

SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

Present:

Justice Jamal Khan Mandokhail
Justice Naeem Akhter Afghan
Justice Aqeel Ahmed Abbasi

C.P.L.A. NO.3871 OF 2022

(Against judgment dated 06.10.2022 passed by Islamabad High Court, Islamabad in RFA No.43/2019)

Afrasyab Khan

...Petitioner(s)

Versus

Mst. Shaista Khanum and others

...Respondent(s)

For the Petitioner(s) : Mr. Mudassar Khalid Abbasi, ASC

For the Respondent(s) : Mr. Muhammad Ishtiaq Ahmad Raja,
ASC for Respondent No. 1-2
Nemo for Respondent No.3
NR to Respondent No.4

Date of Hearing : 25.09.2026

JUDGMENT

Aqeel Ahmed Abbasi, J.- Through instant civil petition for leave to appeal, the Petitioner seeks leave against the impugned judgment dated 06.10.2022 passed by the learned Single Judge in Chamber, Islamabad High Court, Islamabad in R.F.A. No. 43 of 2019, whereby, the appeal filed by the Petitioner was dismissed, and the preliminary judgment and decree dated 11.02.2019 passed by the learned Trial Court in a suit for partition and permanent injunction filed by Respondents No. 1 and 2 was affirmed.

2. Briefly stated, the relevant facts of the case are that Respondents No. 1 and 2 (sisters of the Petitioner) instituted a suit for partition and permanent injunction regarding House No. 29, Street No. 31, Sector G-6/2, Islamabad ("**suit property**"), claiming their inherited shares therein under Islamic law. The Respondents claimed that the suit property was divided according to their late father's wills dated 22.05.2004 and 21.02.2005, allocating the upper portion of the suit property to the Petitioner and the ground portion jointly to the two sisters. The Petitioner contested the suit by asserting that during his lifetime, the late father namely Ghulam

Rasool had arrived at a comprehensive family settlement. Under the said arrangement, two plots in Naval Anchorage, Islamabad, were transferred to the sisters, whereas the suit property was validly gifted to the Petitioner via an oral gift (*Hiba*) subsequently reduced into writing through four instruments dated 25.06.2009 comprising an acknowledgment of oral gift, handing over of possession, acceptance of gift, and acknowledgment of taking over possession. The Petitioner explained that the absence of his late father's signature on these documents was due to hand tremors, owing to which smudged thumb impressions were affixed instead. The Respondents in their replication and evidence vehemently denied any such settlement or oral gift, asserting the instruments were forged, while proving through documentary evidence (bank remittances and transfer letters) that one Naval Anchorage plot was purchased independently by one sister using her own Saudi Arabian earnings and the other was an independent gift by the father during his lifetime. The learned Trial Court, after evaluating the evidence on record, found the Petitioners defense of the family settlement and oral gift unsubstantiated and decreed the suit in favor of the Respondents vide preliminary judgment and decree dated 11.02.2019. Feeling aggrieved, the Petitioner preferred Regular First Appeal (R.F.A. No. 43 of 2019) before the Islamabad High Court, Islamabad ("**High Court**"), which was dismissed by the learned Single Judge in Chamber vide impugned judgment dated 06.10.2022, upholding the findings of the learned Trial Court hence instant petition for leave to appeal.

3. Learned counsel for the Petitioner contended that the High Court failed to properly appreciate the existence of the oral gift and the family settlement pursuant to which alternate properties were provided to the Respondents. It was submitted by the learned counsel for the Petitioner that the gift instruments were duly exhibited without objection (Exh.D1 to Exh.D4). Learned counsel further argued that the provisions of Articles 79 and 117 of the Qanun-e-Shahadat Order, 1984 were misapplied, as the reduction of the oral gift into writing was neither objected to nor disproved in cross-examination. It has been further contended by learned counsel that both the Courts below have failed to appreciate that Petitioner was residing continuously with his father, who out of love and affection gifted the subject property in favour of the Petitioner and

also executed the declaration of gift to this effect, whereas, to support such document the marginal witness was also produced who has verified the declaration of gift by the deceased father in favour of the Petitioner. In support of his contentions learned counsel has placed relied on *Muhammad Ejaz and 2 others vs. Mst. Khalida Awan and another* (2010 SCMR 342).

