

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Justice Syed Hasan Azhar Rizvi

Mr. Justice Adnan Iqbal Chaudhry.

H.C.A. No. 185 of 2015

[Dr. Obaid ur Rehman & others versus Mrs. Neelofer Khalid & others]

Appellants : Dr. Obaid-ur-Rehman and 2 others through
Mr. Mohsin Kadir Shahwani, Advocate.

Respondents 1-9 : Mrs. Neelofer Khalid and 8 others through
Mr. Ishtiaq A. Memon, Advocate.

Respondent 10-11 : Nemo

Date of hearing : 05-12-2018

Date of decision : 23-04-2019

JUDGMENT

Adnan Iqbal Chaudhry J. - This appeal is from a judgment and decree dated 24-03-2015 passed by a learned Single Judge of this Court whereby Suit No. 1733/2008 (Said Suit) filed by Muhammad Khalid (the plaintiff, husband and father of the Respondents 1 to 9) against his brothers, the Appellants (defendants 1 to 3) was decreed to the extent of prayers (i) and (ii) which prayed for a declaration that the registered Gift Deed dated 14-02-1977 said have been executed by the plaintiff in favour of the defendants 1 to 3 (the Appellants) for his 50% share in the Suit Property, was a bogus document, and for cancellation of the same.

2. The subject matter of the Said Suit was House No.B/26, Block H, measuring 416 square yards, North Nazimabad, Karachi ('the Suit Property'), which was initially held jointly in the names of Muhammad Khalid (the plaintiff) and his mother (Noor Jahan) vide a registered conveyance deed dated 09-04-1970. The Appellants are the brothers of Muhammad Khalid and the other sons of Noor Jahan (the mother). There was a fifth brother, namely Mustahibul Islam who had passed away before the Said Suit. Muhammad Khalid (the

plaintiff) passed away on 06-05-2014 when the Said Suit was at the stage of arguments, and the Respondents 1 to 9 were brought on record as his legal heirs.

3. The facts are as follows. On 02-12-1974, the mother gifted her 50% share in the Suit Property to the Appellants vide a registered Gift Deed dated 02-12-1974, where after the Suit Property was held 50% by the Appellants and 50% by Muhammad Khalid. This Gift Deed dated 02-12-1974 is not in dispute between the parties. A photocopy of a certified copy of this Gift Deed dated 02-12-1974 is on the record as Exhibit DW 1/16 to which Muhammad Khalid is one of the attesting witnesses.

4. By another registered Gift Deed dated 14-02-1977, Muhammad Khalid (the plaintiff) is said to have gifted his 50% share in the Suit Property to his brothers, the Appellants (Obaidur Rehman, Habibur Rehman and Shafiqur Rehman). It is this Gift Deed dated 14-02-1977 that was disputed by Muhammad Khalid, who alleged that his signatures thereon were forged.

5. From the it appears that a dispute between the legal heirs of the deceased brother, Mustahibul Islam on the one hand, and the other brothers i.e. Muhammad Khalid and the Appellants on the other hand, relating to partnership business of the said brothers and certain properties held by the brothers, which included the Suit Property as well, was referred to arbitration. An arbitration award was filed in this Court and registered as Suit No.649/2004. That arbitration award was being contested by Muhammad Khalid.

6. On 10-06-2008, Amtul Quddos, the widow of the deceased brother Mustahibul Islam, lodged FIR No.318/2008 as PS North Nazimabad against Muhammad Khalid and his sons, alleging that they had entered the Suit Property by force. On 18-06-2008, the Appellant No.1 (Obaidur Rehman) also made a complaint to the DSP North Nazimabad alleging that on 09-06-2008 Muhammad

Khalid and his sons took possession of the Suit Property by force. Thereafter, on 20-06-2008, the Special Judicial Magistrate and DDO (Revenue), North Nazimabad Town, issued notice to Muhammad Khalid and his sons under section 145 Cr.P.C. (for breach of peace).

7. In July 2008, Muhammad Khalid filed Suit No.494/2008 before the VIII Civil Judge Karachi Central against the Appellants and the legal heirs of his late brother, Mustahibul Islam, contending that he (Muhammad Khalid) was 50% owner of the Suit Property; that he was residing thereat; and that he apprehended dispossession.

