahar Shah Vs. Manzoor Ahmad*, 2022 SCMR 284 observed that:

> *"10. Now we would like to pay attention to the niceties of a right to file Second Appeal provided under section 100 of C.P.C,* ***which can be set into motion only when the decision is contrary to law; failure to determine some material issue of law, and substantial error or defect in the procedure provided by the Code or law****."* [Emphasis added].

Keeping in mind the scope as described in the said case I find that the Husband and Wife have failed to meet the test prescribed for the maintainability of a Second Appeal.

18. The Husband who was allegedly the donor did not deny execution of the Subject Gift Deed in the written statement filed by him in the Wife's Suit No. 438/09/2008. However, the Buyer who was subsequently impleaded as defendant No.2 in such suit vehemently denied execution thereof and alleged that the same was forged and backdated by the Husband and Wife in connivance with each other for ulterior motives. It is also noteworthy that the alleged gift was not mentioned or disclosed by the Husband either in his written statement filed in the Buyer's Suit No.297/2012/2003 filed in the year 2003 nor in his own Suit No. 300/2012/2004 filed in the year 2004 seeking cancellation of the Subject Sale Agreement. Therefore, his admission of the execution of the Subject Gift Deed in his written statement filed in response to the Wife's Suit which was filed as late as in the year 2008 is not free from doubt. In any event, an admission is a relevant fact but not conclusive proof of fact. Reference may be made in this regard to *Manager, State Bank of Pakistan Vs. Ch. Muhammad Ikram,* 1999 PLC (C.S.) 1558.

19. The Subject Gift Deed could not be proved by the Husband and Wife independently through two witnesses. In *Hafiz Tassaduq Hussain Vs. Muhammad Din*, PLD 2011 SC 241, the Honorable Supreme Court observed as follows:

> *"8. The command of the Article 79 is vividly discernible which elucidates that in order to prove an instrument which by law is required to be attested, it has to be proved by two attesting witnesses, if they are alive and otherwise are not incapacitated and are subject to the process of the Court and capable of giving evidence. The powerful expression "shall not be used as evidence" until the requisite number of attesting witnesses have been examined to prove its execution is couched in the negative, which depicts the clear and unquestionable intention of the legislature, barring and placing a complete prohibition for using in evidence any such document, which is either not attested as mandated by the law and/or if the required number of attesting witnesses are not produced to prove it. As the consequence of the failure in this behalf are provided by the Article itself, therefore, it is a mandatory provision of law and should be given due effect by the Courts in letter and spirit. The provisions of this Article are most uncompromising, so long as there is an attesting witness alive capable of giving evidence and subject to the process of the Court, no document which is required by law to be attested can be used in evidence until such witness has been called, the omission to call the requisite number of attesting witnesses is fatal to the admissibility of the document. See Sheikh Karimullah v. Gudar Koeri and others (AIR 1925 Allahabad 56).* ***The purpose and object of the attestation of a document by a certain number of witnesses and its proof through them is also meant to eliminate the possibility of fraud and purported attempt to create and fabricate false evidence for the proof thereof and for this the legislature in its wisdom has established a class of documents which are specified, inter alia, in Article 17 of the Order, 1984. (See Ram Samujh Singh v. Mst. Mainath Kuer and others (AIR 1925 Oudh 737).*** *The resume of the above discussion leads us to an irresistible conclusion that for the validity of the instruments falling within Article 17 the attestation as required therein is absolute and imperative. And for the purpose of proof of such a document, the attesting witnesses have to be compulsorily examined as per the requirement of Article 79, otherwise, it shall not be considered and taken as proved and used in evidence. This is in line with the principle that where the law requires an act to be done in a particular manner, it has to be done in that way and not otherwise."* [Emphasis added]

20. The second witness of the Subject Gift Deed was not produced for cross-examination nor was the scribe of the Subject Gift Deed produced. The objection regarding sufficiency of the testimony of PW-3 who was purportedly the second witness to the Subject Gift Deed is both, factually as well as legally incorrect. The learned counsel for the Wife as well as the one for the Husband were unable to cite any case law whereby examination-in-chief of a witness has been held admissible despite the fact that cross-examination was not conducted simply on account of death of such witness. Even otherwise it is noted that the factum of death of such witness is not an established fact as no death certificate was produced in evidence and only a copy was produced as a marked document which as per settled law has no sanctity in the eyes of the law and cannot be considered as legal evidence of fact. Therefore the Lower Appellate Court was correct in not considering the examination-in-chief of PW-3 given that he was not produced for cross-examination.

