

**IN THE HIGH COURT OF SINDH AT  
KARACHI**

**High Court Appeal No.47 of 2013**

[*Haroon Zia Malik Versus Mst. Fariha Razzak and others*]

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**High Court Appeal No.48 of 2013**

[*Haroon Zia Malik Versus Mst. Fariha Razzak*]

**Present:**

**Mr. Justice Irfan Saadat Khan and**

**Mr. Justice Muhammad Faisal Kamal Alam**

Dates of hearing : 06.09.2017, 13.09.2017, 26.09.2017 and  
28.09.2017.

Date of Judgment : 21.11.2017

Appellant

[*Haroon Zia Malik*]; : Represented by Mr. Mubarak Ahmed,  
Advocate.

Respondents

[*Mst. Fariha Razzak  
and others*] : Represented by Mr. Khalid Javed,  
Advocate.

**Case law cited by the Appellant's counsel.**

1. **2015 SCMR Page-58**  
(*Commissioner Multan Division, Multan and others Versus  
Muhammad Hussain and others*)
2. **2015 SCMR Page-1044**  
(*Farid Bakhsh Versus Jind Wadda and others*)
3. **2002 SCMR Page-1089**  
(*Mst. Rasheeda Begum and others Versus Muhammad Yousaf and  
others*).
4. **2003 YLR Page-1866 [Karachi]**  
(*Maqsood Ali Khan Versus M. Tehseen Khan*).
5. **PLD 1995 Lahore Page-395**  
(*Muhammad Yaqoob and others Versus Naseer Hussain and others*).
6. **1992 CLC Page-402 [Peshawar]**  
(*Mst. Hassan Bibi Versus Ghulam Siddique and others*).

7. **PLD 1965 Supreme Court Page-274**  
(*United Bank of India Ltd. Versus Azirannessa Bewa alias Azizannessa Bewa*).
8. **2010 SCMR Page-342**  
(*Muhammad Ejaz and 2 others Versus Mst. Khalida Awan and another*).
9. **PLD 1963 Supreme Court Page-553**  
(*Budho and others Versus Ghulam Shah*).
10. **PLD 1976 Karachi Page-1154**  
(*Muhammad Imtiaz Ahmed Shaikh Versus Principal and Chairman, Academic Council, Chandaka Medical College, Larkna and another*).
11. **PLD 1990 Lahore Page-467**  
(*Muhammad Saeed Versus Mst. Nahid Shagufta and 3 others*).
12. **1996 SCMR Page-336**  
(*Binyameen and 3 others Versus Chaudhry Hakim and another*).
13. **1984 CLC Page-169 [Karachi]**  
(*Messrs Ruby Trading Company Versus Mst. Zainab Khanum and 5 others*).
14. **1998 SCMR Page-1274**  
(*Muhammad Shafi and another Versus Muhammad Ishaque and others*).
15. **2000 CLC Page-759 [Lahore]**  
(*Malik Muhammad Akram Versus Khuda Bakhsh*).
16. **PLD 1976 Karachi Page-885**  
(*Asghar Husain and 6 others Versus Mst. Husan Ara and another*).
17. **1998 SCMR Page-760**  
(*Abdul Wali Khan through legal heirs Versus Muhammad Saleh*).
18. **2006 SCMR Page-895**  
(*Hameed Ahmed Versus Gulab Khan*).
19. **2002 YLR Page-3134 [Lahore]**  
(*Mst. Faiz Elahi Versus Syed Bashir Ali Shah*).
20. **CP No. D-3662 of 2011**  
(*Ali Raza Versus Mohammad Shoaib and others*).
21. **R.A No.11 of 2009**  
(*Muhammad Ayub Versus Barkat Shaikha and others*).
22. **2015 SCMR Page-21**  
(*Muhammad Iqbal Versus Mehboob Alam*).

**Additional Case Law supplied by  
Appellant's Counsel on 28.09.2017.**

1. **PLD 2011 Supreme Court Page-241**  
(*Hafiz Tassaduq Hussain Versus Muhammad Din through Legal heirs and others*).

2. **2007 MLD Page-1554 [Lahore]**  
(*Muhammad Rafique and 7 others Versus Noor Ahmed*).
3. **PLD 2008 SC Page-73**  
(*Allah Diwaya Versus Ghulam Fatima and others*).
4. **2003 MLD Page-1280**  
(*Mst. Iqbal Begum and 2 others Versus Muhammad Bashir and others*).
5. **2002 SCMR Page-326**  
(*Mst. Baswar Sultan Versus Mst. Adeeba Alvi*).
6. **2008 SCMR Page-1318**  
(*Abdul Sattar and others Versus Muhammad Ashraf and others*).

**Case law relied upon by Respondents' counsel.**

1. **2001 SCMR Page-1488**  
(*Abdul Rahim Versus Mukhtar Ahmed and 6 others*).
2. **1997 CLC Page-1317 [Lahore]**  
(*Mst. Surria Bibi Versus Additional District Judge, Khanpur and 2 others*).