8. In the meanwhile, in the proceedings before the Special Judicial Magistrate, the Appellants filed photocopies of certified copies of the registered Gift Deeds dated 02-12-1974 and 14-02-1977 to show that they were owners of the Suit Property to the exclusion of Muhammad Khalid. The Special Judicial Magistrate sought verification of the said Gift Deeds from the Sub-Registrar Central Record Karachi, who, vide letter dated 28-10-2008 reported that both the Gift Deeds were genuine and duly registered.

9. On 22-12-2008, Muhammad Khalid withdrew Suit No.494/2008 from the Court of VIII Civil Judge Karachi Central, and on 23-12-2008 he filed Suit No.1733/2008 (the Said Suit) to challenge the registered Gift Deed dated 14-02-1977, as according to him the same was a forgery and he came to know of its existence only when a photocopy of a certified copy of the said Gift Deed was filed by the Appellants in proceedings before the Special Judicial Magistrate.

10. In the Said Suit, it was pleaded by Muhammad Khalid that he was 50% owner of the Suit Property; that the registered Gift Deed dated 14-02-1977 said to be executed by him in favor of the Appellants for his 50% share in the Suit Property, had been 'recently' forged by the Appellants in collusion with the Sub-Registrar 'T' Div. VIII, Karachi (defendant No.4); and that he was

residing at the Suit Property since 1971, and now his married sons resided thereat. The prayer in the Said Suit was as follows:

- “(i) Declaration that Gift Deed dated 14th February-1977 allegedly executed by the Plaintiff in favour of the Defendants in respect of his 50% share in the Suit Property, is a bogus document and Plaintiff continues to be owner of 50% share in the Suit Property;*
- (ii) Cancelled the Gift Deed dated 14th February-1977;*
- (iii) Decree for Damages to the extent of Rupees Five Million;*
- (iv) Permanently restrain the Defendants from ejecting the Plaintiff and/or his children from the Suit Property without due process of law;*
- (v) Grant any other relief*;
- (vi) cost of the Suit*”

11. In their written statement to the Said Suit, the Appellants (defendants 1 to 3) pleaded that the registered Gift Deed dated 14-02-1977 was genuine, duly executed by Muhammad Khalid, and thus the Said Suit was time-barred. The Appellants pleaded that the originals of both the registered Gift Deeds dated 02-12-1974 and 14-02-1977 were in the custody of Muhammad Khalid. They contended that Muhammad Khalid was not in possession of the Suit Property ever since he executed the registered Gift Deed dated 14-02-1977. The Appellants 1 and 2 were doctors by profession and they pleaded that from 1984 till 1996, the Appellants along with their elder brother, Dr. Mustahibul Islam, ran a clinic in partnership at the Suit Property; and that Muhammad Khalid occupied the Suit Property unlawfully in 2008. They pleaded that the Suit Property had been purchased from the money of the mother and before divesting his share in the Suit Property in favor of the Appellants, Muhammad Khalid had held 50% of the Suit Property only as *benamidar* of the mother.

12. On 13-10-2011, Amtul Qudoos and her children, as legal heirs of the other brother, Mustahib-ul-Islam, moved CMA

No.10413/2011 under Order I Rule 10 CPC to become parties to the Said Suit. The application contended that the dispute between Mustahib-ul-Islam and his brothers (Muhammad Khalid and the Appellants), had previously been settled vide a Family Settlement agreement dated 02-03-1996 executed by all the brothers; that subsequently, the dispute between the legal heirs of Mustahibul Islam and his surviving brothers was referred to a sole arbitrator, who passed an Arbitration Award dated 08-09-2003 with the consent of the parties. That Award was filed in Court and registered as Suit No.649/2004. Per the Intervenors, the said Family Settlement and the said Award had envisaged a distribution of properties amongst the brothers and the legal heirs of Mustahibul Islam, which included the Suit Property. However, the application of the Intervenors was dismissed for non-prosecution on 28-01-2013.

13. In the Said Suit, the following issues were settled on 08-11-2010 and a Commissioner was appointed to record evidence:

- “(i) Whether the suit is maintainable under the law ?
- (ii) Whether the gift was validly made by the Plaintiff to the Defendants ?
- (iii) Whether the Plaintiff is entitled to the cancellation of Gift Deed made by him ? If yes, what is the effect ?
- (iv) What should the decree be ?”

As stated in para 1 above, the Said Suit was decreed to the extent of prayers (i) and (ii); hence this appeal.