21. The Stamp Vendor who appeared as PW-3 produced the stamp register as Ex-P4 which shows entry No. 5295 in favour of the Husband which

entry matches the number given on the Subject Gift Deed produced as Ex.P2, however, there is no date mentioned in the stamp register on which such stamp paper was purportedly issued for the execution of the Subject Gift Deed whereas the date mentioned on the Subject Gift Deed for issuance of the stamp paper is written by hand. Therefore, the Buyer's allegation that the Subject Gift Deed was backdated was not rebutted through cogent evidence.

22. As far as delivery of possession of the Suit Plot is concerned, it has been correctly observed in the Impugned Judgment and Decree II that the first witness to the Subject Gift Deed i.e., PW - 2 did not depose regarding delivery of possession of the Suit Plot which is an essential ingredient of a gift under Article 150 of the Muhammadan Law and that the Suit Plot was non-transferable at the time of the alleged gift. It is pertinent to note that on one hand it has been asserted in the Subject Gift Deed as well as the Memo of Appeal in RSA 09-2018 that possession was delivered to the Wife and was accepted by her. On the other hand the Provisional Allotment Letter dated 26-01-2001 issued to the Husband by the Respondents No. 3 and 4 and produced as Ex-P1 provides that the Suit Plot would remain non-transferable till completion of the house. The evidence does not reflect when the house was completed. The learned counsel for the Wife admitted that the Suit Plot was non-transferable at the time of the Subject Gift Deed and in fact argued that it was also non-transferable at the time of the Subject Sale Agreement.

23. The learned counsel for the Wife argued that in case of gift from, *inter alia*, husband and wife the requirement of delivery of possession can be dispensed with. However, the only exception to the requirement of delivery of possession as per D.F. Mulla's *Principles of Muhammadan Law* [Pakistani Edition] is described in Section 152 and explained in Section 153 both of which are reproduced herein below:

> **152. Delivery of possession of immovable property.-** (1) Where donor is in possession. – A gift of immovable property of which the donor is in actual possession is not complete, unless the donor physically departs from the premises with all his goods and chattels, and the done formally enters into possession.
>
> (2) Where property is in the occupation of tenants.—A gift of immovable property which is in the occupation of tenants may be completed by a request by the donor to the tenants to attorn to the done, or by delivery of the title deed or by mutation in the Revenue Register or the landlord's sherista. But if the husband reserves to himself the right to receive rents during his lifetime also undertakes to pay Municipal dues, a

mere recital in the deed that delivery of possession has been given to the donee will not make the gift complete.

(3) Where donor and donee both reside in the property.—No Physical departure or formal entry is necessary in the case of a gift of immovable property in which the donor and the donee are both residing at the time of the gift. In such a case the gift may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift. The principle for the determination of questions of this nature was thus stated in Shaik Ibrahim v. Shaik Suleman, wherein it was laid that: "When a person is present on the premises proposed to be delivered to him, a declaration of the person previously possessed puts him into possess… without any physical departure or formal entry."

Where the donor and donee reside together in a house, it is not necessary to depart from the house but some overt act showing that the donor has divested himself of the property is sufficient. In the cited case papers were handed over and the donor consented to record the name of the done in the Municipal records, it was held that the condition about delivery of possession was satisfied.

153. Gift of immovable property by husband to wife.—The rule laid down in section 152(3) applies to gifts of immovable property by a wife to the husband, and by a husband to the wife, whether the property is used by them for their joint residence, or is let out to tenants. The fact that the husband continues to live in the house or to receive the rents after the date of the gift will not invalidate the gift, the presumption in such a case being that the rents are collected by the husband on behalf of the wife and not on his own account.

23. It is nobody's case that the Suit Plot was in occupation of tenants or used by the Husband and Wife for their joint residence. Therefore, the instant case clearly does not fall within the exceptions of Section 152 of D.F. Mulla's *Principles of Muhammadan Law* [Pakistani Edition]. The learned counsel for the Wife relied upon the judgment rendered by a learned Division Bench of the Honorable Peshawar High Court in the case of *Muhammad Amin Vs. Mst. Shaista,* 2015 MLD 296 in support of his argument that delivery of possession can be dispensed with in case of gift between husband and wife.

24. In order to decide this proposition, it is necessary to consider the relevant case law pertaining to transfer of property by gift under Muhammadan Law. Transfer of property by way of "gift" is dealt with under Chapter VII of the Transfer of Property Act, 1882. However, Section 129 thereof provides that nothing in such chapter shall be deemed to affect any rule of Muslim Law. In view thereof the Honourable Supreme Court held in *Mst. Umar Bibi Vs. Bashir Ahmad,* 1977 SCMR 154 that it is a 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. Amongst these formalities, the Supreme Court noted, are the passing of possession from the donor and the acceptance of the same by the donee.