**Other Precedent:**

- i) **1991 SCMR Page-2300**  
(*Nur Jehan Begum Versus Mujtaba Ali Naqvi*).
- ii) **1987 SCMR Page-1403**  
(*Maulvi Abdullah and others Versus Abdul Aziz and others*).
- iii) **1977 SCMR Page-154**  
(*Mst. Umar Bibi and 3 others V. Bashir Ahmad and 3 others*)

**Other Research Material:**

- i). **Decisions of Hazrat Ali (R.A).**  
Compilation by Mr. Khalid Raza.
- ii). **The Principles of Muhammadan Law.**  
(*Reprint Edition 2004*) by Dr. Nishi Purohit.
- iii). **The Hidayah; Commentary on the Islamic Laws.** Complete Revised and Edited by Z. Baintner. Volume 2.

- Law under discussion:**
- (1). Gift (*Hiba*) under Islamic Jurisprudence.
  - (2). Transfer of Property Act, 1882.  
{Property Law}

- (3). Civil Procedure Code, 1908 {*CPC*}
- (4). Qanoon-e-Shahadat Order, 1984  
{*Evidence Law*}.
- (5). Limitation Act, 1908 {*Limitation Law*}.
- (6). The Registration Act, 1908.

## **JUDGMENT**

**Muhammad Faisal Kamal Alam, J:** These two Appeals have been preferred by Appellant, calling in question the Judgment and Decree dated 28.01.2013 and 20.02.2013 respectively, whereby, the suit of Respondent No.1 decreed while Suit No.1461 of 2000 filed by present Appellant was dismissed. Since parties litigated in cross suit, therefore, it is necessary to describe them individually. Suit No.359 of 1996 was earlier in time filed by present Respondent No.1 (*Mst. Fariha Razzak*) against the present Appellant, primarily seeking a declaration of ownership in his favour (*Appellant*) vis-à-vis the property being House No.21, Khayaban-e-Hilal, Phase-6, DHA, Karachi, (*the subject property*), on the basis of a **Gift Deed (purported) dated 08.02.1992**, besides seeking cancellation of afore referred Oral Gift, whereas, the present Appellant subsequently filed a Suit No.1461 of 2000 against the present Respondent No.1, who was his former wife and also impleading latter's father, namely, Muhammad Abdul Razaq, Rais Hyder, Shazia Razaq, Omer Razaq, Mrs. Nishat Afza and Abbas Ali as Respondents No.2 to 7 respectively. Rais Hyder and Shazia Razaq were / are contesting witnesses of the afore mentioned Gift Deed in question; whereas, Omer Razaq is the former brother in law of present Appellant and Defendant No.7 was a Notary Public and has stamped the said Gift Deed in question.

2. The other relevant facts are that the present Appellant and Respondent No.1 got married on 08.01.1975 and were divorced on 21.03.1995. Out of the said wedlock three sons were born. The Gift Deed in

question has said to have been made on 08.02.1992. Respondent No.1 filed the above Suit on 24.04.1996, whereas, Appellant brought his action in the shape of aforementioned *lis* on 26.10.2000. Consolidated Issues were settled on 17.03.2000. Parties to the proceedings led the evidence by examining number of witnesses. Consolidated Issues framed were subsequently categorized and broadly falling into three categories;

***“9. Having considered the issues, it appears to me that they fall into three main categories: (a) Whether the suit property was gifted to Mst. Fariha by Mr. Haroon? This comprises issue Nos.1, 2, 4, 7, 8 and 10 and can (by reason of the number of issues devoted to it) be regarded as the main point in dispute. (b) Whether Suit No.1461/2000 is barred by limitation? This comprises issue No.5. (c) Whether the suit property was acquired and the house thereon built with funds contributed by Mst. Fariha and her father, or Mr. Haroon? This comprises issue No.3. As will become apparent, the remaining issues need not be decided (except of course, issue No.12, the final relief). I take up the issues in the foregoing order. Before proceeding further, I may note that learned counsel for Mr. Haroon filed written submissions, and learned counsel for both disputants also relied upon certain case law, which I have gone through. The case law shall be considered below if and as and to the extent necessary and appropriate.”***

3. Since cross suits were filed by the Parties, thus, in order to avoid any confusion about description of parties to the proceeding, the Plaintiff of Suit No.1461 of 2000 (*Haroon Zia Malik*) who is also present Appellants of these Appeals will be referred to as the “Objector’ and Plaintiff of Suit No.359 of 1996 and other Defendants of Suit No.1461 of 2000 can be called Respondents, as they are defending the above Gift in question.