14. Vide CMA No.1690/2015 moved under Order XLI Rule 27 CPC, the Appellants have prayed for permission to adduce additional evidence in this appeal by summoning the Sub-Registrar Central Record to produce the register of thumb impression and signatures in respect of the registered Gift Deed dated 14-02-1977 so as to match the thumb impression and compare the signature of Muhammad Khalid (plaintiff). In support of such application, learned counsel for the Appellants submitted that when the Sub-Registrar Central Record (DW 2) was cross-examined by the

plaintiff's counsel, the Sub-Registrar had stated that though he had not brought the register of thumb impression on that day, he could produce the same if required by the Court; but then he was never asked to produce the same by the plaintiff's counsel. The application is of course opposed by the Respondents 1 to 9 whose Counsel submitted that it was for the Appellants to have summoned the register of thumb impression, and since they chose not to do so, such lacunae cannot be filled at the appellate stage. Vide order dated 20-10-2016 passed in this appeal, it was observed that the application for additional evidence would be heard with the main appeal in order to enable the Court to assess whether additional evidence is required or not. Therefore, the said application and the main appeal were heard together by us.

15. Mr. Mohsin Shahwani, learned counsel for the Appellants submitted that in passing the impugned judgment and decree the learned Single Judge had misread the evidence; that the diaries of Muhammad Khalid produced as Exhibit PW 1/33 and Exhibit PW 1/34, and the documents produced by official witnesses, DW 2 and DW 3, which included a certified copy of the registered Gift Deed dated 14-02-1977, was sufficient to prove that the said Gift Deed had been executed by Muhammad Khalid; that a presumption of correctness attached to the latter evidence; and that the utility bills, tax receipts etc. produced by the Appellant No.1 had proved that possession of the Suit Property had been delivered by Muhammad Khalid to the Appellants to complete the gift. He submitted that the letters of Mybank Ltd. produced as Exhibit DW 1/26 and DW 1/27 proved that the original of the Gift Deed dated 14-02-1977 was with Muhammad Khalid. He submitted that to the extent Muhammad Khalid had initially held 50% of the Suit Property, he was only a *benamidar* for the mother and that it was on her instructions that he executed the registered Gift Deed dated 14-02-1977 in favor of his younger brothers, the Appellants. He submitted that the Said Suit was time-barred; that the Appellants had never given up the point

of limitation that was expressly pleaded and covered under Issue No.1; and that in any case, under section 3 of the Limitation Act, 1908 it was incumbent on the Court to dismiss a time-barred suit.

16. On the other hand, Mr. Ishtiaq A. Memon, learned counsel for the Respondents 1 to 9 submitted that suit was not time-barred as limitation would run from the date when Muhammad Khalid (plaintiff) acquired knowledge of the Gift Deed dated 14-02-1977, which was in the year 2008. He pointed to the complaint dated 18-06-2008 made by the Appellant No.1 to the DSP (Exhibit PW 1/13) to submit that since the same acknowledged that Muhammad Khalid was 50% owner of the Suit Property, it established that the Gift Deed dated 14-02-1977 had been fabricated sometime thereafter. Regards the diaries of Muhammad Khalid (Exhibit PW 1/33 and PW 1/34), learned counsel submitted that though the diaries were not disputed, but their contents and the interpretation being placed by the Appellants on the writing therein was disputed. He submitted that the Appellants being beneficiary of the alleged Gift Deed dated 14-02-1977, it was for them to first dispel the presumption that the original of the same was not in their possession. He submitted that had the Gift Deed dated 14-02-1977 been actually executed, the Appellants would have mutated the Suit Property to their names, and he relied on the case of *Mushtaque Ali Shah v. Bibi Gul Jan* (2016 SCMR 910) to argue that in the absence of such mutation, the presumption would be against the Appellants. He submitted that the allegation that the disputed Gift Deed dated 14-02-1977 was with Muhammad Khalid was belied by Exhibit DW 1/30, a publication made by the Appellants in Daily Aman to state that the original documents of the Suit Property had either been lost or stolen. He submitted that when the signature of Muhammad Khalid on the Gift Deed dated 14-02-1977 had not been proved, the said Gift Deed was not proved. He submitted that in any case, the disputed gift had never fulfilled conditions to constitute a valid gift under Muslim Law.

17. Heard the learned counsel and perused the record.

The original of the disputed Gift Deed dated 14-02-1977 had not been tendered in evidence. Therefore, in passing the impugned judgment and decree the learned Single Judge held as follows:

“..... The Defendants No.1, 2 and 3 are admittedly not in possession of the gift deed as well as the title documents of the property said to have been gifted to them. No explanation offered by the defendants to justify their failure to produce the original or even copy of it. The defendants have failed to discharge their burden of proof of execution of gift deed which squarely was on them being beneficiary of the gift.”