25. Indeed Section 150 of *Principles of Muhammadan Law (Supra)* provides that it is essential to the validity of a gift that there should be delivery of such possession as the subject of the gift is susceptible of. The earliest case that I have found regarding requirement of delivery of possession is the case of *Ma Mi and another Vs. Kallander Ammal*, AIR 1927 PC 22 wherein it was held that in case of a gift of immovable property by a Muhammadan husband to his wife, once mutation of names has been proved the natural, presumption arising from the relation of husband and wife existing between them is that the husband's subsequent acts with reference to the property were done on his wife's behalf and not his own. It is noteworthy that delivery of possession was not dispensed with rather it was presumed in view of mutation in favour of the wife and any act done by the husband subsequent to the gift in relation to the property was presumed to be on behalf of the wife in acknowledgment of the relations that normally exist between spouses.

26. The same logic was followed in the case of *Fakhur-Ud-Din Vs. Mst. Zohra Bi*, 1989 SCMR 2017, wherein the son of the donor had challenged the alleged gift to the donor's Wife and daughter, the learned trial court dismissed the suit filed by the said son i.e. the appellant before the Honourable Supreme Court. On appeal the District Court reversed the finding of the trial court and held that the gift was invalid for want of delivery of possession despite the fact that mutation had been affected. The Honourable High Court restored the judgment of the trial court with the observation that the gifted land in question was in occupation of tenants who admittedly paid rent to the donees. The Honourable Supreme Court held that the High Court was correct in its observation and further that donees are females and in the circumstances the management of the gifted property shall be deemed to be with the donor on behalf of the donees.

27. Similarly, in *Abdul Mateen Vs. Mustakhia*, 2006 SCMR 50 the apex Court took note of the fact that the donor and donee being husband and wife were living together and management of agricultural land would certainly be under the control of donor as donee could not personally engage herself in the cultivation of land and therefore it was held that in law the donee would be

deemed to be in possession of the land under the gift. The Supreme Court did not state that delivery of possession was not required because the donor and donee were husband and wife.

28. Where such other factors were missing, a Division Bench of the Honourable Peshawar High Court refused to dispense with the requirement of delivery of possession in the case reported as *Mst. Eidun Nisa Begum Vs. Member (Revenue), Board of Revenue, West Pakistan, Lahore,* PLD 1973 Peshawar 1 involving gift between husband and wife and referred to the case of *Ma Mi (Supra)* in the following words:

> *"**We are not convinced with the arguments of the learned counsel for the petitioner that the gift being between husband and wife requires no separate transfer of physical possession of the land in dispute.** It is not the case of the petitioner that separate physical possession of the land transferred by way of gift to the petitioner was delivered to the donee. The learned counsel vehemently argued that because the donor and the donee were living as husband and wife and gift mutations were attested, therefore, separate transfer of possession of the gifted property was not essential. **The learned counsel for the petitioner relied on Ma Mi and another v. Kallander Ammal (A I R 1927 P C 22),** wherein it has been held:-*
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> > *"In the case of a gift of immovable property by a Mahomedan husband to his wife, once mutation of names has been proved, the natural presumption arising from the relation B of husband and wife existing between them is that the husband's subsequent acts with reference to the property were done on his wife's behalf and not on his own."*
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> ***This authority would be of no assistance to the petitioner because in the present case the mutations were attested after the death of the donor** and it is not the case of the petitioner that the donor had done subsequent acts with reference to the gifted land on behalf of the donee. For lack of unequivocal declaration of intention to gift and in the absence of entry and attestation of disputed gift mutations in the lifetime of the donor, the ambiguity as to possession between a husband and wife would not be cured. See K. S. Agha Mir Ahmad Shah and others v. K. S. Agha Mir Yaqub Shah and others (P L D 1957 Kar. 258).*
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> ***Even in case of husband and wife, both residing together, actual delivery of possession of the property to the donee by the donor and the donor divesting himself of the possession of the Property is absolutely necessary because delivery of possession of the subject of the gift by the donor to the donee is a necessary condition to be complied with for the completion of a valid gift.**"*
> [Emphasis added]

29. The Honourable Peshawar High Court in *Mst. Eidun Nisa Begum (Supra)* relied upon, *inter alia*, *Jabbar Pramanik Vs. Nurjahan Bewa*, PLD 1960 Dacca 489 wherein it was found that the gift was not valid for want of delivery of possession despite the fact that the donees were living with the donor on the gifted land. The Honourable Peshawar High Court also relied upon *Shamshad Ali Shah Vs. Syed Hassan Shah,* PLD 1960 (Lahore) 300 wherein it was held that as the gift was not completed by the delivery of possession of property, the

gift was void in its entirety despite the fact that the factum of gift was alleged between mother to son and mere recital in the deed that possession has been given was held insufficient in the eyes of the law to prove delivery of possession.