4. The Issues falling in category “C” was decided against Respondents, particularly, the present Respondent No.1 (*Mst. Fariha Razzaq*). This finding of the learned single Judge is with regard to the stance of said

Respondent that the aforementioned property in question, which is the subject matter of the gift was purchased from the funds of Respondent No.1 and her father/Respondent No.2. However, no cross objection is preferred in present Appeals on this very finding of the learned Trial Court. Thus, the Issue relating to Benami / Ostensible ownership of Respondent No.1 in relation to the subject property has attained finality.

5. In view of the above, points of determination in the present Appeals are primarily the Issues framed under the heading of category “A” and “B” which are already reproduced hereinabove.

- (i) whether the document titled Oral Gift dated 01.2.1992 (*Exhibit-13/2*) is a forged and fabricated document;
- (ii) whether the claimant has gifted the subject property to Respondent No.1 (*Fariha Razzak*);
- (iii) subsequent Suit No.1461 of 2000 filed by present Claimant (*Haroon Zia Malik*) is barred by law;
- (iv) whether the claimant has suffered any damage or mental distress at the hands of Respondents for which he is entitled to damages;
- (v) Is the Claimant is entitled to be put in physical possession of the subject property-House No.21 Khayaban-e-Hilal, Phase-VI, DHA, Karachi.

6. The crux of the arguments advanced by Mr. Mubarak Ahmed, the learned counsel representing the Objector (*Appellant*) is that the Gift Deed in question is a forged document. It was further contended that the document is forged because the relationship between Objector (*Appellant*) and Respondent No.1 (*Fariha Razzaq*) was always remained estranged and

there was no occasion when the said Objector / Appellant could have gifted the subject House Property to present Respondent No.1 (*former wife of Appellant*). With this background and in this context it was further argued that even the Gift in question is hit by Section 122 of the Property Law; relating to the Gift. Secondly, since the document is a Gift Deed, it has to be witnessed by at least one male and two female witnesses, or, two male witnesses, in terms of Article 79 of the Evidence Law and admittedly the said Gift Deed in question has not been attested as required, but only attesting witness is one male Raees Haider, Respondent No.3 and Mst. Shazia Razzaq, who is the real sister of Respondent No.1, thus impugned Gift deed has no legal value. The learned counsel argues that evidence of Mst. Shazia Razzaq has to be discarded as she is interested party and to fortify his arguments, he has relied upon the above mentioned case law and excerpt from the book authored by Mr. Khalid Raza, containing a decision about a dispute between the fourth Caliph Hazrat Ali (*R.A.*) and one Jew. The learned counsel has challenged the authenticity of the Gift from various angles. It is further argued that since the Gif Deed (*Exhibit-13/2*) contains the word 'do hereby', which means that it was to be happened in future, whereas, such type of document should be in the form of '*in praesenti*', thus, this type of instrument should have been registered under Section 17 of the Registration Act, and admittedly since it is not, therefore, this non-registration is fatal to the case of Respondents, particularly, Respondent No.1-(the donee), in terms of Section 49 of the Registration Act, hence no right and interest can be claimed under the said gift.

7. The learned counsel for the Appellant has also relied upon reported Judgments, (*supra*), relating to the additional evidence. According to Appellant, one of the witnesses of impugned Gift Deed is Raees Haider (*present Respondent No.3*), who though stated to be a friend of present Appellant, but in fact he was an employee of brother of Respondent No.1,

namely, Umar Razzaq-who has been impleaded as Respondent No.5 in the present Appeal. To substantiate this fact, the learned counsel has filed record of some other Constitutional Petition, which has been preferred by the Security Company of said Respondent No.5 through the said Raees Haider.

8. The learned counsel for the Appellant argued so is mentioned as one of the grounds in appeal, that the learned Single Judge erred in believing that Abbas Ali the present Respondent No.7, and Defendant No.7 in Suit No.1461 of 2000, who was a Notary Public, that the latter had in fact attested the documents. Per learned Advocate, the evidence of said Notary Public-Abbas Ali, who was the Claimant / Appellant's second witness had deposed in another Criminal Case between the parties hereto, a private Complaint No.842 of 2008, that the said document of the impugned Gift was not attested by him. Since there is an apparent contradiction in the testimony of said Abbas Ali (Ex-14, Page-1521 of the Paper Book Part-2 of 3), therefore, the learned counsel for Appellant/Claimant argues that his evidence should have been discarded, but instead the Trial Court gave an unnecessary weightage to the said evidence.