The conclusion of the above discussion is that the defendants have failed to establish execution of gift deed and therefore issue No.2 is decided in negative. No gift was validly executed. Consequently issue No.3 is decided in affirmative and if there is any gift deed that should be treated as cancelled and of no legal consequence.”

18. The learned Single Judge has essentially held that since the document of the disputed Gift Deed dated 14-02-1977 had not been proved by the Appellants, there was no evidence of its execution, and thus the plaintiff must prevail. The judgment shows that to arrive at such conclusion, the learned Single Judge tested the evidence on the burden of proof rather than the balance of probabilities. It is settled law that once the parties have produced their respective evidence, and it is not their grievance that any evidence was shut-out, the question of evidentiary burden of proof loses significance. That question becomes material only where the Court finds evidence to be so evenly balanced that it cannot come to any definite conclusion¹. In the Said Suit, since both sides had lead evidence and had cross-examined each other, we proceed to decide the case on the balance of probabilities.

19. The point that emerges for the determination of this appeal is whether the document of the registered Gift Deed dated 14-02-1977 had been proved ? And if so, whether on a preponderance of the

¹ See the cases of *Qaisar Khatoon v. Moulvi Abdul Khaliq* (PLD 1971 SC 334), and *Khatun v. Malla* (1974 SCMR 341).

evidence, had the execution of the said Gift Deed by Muhammad Khalid in favour of the Appellants also been proved ?

20. The observation of the learned Single Judge that the Appellants had not even produced a 'copy' of the disputed Gift Deed dated 14-02-1977, is a mis-reading of the evidence. A certified copy of the Gift Deed dated 14-02-1977 bearing Registered No.897, pages 25 to 28, Vol. 112 of Book No.I Addl, Sub-Registrar T. Div.VIII, Karachi, was on record as **Exhibit DW 2/1**. Such certified copy had been produced in evidence by the Sub-Registrar Central Record, Karachi (DW 2), who had been summoned by the Appellants. The Sub-Registrar (DW 2) was cross-examined by Muhammad Khalid's counsel and then re-examined by the Appellants' counsel. He informed that the process of micro-filming of registered documents had not been implemented at the concerned Sub-Registrar until the year 1986. He denied the allegation that the record of registration of the Gift Deed dated 14-02-1977 was forged or manipulated. On being queried whether he could produce the thumb impression and signature register related to the Gift Deed dated 14-02-1977, he said he could if it had been shifted by the concerned Sub-Registrar to the office of the Central Registrar. But then none of the parties asked him to do so. Be that as it may, the certified copy of the registered Gift Deed dated 14-02-1977 produced as Exhibit DW 2/1 was duly signed and sealed by the concerned Sub-Registrar and the certificate on such copy states that it is a true copy, duly compared with the record maintained by the concerned Sub-Registrar². Needless to state that being a certified copy, such document did not bear signatures of the persons who had signed the original document, and instead read 'sd' in place of such signatures. However, subsection (5) of section 57 of the Registration Act, 1908 provides that "All copies given under this section shall be signed and sealed by the Registering Officer, and shall be admissible for the purpose of proving the contents of the original documents."

² Such record is maintained under section 52 of the Registration Act, 1908.

21. Per Article 72 of the Qanoon-e-Shahadat Order, 1984, "The contents of documents may be proved either by primary or by secondary evidence." Per Article 74(1), "Secondary evidence means and includes certified copies given under the provisions hereinafter contained." That provision is contained Article 87 which requires every public officer having the custody of a public document, which any person has a right to inspect, to give on demand and on payment of a fee, a certified copy of such public document. Needless to state that the record of the registered Gift Deed dated 14-02-1977 maintained by the Sub-Registrar is a Public Document under Article 85 of the Qanoon-e-Shahadat Order, 1984 read with sub-section (1) of section 57 of the Registration Act, 1908, and therefore a certified copy of the registered Gift Deed dated 14-02-1977 (Exhibit DW 2/1) is secondary evidence thereof. However, Articles 75 and 76 of the Qanoon-e-Shahadat Order, 1984 provide that documents must be proved by primary evidence and only where the case falls under Article 76 can secondary evidence be given of the "existence, condition or contents" of a document. Therefore, the question that arises is whether the Appellants had made out a case under Article 76 of the Qanoon-e-Shahadat Order, 1984 so as to be permitted to produce secondary evidence of the registered Gift Deed dated 14-02-1977 i.e., its certified copy as Exhibit DW 2/1.