30. On the other hand, the Honourable Supreme Court in the case reported as *Riaz Ullah Khan Vs. Asghar Ali*, 2004 SCMR 1701concluded that in case of gift to a wife or to a ward the delivery of possession is immaterial. Similarly, various Single Benches of the Honourable High Courts in cases such as *Sikandar Hayat Vs. Ahmad Sher,* 2003 CLC 1006; *Waheed Gul Vs.Mst. Saida Jan*, 1998 MLD 3; and *Mst. Waziran Vs. Kalu*, 1995 CLC 1532 held that delivery of possession can be dispensed with in certain exceptional cases including gift between husband and wife. However, the facts in such cases show that either the gift deed in question was registered or mutation had been affected; and/or the scribe of the deed and two marginal witness were produced to prove its execution.

31. In view of the foregoing case law, I am not convinced that the requirement of delivery of possession which is an essential ingredient of a gift under Muhammadan law can be dispensed with in all cases of gift from husband to wife or vice versa *ipos facto* regardless of the facts. In my opinion, given the dynamics of the relations between husband and wife or parent and child etc., the requirement of delivery of possession may be dispensed with and delivery may be presumed if certain other factors exist such as registered gift deed (though not strictly required in case of gift from Muhammadan husband to wife or vice versa as per *Mst. Umar Bibi (Supra)* however it may still be a relevant factor to consider for the purposes under discussion); affectation of mutation; proof of gift through scribe and two marginal witnesses; and/or where facts otherwise show that donor has divested his possession of the gifted property for example receipt of rent from tenants by the donee.

32. In the instant case neither there is any registered deed or mutation in the name of the Wife nor the scribe of the Subject Gift Deed was produced and the witness produced by the Wife did not depose as to the factum of delivery of possession whereas the second witness was not produced for cross-examination. On top of it the record produced by the stamp vendor does not establish the date of execution of the Subject Gift Deed and the Suit Plot was admittedly non-

transferable on the date of the purported execution of the Subject Gift Deed. No case law which is binding upon me has been cited by the learned counsel for the Wife where delivery of possession was dispensed with despite the absence of all such factors.

33. Therefore, as far as the findings regarding the Wife's case for gift is concerned the learned counsel for the Wife failed to point out as to how the Impugned Judgments and Decrees are contrary to law or usage having the force of law or any material issue which it has failed to determine or any substantial error or defect in the proceedings.

34. As far as the objection regarding findings in respect of specific performance of the Subject Sale Agreement in favour of the Buyer is concerned the minor discrepancies regarding earnest money are inconsequential in view of the admission of receipt of Rs.150,000/- as earnest money by the Husband in the written statement filed by him in Suit No.297/2012/2003 for specific performance filed by the Buyer against the Husband. Similarly there was no need to produce the stamp vendor given that the execution of the Subject Sale Agreement was not denied by the Husband. Reference may be made to paragraph 16 herein above in reference to discussion regarding C.R. No.273/2018 in this regard.

35. With regard to the argument that the Suit Plot was not transferable at the time of the execution of the Subject Sale Agreement, it is noted that no such submission has been made by the Respondent No.4 in its written statement filed in Suit No.297/2012/2003 instituted by the Buyer for specific performance.

36. It is also interesting to note that while the learned counsel for the Wife objected to the grant of specific performance in favour of the Buyer on account of allegation that the Buyer failed to pay development charges for the Suit Plot as agreed vide the Subject Sale Agreement, no such allegation was made by the Husband in his written statement filed in response to the Buyer's suit nor in his own suit for Declaration and Cancellation of alleged Subject Sale Agreement.

37. Lastly, as far as provision of liquidated damages in the Subject Sale Agreement is concerned the presence of a clause providing for liquidated damages does not out rightly bar the grant of specific relief. Reliance is made on *Muhammad Naeem Shafi Vs. Mst. Shamim Akhtar,* 2022 CLC 744.

38. For all the foregoing reasons, instant R.S.A. and both the Civil Revision Petition Nos.272 & 273 of 2018 are dismissed being devoid of any merit. Resultantly, the Impugned Judgments and Decrees I & II as well as Impugned Orders I & II passed by the learned Lower Appellate Court are upheld.

(SAMAN RAFAT IMTIAZ)
JUDGE

Announced in the open Court on the 29th day of August, 2022.

JUDGE

JUNAID

Approved for Reporting
Blue Slip added.

uncertify