9. The arguments of Appellant's counsel have been controverted by Mr. Khalid Javed, the learned counsel representing the contesting Respondents. Like Appellant's side, the Respondents have also submitted their Written Synopsis, which is a part of the record. The main line of argument that Respondents have adopted, is that the impugned Judgment has been handed down after proper appraisal of the evidence. The learned counsel for the Respondents have read and referred to various portions of testimonies of the parties and their witnesses. It has been argued on behalf of Respondents that none of the provisions of the Property Law and of Registration Act are applicable to the subject Gift, as the document itself

says that it is a Deed of Declaration of Oral Gift and not a Gift Deed. Per learned counsel for Respondents, the document is in fact is a confirmation of Oral Gift, which in jurisprudence parlance is called '*Hiba*' and not a Gift Deed as mentioned in Section 122 of the Property Law, as argued by Appellant's side. He has relied upon the research material as well as case law in support of his arguments that firstly such type of document is not required to be witnessed as required under Article 17 read with Section 79 of the Evidence Law, or compulsory registerable. He has relied on the research material / from the Book-'The Principle of Muhammadan Law' reprint edition 2004 (*supra*); in Chapter-15 of this Book 'Hiba' has been explained in detail. It was further argued that even if it is presumed, as alleged by the Appellant's side, that the attesting witnesses, above named- Raees Haider and Shazia Razzaq, present Respondents No.3 and 4 respectively, were the interested witnesses, even then their depositions / evidence cannot be discarded. In support of this plea, he has relied upon the case law already mentioned in the opening part of this Decision.

10. Arguments of learned counsel representing the parties have taken into the account and with their assistance record and particularly evidence have been perused and considered.

11. The first question which should be decided in this matter is that whether documents filed by Appellant's counsel under his Statement dated 5<sup>th</sup> December, 2014 can be considered. These documents are the record of another case in the shape of Constitutional Petition No.S-476 of 2014 filed by Umar Razzaq Enterprises (Private) Limited, a Security Management Services Company against the widow of its erstwhile employee. Record of this Constitutional Petition has been placed on record by Mr. Mubarak Ahmed Advocate (for Appellant), to show that the said Petition has been filed by the above named witness Raees Haider, who is shown to be a

Project Manager / employee of the said Umar Razzaq Enterprises, which is a Company owned by brother of present Respondent No.1, namely, Umar Razzaq. Thus, the Appellant's side has raised a further ground for discarding the evidence of one of the Respondent No.1's witnesses, the said Raees Haider, on the ground that he belied on oath when he stated that he was not an employment either of father or brother of the Respondent-Fariha Razzaq (*Donee of the impugned Gift*).

12. The first Judgment of Commissioner Multan Division by Hon'ble Supreme Court, *inter alia*, on the point of additional evidence has been carefully examined. Admittedly in this case, the dispute between the parties started by filing a Writ Petition in the learned Lahore High Court. With this background and in this context, the learned Apex Court has held that additional documentary evidence should have been considered if the same is authentic and consistent with the pleadings of the petitioner (*of that case*). The ratio of this case is that such additional evidence facilitates resolution of controversy between the litigating parties, all the more when the evidence is admissible on record. This precedent in our considered view is clearly distinguishable from the facts of present case. It is a settled Rule, generally in a civil proceeding of the nature, that only that part of testimony/evidence is considered which has come on record during an evidence proceeding, particularly, those documents which are confronted to the witnesses and properly exhibited. Secondly, the record of the above referred Constitutional Petition is undisputedly of year 2014, whereas, the evidence of said Raees Haider was recorded way back on 30.05.2001. In his deposition, he has specifically stated he is a friend of the present Appellant (*Haroon Zia Malik*) and in his cross-examination, he could not be falsified when he further clarified that he came to know the Appellant through an old friend Mr. Mujeeb. Thirdly, there is a long period of 13 years between the evidence of above named Raees Haider and the present

record produced by Objector/Appellant about the employment with the afore mentioned Company of brother of contesting Respondent No.1. There is no legal bar that if in the intervening period, the said Raees Haider has joined the said Company as its Project Manager-the designation mentioned in the above mentioned Constitutional Petition No. S-476 of 2014. The present record upon which the Appellant side has placed much reliance does not established the plea of the Appellant; however, if the above record was of around same period when the evidence of said Raees Haider was recorded, only then weightage could have been attached to the same. Fourthly, there is a specific procedure mentioned in CPC for production and consideration of the additional evidence at the appellate stage; Order XL1 Rules 27 to 29, which admittedly has not been resorted to, for the simple reason, that the record about the afore named Company which has been filed now under the Statement was never produced before the Trial Court; thus, the same cannot be considered now, in view of the bar contained in Rule 27 *ibid*. Therefore, the plea of additional evidence of the Appellant in view of the above discussion is misconceived in nature and hence rejected.

13. The record of the evidence has been analyzed to see whether the learned Trial Court has correctly done the appraisal or not.