22. Article 76 of the Qanoon-e-Shahadat Order, 1984 provides:

"76. Cases in which secondary evidence relating to document may be given.- Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:

(a) when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court; or of any person legally bound to produce it; and when, after the notice mentioned in Article 77, such person does not produce it;

.....

(f) when the original is a public document within the meaning of Article 85;

(g) when the original is a document of which a certified copy is permitted by this Order, or by any other law in force in Pakistan, to be given in evidence;

.....

In cases (a), (c), (d) and (e), any secondary evidence of the contents of the document is admissible.

.....

In case (f) or (g), certified copy of the documents, but no other kind of secondary evidence, is admissible.

.....”

23. It was the case of Muhammad Khalid that he came to know of the Gift Deed dated 14-02-1977 when a copy of a certified copy of the same was produced in proceedings before the Special Judicial Magistrate. On the other hand, the case of the Appellants from the outset was that the possession of the original of the registered Gift Deed dated 14-02-1977 was with Muhammad Khalid (para 7 of the written statement). In para 6 of his affidavit-in-evidence, the Appellant No.1 stated that the original title documents of the Suit Property including the registered Gift Deed dated 14-02-1977 were originally in the custody of the mother of the parties, then (after the mother's death) with their father, and then they came to be with Muhammad Khalid. On cross-examination, Muhammad Khalid acknowledged that when their father died in the year 2003, he was living with Muhammad Khalid. Both sides had given notice to the other under Article 77 of the Qanoon-e-Shahadat Order, 1984 to produce the originals of certain documents including the registered Gift Deed dated 14-02-1977. When the Appellant No.1 lead evidence he produced a certificate dated 26-06-2008 issued by Mybank Ltd. (previously Bolan Bank Ltd.) as Exhibit DW-1/26, which confirmed that the registered Gift Deed dated 02-12-1974 (the one executed by the mother in favour of the Appellants for her 50% share in the Suit Property) had been mortgaged with the bank for the issue of a bank guarantee dated 11-01-1996 to Sui Southern Gas Co. Ltd. on behalf of M/s. Islam Brothers. The said certificate stated that the said Gift Deed dated 02-12-1974 was released to “our account holder”. Exhibit DW-1/27 produced by the Appellant No.1 was another letter dated

06-06-2009 issued by Mybank Ltd. stating that the current account of M/s. Islam Brothers maintained with the said bank was operated by Muhammad Khalid. On cross examination, Muhammad Khalid stated as follows:

“I did deposit the gift deed in Bolan Bank, it is mine and did not belong to my mother. I do not remember in the year 1996 the said gift deed was deposited in Bolan Bank. I think the said gift deed pertained to the Suit Property. I do not remember if the said gift deed was deposited in Bolan Bank for guaranteeing Sui Southern Gas Company”.

Therefore, the Appellants had brought evidence to show that the original of the other Gift Deed dated 02-12-1974, the one executed by the mother in favor of the Appellants for her 50% share in the Suit Property, was in the possession of Muhammad Khalid, even though he was not a beneficiary thereof. Admittedly, the original of the initial conveyance deed dated 09-04-1970 whereby the Suit Property had been purchased, was also in Muhammad Khalid's possession which he produced as Exhibit PW 1/2. Therefore, it could well be inferred as a presumption of fact under Article 129 of the Qanoon-e-Shahadat Order, 1984, that the original of the registered Gift Deed dated 14-02-1977 (the disputed Gift Deed) was also in Muhammad Khalid's possession. Given the fact that the Appellants had summoned the record of the registered Gift Deed dated 14-02-1977, it appears unlikely that they had reason to withhold the best evidence.