4. Conversely, learned counsel for the Respondents vehemently opposed the contention of learned counsel for the Petitioner and have supported the impugned judgment passed by the High Court as well as the Trial Court. Learned counsel for the Respondents contended that both the courts have recorded concurrent findings of fact after a meticulous appraisal of the evidence, which warrants no interference. It has been argued by learned counsel for the Respondents that the Petitioner's entire case rests upon an unproven oral gift (*Hiba*) allegedly executed on 25.06.2009, which failed to meet the mandatory statutory standards laid down under Articles 17, 79, and 117 of the Qanun-e-Shahadat Order, 1984 in the instant case. According to learned counsel the Petitioner produced only a single witness namely Muhammad Bilal Abbasi (DW-2) to prove the oral gift declaration dated 25.06.2009, whose testimony explicitly contradicted the Petitioner's defense during cross-examination while stating that the deceased father was completely healthy when executing the document, thereby, disproved the claim of hand tremors and inability to sign such documents. Learned counsel further submitted that DW-2 failed to affirm in his examination-in-chief or cross-examination that the Donor (Father) actually signed or put thumb-mark on the gift document in his presence, thereby rendering the alleged gift unproved in the eyes of law. It has been argued by learned counsel for the Respondents that the deceased father of the parties was a retired officer from Pakistan Navy as Lieutenant Commander, but the document of declaration of oral gift was not signed, rather the donor put a thumb mark which fact, when coupled with the non-production of the two attesting witnesses under Articles 17 and 79 of the Qanun-e-Shahadat Order, 1984, renders the alleged oral gift legally unproven and void. Learned counsel has further contended that the deceased father passed away on 29.06.2009, barely four days after the alleged execution whereas, the possession was not handed over to the Petitioner. Moreover, the

ownership of the suit property remained in name of the deceased father and title never transferred in the name of the Petitioner. While concluding his submissions, learned counsel for the Respondents argued that both the Courts have concurrently recorded finding on facts after minute scrutiny of the evidence produced by the parties and has accordingly resolved the controversy relating to validity of alleged gift in the light of Section 138 of Muhammadan law while placing reliance in the case of *Bilal Hussain Shah v. Dilawar Hussain Shah* (**PLD 2018 SC 698**) to support such conclusion, therefore, both the decisions in this regard does not require any interference by this Court and consequently, the above civil petition for leave to appeal is liable to be dismissed.

5. Heard the learned counsel for the parties, examined the record and perused the judgments of the fora below with their assistance.

6. The primary controversy revolves around the legality of the alleged oral gift (*Hiba*) and the family settlement claimed by the Petitioner. Under settled Islamic jurisprudence in view of Section 138 of the Muhammadan law as affirmed by this Court in the case of *Hayat Muhammad thr. LRs. v. Muhammad Riaz* (**2023 SCMR 212**) and *Bilal Hussain Shah v. Dilawar Shah* (**PLD 2018 SC 698**), a valid gift requires three mandatory prerequisites: (i) offer by the donor; (ii) acceptance of gift by the donee; (iii) and delivery of possession. Keeping in view hereinabove settled legal position, we may now examine as to whether the essential elements of a valid gift (*Hiba*) were satisfied in the instant case or not.

7. Perusal of the record shows that there are critical evidentiary gaps in the Petitioner's case relating to the alleged gift as the Petitioner could not produce the two marginal witnesses to establish a valid gift (*Hiba*) in his favour. The Petitioner only produced one marginal witness, DW-2, to support alleged gift in his favour, who could not establish that the deceased father executed the alleged instruments relating to gift. Article 79 of the Qanun-e-Shahadat Order, 1984 ("**QSO**") mandates the production of at least two attesting witnesses to prove a document required by law to be attested. The Petitioner failed to provide legally acceptable proof regarding the unavailability of the remaining attesting witness of four

instruments allegedly executed by the deceased father on stamp papers dated 25.09.2009. The execution of the oral gift (*Hiba*) cannot be proved in terms of Article 17 and 79 of QSO unless the required two marginal witnesses are produced. In the instant case, the deceased father did not sign the gift instrument, instead, put his smudged thumb impressions on all the alleged instruments produced by the Petitioner, in spite of the fact that he was an educated retired Lieutenant Commander (Navy). The Petitioner sought to explain the absence of signatures by alleging that his late father suffered from severe hand tremors, however, this plea was completely demolished by the Petitioner's own sole attesting witness namely Muhammad Bilal (DW-2), a court typist, who explicitly deposed in his cross-examination that the deceased father was completely healthy when the Petitioner came to F-8 for getting the oral gift instruments typed by the DW-2, whereas, he further deposed that the deceased father did not execute the oral instruments in his presence. The deceased father remained the registered owner of the suit property and continued living in it until his death on 29.06.2009, just four days after the alleged execution of gift instrument. This fact alone, makes the assertion of Petitioner relating to execution of gift instrument in his favour dubious and unreliable particularly in the absence of fulfilment of the essential requirements of a valid oral gift in accordance with law.

8. Adverting to the Petitioner's assertion regarding a comprehensive family settlement, no written deed of family settlement was ever produced during evidence. Conversely, as per record of instant case, it appears that the sisters satisfactorily established through documentary evidence including the bank remittances from Saudi Arabia and transfer letters, that one Naval Anchorage plot was purchased independently by one sister, which disproved the Petitioner's claim of a unified family distribution.

9. The concurrent findings of facts and law have been recorded by both the Trial court and the High Court in the instant matter, which are based on proper appreciation of the record and correct application of Articles 17, 79, and 117 of the QSO. In view of hereinabove facts and circumstances of instant case, we find no legal infirmity, misreading, or non-reading of evidence in the impugned judgment dated 06.10.2022 passed by the learned High Court.

Consequently, leave to appeal is refused, and the petition stands dismissed.

"Not Approved for Reporting"