14. It has been admitted by Objector (*Haroon Zia Malik*) that first time he challenged the impugned Gift by way of his Suit No.1461 of 2000 filed in this Court. It is also an undisputed fact that the Suit filed by the Respondent No.1 (*Donee*) prior in time and filed in 1996 in which the factum of gift has been specifically mentioned. But even before that the Objector (Appellant) filed a Suit No.86 of 1996 in the Court of IX Civil and Family Judge, Karachi (*South*) and the plaint has been exhibited as D-1/7 with the testimony of said Objector, at Page-1231 of Part-II of the Paper

Book. In this Suit the present Objector has claimed that even on persuasion of family members of Respondent No.1, who have been arrayed as Respondents No.2 to 6, the Objector was ready to revoke the Divorce Deed. It has been further pleaded by Objector that the latter allowed the Respondent No.1 to continue reside in the subject property on the basis of a Fatwa (Religious Decree) that the wife should complete her Iddat period at the place where she has been divorced. The cause of action as mentioned in Paragraph-13 of plaint of this earlier suit and the first cause of action as per the present Objector is that when the Revocation Deed to revoke the divorce was not signed and hence since Divorce Deed became final, therefore, the present Respondent No.1 (*Donee*) should have left the subject property. However, in above mentioned subsequent Suit filed in this Court an altogether different version has been pleaded. It has been pleaded that on 25.04.1996 the Respondent No.1 in connivance of other family members, who are Respondents in present appeal, forcibly dispossessed the present Appellant / Objector and his father (*Mr. Ziauddin Malik*). The other undisputed fact is that the divorce was pronounced on 31.03.1995 and the present Objector / Appellant filed his first Civil Suit for Possession of the subject property on 10.02.1996, that is, after 11 months and it is not difficult to conclude that in all this period it is the present Respondent No.1 (*Donee*), Fariha Razzaq and her sons were residing in the subject property; the subject matter of the Gift.

15. In his cross-examination, the Objector / present Appellant has stated that he divorced the Respondent No.1 (his erstwhile wife) on 25.03.1995, whereas, the Gift Deed, subject matter of the suit proceeding is of 08.02.1992. Though he denied the suggestion that he ever had declared the gift in favour of the Respondent No.1 (*Donee*) which was duly accepted by her, but at the same time he answered in Affirmative to a suggestion that he never sought dispossession of the Respondent No.1 from the Suit property

in any proceeding. He further acknowledged that the said Respondent No.1 (*Fariha Razzaq*) along with the three sons of Appellant and Respondent No.1 are residing in the subject property ever since. He has further admitted in his cross-examination that for the first time he has claimed damages and mesne profits in his subsequent proceeding instituted in the shape of Suit No.1461 of 2000.

16. The evidence of Shazia Razzaq is quite conclusive. She has specifically stated on oath that on 08.02.1992, that is, the date mentioned on the impugned gift document, the Claimant / present Appellant has brought the said declaration of Oral Gift and on his request the said witness-Shazia Razzaq (*sister of Donee Fariha Razzaq*) signed the document. She further stated that other witness Raees Haider and her sister the Respondent No.1 and Ms. Aysha were also present there. She has further deposed that after the dispute started between the Objector / present Appellant and present Respondent No.1 (*Donee*), the former (*present Appellant*) extending threats to said witness-Shazia Razzaq for which a Complaint was also lodged in CPLC (*Citizens Police Liaison Committee*). The said witness Shazia Razzaq was cross-examined in an interesting way. No question was put to her with regard to her afore mentioned deposition, which was material and goes to the root of the case. One of the questions put to the said Shazia Razzaq (*witness and the present Respondent*) is as follows\_

***“Q. Was any person other than Faria Raza, yourself, Aisha and Rais Hyder present at the time when the declaration was made and the document signed?”***

Her answer is that\_

***“A. In addition to the above, Mr. Haroon Zia Malik was present.”***, that is, the present Appellant. She was not further confronted with this reply; which goes against present Appellant.

17. The evidence of other attesting witness-Raees Haider is also very important. He corroborated the version of Shazia Razzaq about the factum of the gift and the date and place of signatures. No question was put to said witness-Raees Haider with regard to his evidence that it was present Appellant, who took the said witness-Raees Haider to the subject property where the present Respondent No.1, her sister Shazia Razzaq-the Respondent No.4 and one other lady Aysha were present. It was specifically deposed by said Raees Haider that he signed the Gift Deed in question after reading the same. On this account also he was not cross examined. To a question that the signature of Appellant has been forged by said Raees Haider, the latter (*witness Raees Haider*), denied the same.

It is a settled rule of evidence as also laid down in the reported case of *Nur Jehan Begum (1991 SCMR Page-2300)*, if a witness is not cross-examined in respect of the material portion of his evidence, then that part of the evidence is considered to be admitted, therefore, the above portion of the evidence adduced by Respondents is in fact admitted by the present Appellant.

18. Similarly, the evidence of one of the sons Fahad Haroon is also very direct on the fact; when he could not be shaken in his cross-examination and deposed that the fact about gifting of the subject property by present Appellant to present Respondent No.1 was disclosed by the Appellant / Objector himself to the above witness Fahad Haroon, who is the eldest son of Objector.

19. Evidence of Muhammad Abdul Razzaq, the father of Respondent No.1 is also corroborated to the deposition of other witnesses. The scrutiny of cross-examination of this witness leads to the conclusion that the present Appellant failed to impeach the credibility of said witness Abdul Razzaq, particularly on the point of gifting of the subject property as well as estranged relationship. It was categorically denied by the witness-Mr.

Abdul Razzaq, that in 1991, that is, the period roundabout when the impugned gift in question was made, the relationship between present Appellant and Donee / Respondent No.1 was not good.

20. Taking into the account the record of these Appeals and even reappraisal of the evidence at this Appellate stage, it is not difficult to hold that the learned Single Judge has correctly appraised the evidence of the parties while handing down his findings. So the answer to the First Point of determination is that the impugned document, that is, the Deed of Declaration of Oral Gift (Exhibit 13/2, available at Page-1885 of Part-II of the Paper Book) is not a forged and fabricated document, but in fact the same was duly signed by the present Appellant / Objector (Haroon Zia Malik) as donor, by virtue of which the latter gifted the subject property to the Respondent No.1 (Fariha Razzaq) who was admittedly at that relevant time was his (Objector's) wife.

21. Now adverting to another ground of the present Appeals, that the learned single Judge erred in believing the evidence of Notary Public-Abbas Ali. Paragraphs-15, 16 and 17 of the impugned Judgment contain a discussion about the evidence of Notary public-Abbas Ali, who though, admittedly appeared as a witness of present Appellant, but during the evidence, he turned hostile. The learned single Judge has given a very categorical finding that the evidence of said Notary Public lacks credibility; thus the arguments of Appellant's learned counsel in this regard is devoid of any force. The learned Judge has held that the afore said impugned gift document was notarized by the above mentioned Abbas Ali, considering the established practice prevalent at that relevant time, which was never disputed by the Appellant. The other reason for giving a positive finding on the impugned gift document vis-à-vis its notarization, also does not warrant any interference in this Appeal, as again it is more of a matter of common

sense, keeping in view the evidence that has come on record, that there was no occasion for the Donee / Responded No.1 that to search any Notary Public whose license lapsed at that relevant time, when the said gift document in question was prepared and signed.

22. Once it has been held that Exhibit 13/2, the Deed of Declaration of Oral Gift is neither a concocted document nor the signatures thereon of the present Appellants were forged, the other legal arguments raised by the learned counsel for the Appellants' side will now be considered. Much emphasis has been laid from the Appellants' side on the term 'hereby used in Paragraph-5 of this document', to show that it should be in presentia. But Paragraph-4 of the same document (gift) expressly states that "***I declare that from this day the date my oral gift I have relinquished all of my rights, title, interests...***"; it means that the intention of the Donor who is present Appellant was very clear on 08.02.1992 when the above subject property was gifted to Respondent No.1, that from the date of making of gift-08.2.1992, the Appellant divested himself of all the ownership rights and other interests incidental thereto vis-à-vis the subject property. Not only this, in Paragraph-11 of this document, the present Appellant also acted as an indemnifier for the subject matter of the gift, viz. the house property.

23. Now the question is that whether the learned Trial Court has correctly held that the subject document is a mere declaration of the oral gift, which in the general parlance is called '***Hiba***'-an Arabic term mentioned in the Islamic jurisprudence for gifts or, this document is a Gift as envisaged in Section 122 of the Property Law coupled with other legal formalities, as argued by Mr. Mobarak Ahmed, the learned counsel representing the Appellant / Objector. One of the most authentic Books on Islamic Jurisprudence is Hidaya. In Volume-2 of Hidaya definition of 'Gift'

is mentioned. There are three basic ingredients. A Gift should be rendered by its lawful owner, who is called Donor, accepted by the beneficiary to whom the gift is rendered, that is, Donee, and thirdly its possession. In the present case, all the above ingredients are present. The evidence that has come on record, where from it can be clearly established that present Appellant / Objector, who at that time was the owner of the subject property, voluntarily and for the reasons mentioned in the above mentioned gift document, gifted the subject property to Respondent No.1 / Donee. Possession was already with the latter (*Respondent No.1*), which till date continues to be with her. In the same Book (*the Hidayah, Volume-2*) there is another Chapter-II relating to retraction of gift; revocation of gift. It is a settled Rule of Islamic jurisprudence that gift either can be revoked through a Court Decree or by consent of the Donee. It has further mentioned on Page-194 (of the Hidayah) that if husband makes a gift of anything to his wife or vice-versa, it cannot be retracted, because the object of a gift is improvement of affection and as the object is obtained, the gift cannot be retracted. On Page-193 it is also mentioned that “**generally a retraction of a Gift is like eating once spittle**”. The Book on the Islamic jurisprudence which has been relied upon by the learned counsel for Respondents is also relevant here, wherein the Gift / Hiba is explained in detail. Page-360 of Chapter-15 as contained in this Book, the principles of Muhammadan Law (*reprint edition 2004*), the subject matter of a Gift can be anything, including movable and immovable properties. Under the heading Formalities of a Gift / (Hiba), Rules 177 and 178 is mentioned, which explains the procedure of making the gift. It would be advantageous to reproduce the same\_

***“Rule 177. A gift how made.\_Under Mohammedan Law a gift may be made: -***

- (i) *by a clear and unequivocal declaration of intention of making a gift made orally or in writing by the donor or his agent and,*
- (ii) *accepted expressly or impliedly by the donee or his agent except in the case of a gift,*
  - (a) *by a guardian to his ward; or*
  - (b) *of a debt to the debtor; and*
- (iii) *Such declaration and acceptance must be followed by the delivery of possession (actually or, constructively) of the subject-matter of the gift by the donor or his agent to;*
  - (a). *the donee or his agent ; or*
  - (b). *to the guardian, if the donee is a minor or lunatic; or*
  - (c). *to the husband if the donee is a minor wife provided that the marriage has been consummated; or*
  - (d). *to the trustees, if the gift is made through a trust.*
- (iv). *on the delivery of possession, a gift becomes complete, immediately.*

**Rule 178.** *Exceptions to actual or physical delivery of possession. Actual delivery of possession of property (including movable or immovable) is required except in the cases: \_*

- (i) *where the donor and the donee are residing together in the same house which is the subject of the gift.*
- (ii) *where the property is in the possession of other person.*
- (iii) *where the husband is the donor and the wife is the donee or vice versa.*
- (iv) *where the guardian is the donor and the ward is the donee.*
- (v) *where the donee is the Baillie.*
- (vi) *where the property is not capable of being delivered, but not otherwise.”*

*(Underlining to add emphasis)*

24. Since it is now a decided Issue that the subject gift document dated 08.02.1992 was/is not a forged one, but a genuine document, therefore, by reading the same, Point No.2 (for determination) can also be answered. Clause-3 of the said Exhibit 13/2, the subject gift specifically states that the object of the said document is “to confirm, admit, acknowledge, and bring the said oral gift (*emphasis added*) in black and white, these present is being executed by me of my own free will”. In presence of such an unequivocal Clause and intention, the answer to the Point No.2 is that in fact as is also mentioned in the heading of the subject document (*Exhibit 13-2*) it is a declaration of oral gift (Hiba) and not the gift deed or the gift as

mentioned in Section 122 of the Property Law. Consequently, the legal requirements of registration and the consequence mentioned in Section 149 of Registration Act, for not registering such a document, cannot be attracted in the present case and to the subject gift document. Therefore, the precedents relied upon by the Appellant (*Objector*) to augment his arguments on this particular point are distinguishable and not applicable to the present case and hence does not require a detail discussion.

In the case of *Abdul Sattar* (2008 SCMR Page-1318), the gift was held to be invalid, because before the learned Trial Court not only Donor denied the making of gift, but none of the witnesses mentioned in the gift were produced by Petitioner/Donee in respect of his plea and one other person who witnessed the mutation in favour of Petitioner (*of the reported case*) also in his evidence categorically denied that the property in question was gifted to the Petitioner. This Judgment *ex facie* is distinguishable from the present case on the basis of facts as well as point of law.

The other reported decision of PLD 2008 SC Page-73 (*Allah Diwaya Versus Ghulam Fatima and others*) [*supra*] is perused. Facts of this case show that only factum of gift was not questioned, but in pursuance of the same a subsequent Agreement to Sell was also challenged. The crucial facts of this case were that Appellant was claiming that gift in question which was made when civil and criminal litigation were pending between the parties. In this context, it was held that the execution of the gift has not been proved.

Similarly, the unreported decision of this Court handed down in *Ali Raza case*, which is mentioned at serial No.20 (*supra*), the gift document was held to be doubtful as the litigation filed by the Petitioner / purported Donee was resisted and even compromise was rejected. The other thing that weighed with the learned Division Bench was the conspicuous absence of the name of other legal heirs in the litigation instituted by Petitioner / party

of the reported case. Secondly, the Donor's mother could not be examined as she had already passed away. Again, the facts of present case are altogether different from the present Appeals. The consistency of witnesses from the Respondents' side, including the real sons of the Appellant himself, led to the conclusion that the gift in question in the present proceeding is a valid one, so is appropriately held by the learned Trial Court in the Judgment impugned in the present proceeding.

Similarly, the reported decisions about the attesting witnesses relate to the situation mentioned in Article 17 read with 79 of the Evidence Law. In Article 17, the requirement of one male, two females or two male witnesses are mentioned for transaction having a financial element. The learned counsel of present Respondents have placed reliance on the words '*finance*', '*financial*' and '*financial obligation*' as mentioned in the Legal as well as English language Dictionaries (*supra*). For a ready reference, the meaning / explanation as mentioned in the Black's Law Dictionary (*ibid*) is reproduced herein below\_

**“Finance. As a verb, to supply with funds through the payment of cash or issuance of stocks, bonds, notes, or mortgages to provide with capital or loan money as needed to carry on business.**

***Finance is concerned with the value of the assets of the business system and the acquisition and allocation of the financial resources of the system.”***

**“Financial. Fiscal. Relating to finances.”**

**“Obligation. A generic word, derived from the Latin substantive “obligatio,” having many, wide, and varied meanings, according to the context in which it is used. That which a person is bound to do or forbear; any duty imposed by law, promise, contract, relations of society, courtesy, kindness, etc. *Helvering v. British-American Tobacco Co., C.C.A., 69 F.2d 528, 530. Law or duty binding parties to perform their agreement. An under-taking to perform.***

***A formal and binding agreement or acknowledgement of a liability to pay a certain sum or do a certain thing.”***

25. The transaction in question is not a financial one, but it is a Hiba, of which a reciprocal financial obligation is not a consideration. Consequently, Articles 17 and 79 of the Evidence Law also do not have any

applicability to the facts of the present case and thus the rule prescribed in the case law relied upon by the Appellant's side is not attracted here. It is not out of place to mention, that the cited judgments relating to the Articles 17 and 79 of the Evidence Law, primarily is for the sale transaction of properties, which inherently has a financial consideration, but by all means is altogether different from a transaction of the subject Gift, as envisaged in the Islamic jurisprudence, rule whereof is fully attracted in the present case, hence all those cited decisions, we are afraid, do not lend support to the arguments of Appellant's side.

26. The point of law, which needs to be stressed here, is that the subject gift falls outside the purview of the Property Law in terms of Section 129. This concept has been expounded time and again and two reported decisions of Hon'ble Apex Court are of significance and guidance here and the dicta are applicable to the facts of present Appeals.

27. The cases of *Maulvi Abdullah (supra)* and that of *Mst. Umar Bibi*; it is relevant to reproduce the rule laid down in the first case reported in 1987 SCMR Page-1403\_

*“Although no reference was made to Section 129 of the Transfer of Property Act, yet it was held after discussing the other provisions of the Transfer of Property Act and Registration Act that a gift by a Muslim would be complete even if there is no writing; and, it depends, for its validity, upon: (1) a declaration of gift by the donor; (2) acceptance of gift expressly or impliedly by or on behalf of the done, and (3) delivery of possession of the subject-matter by the donor to the done. If these three conditions are complied with the gift is complete. Registration of the document will not be helpful if either of the aforementioned conditions are not satisfied. A written instrument in any case would not create a gift but is a mere evidence of the gift and as such would not in the case of a Musalman require registration. The gift was, therefore,*

*held as complete under the Muslim Law and as such operative notwithstanding the non-registration of the gift deed itself.”*

*(Underling to add emphasis)*

28. From the above dictum it is amply clarified that the Gift / Hiba in question in these present Appeals neither requires a compulsory registration nor the same number of witnesses or attestation as required under the Registration Act and the Evidence Law.

29. Point No.3 is relating to the Limitation. Under Article 91 of the Limitation Act, three years limitation is prescribed for bringing an action to cancel any instrument, which is otherwise, not specifically provided in the schedule of Limitation Law. Admittedly, Written Statement has been filed by the present Appellant / Claimant in the suit of Respondent No.1 on 30.05.1996, but subsequent suit filed by the present Appellant was on 26.10.2000, that is, after four years. Although it has already been held hereinabove that Deed of Declaration of Oral Gift (*Exhibit 13/2*) is a genuine document and thus limitation runs from the date of its execution, that is, 08.02.1992, therefore, subsequent suit that has challenged the gift in question, is hopelessly time barred. Even, for the argument's sake, the date of knowledge as contended by Appellant is taken, that is, when the Suit No.359 of 1996 was filed, even then the subject suit filed by present Appellant is barred by Limitation Law, as aptly held by the learned trial Court after taking into consideration the undisputed factual position and applicable law.

30. The Claimant / Appellant did not suffer any mental distress at the hands of Respondents nor the said Appellant / Claimant is liable to be put in physical possession of the subject property, as the same has been validly gifted to his erstwhile wife / present Respondent No.1. Since the Appellant divested himself of the ownership of the subject property, therefore, he has

no right or interest in respect of the same. We are constrained in observing that the evidence that has come on record, it is regrettably noted that even one of the witnesses Shazia Razzaq, who is the real sister of present Respondent No.1 and is a crippled person, was dragged into litigation by the present Appellant.

31. In view of the above, our findings on the other two Points, that is, Points No.4 and 5 are also in Negative.

32. Conclusion of the above discussion is that the impugned Judgment does not suffer from any infirmity or illegality that calls for an interference in the present Appeals, which are devoid of merits and are accordingly dismissed.

33. Parties are left to bear their own costs.

**JUDGE**

**Dated: 21.11.2017**

**JUDGE**

M.Javid.PA