Mr. Ishtiaq Memon, learned counsel for the Respondents 1 to 9 had submitted that the fact that the registered Gift Deed dated 14-02-1977 was not with Muhammad Khalid, had been accepted by the Appellant No.1 in Exhibit DW 1/30, which was a notice dated 20-06-2008 published in a newspaper to state that 'important documents' relating to the Suit Property had either been lost or stolen, which public notice was owned by the Appellant No.1 when he was confronted with it during cross-examination. But then such submission fails to appreciate firstly that had the Appellants even set-up such a case, which they did not, they had nonetheless brought evidence to show that the original was not in their possession so as

to bring their case also under sub-Articles (f) and (g) of Article 76 of the Qanoon-e-Shahahdat Order, 1984 for the production of a certified copy as secondary evidence; and secondly, the public notice (Exhibit DW 1/30) became insignificant when there was evidence to show that two of the *'important documents'* referred to in the public notice, ie., the initial conveyance deed dated 09-04-1970 and the other Gift Deed dated 02-12-1974 (by the mother), were in the possession of Muhammad Khalid.

24. The upshot of the discussion above is that the Appellants had brought sufficient evidence to show that the original of the registered Gift Deed dated 14-02-1977 'appeared' to be with Muhammad Khalid, and thus the Appellants had laid the foundation³ for bringing their case under sub-Article (a) of Article 76 of the Qanoon-e-Shahadat Order, 1984 for giving secondary evidence of the said Gift Deed. It is to be noted that in order to bring a case under the said sub-Article (a) of Article 76, the party desiring to give secondary evidence is not required to prove conclusively that possession of the original document is with the party against whom it is sought to be proved, but only that "the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved." The other condition to the giving of such secondary evidence viz., the prior notice under Article 77 of the Qanoon-e-Shahadat Order, 1984 had already been fulfilled by the Appellants vide notice dated 08-03-2011 which had been produced by Muhammad Khalid as Exhibit PW 1/21. The said foundation laid by the Appellants for giving secondary evidence by reason of sub-Article (a) of Article 76 of the Qanoon-e-Shahadat Order, 1984, also brought the Appellants' case under sub-Articles (f) and (g) of Article 76 so as to permit them additional grounds to produce a certified copy as secondary evidence separate and

³ 'The foundation for reception of secondary evidence' is a technical expression to state that circumstances of the case permit the giving of secondary evidence - See 'Law of Evidence' by M. Monir, 17th Edition, in comments to section 65 of the Evidence Act, 1872 at page 1271.

independent of sub-Article (a) of Article 76⁴. Therefore, and in terms of Articles 76 and 88 of the Qanoon-e-Shahadat Order, 1984, the certified copy of the registered Gift Deed dated 14-02-1977 produced as Exhibit DW 2/1, and that too without any objection from the plaintiff's counsel, was evidence of the "existence" and "contents" of the original of the said registered Gift Deed. Needless to state that in view of Article 90 of the Qanoon-e-Shahadat Order, 1984 a presumption of genuineness attaches to the said certified copy (Exhibit DW 2/1). No evidence was brought by Muhammad Khalid (the plaintiff) to rebut such presumption.

25. This brings us to the second point for determination, viz. whether the registered Gift Deed dated 14-2-1977 had been executed by Muhammad Khalid (the plaintiff), for it is settled law that even where the existence and contents of a registered document are proved, that by itself is not proof of its execution when the executant is denying its execution.

26. Articles 78 to 84 of the Qanoon-e-Shahadat Order, 1984 provide modes of proving execution of a document.

Per the certified copy of the registered Gift Deed dated 14-02-1977 (Exhibit DW 2/1), the attesting witnesses to the said Gift Deed were Tahir-ul-Islam and Noor Jehan, both of whom were admittedly the parents of the Appellants and Muhammad Khalid, and both of whom had admittedly passed away long before the Suit. Therefore, the mode of proof of execution of a document under Article 79 of the Qanoon-e-Shahadat Order, 1984 was not available. Since the original of the registered Gift Deed dated 14-02-1977, which would contain the signature of its executant, was not forthcoming, the Court could not resort to proof under Article 84 either. This brings us to Article 78 of the Qanoon-e-Shahadat Order, 1984 (previously section 67 of the Evidence Act) which requires the signature or handwriting of

⁴ That is not to say that under sub-Articles (f) and (g) of Article 76 of the Qanoon-e-Shahadat Order, 1984, a certified copy may be produced in the first instance in all cases without accounting for the non-production of the original.

the signatory or author of the document to be proved to prove its execution. Though on a first reading, Article 78 seems to suggest that the signature/handwriting must be proved by a direct evidence of the signature/handwriting itself, however the settled interpretation of Article 78 is that it intends only to lay down generally that the factum of execution of a document is to be proved, inasmuch as the said Article does not prescribe any particular mode for proving the signature/handwriting, and therefore the proof of execution of a document can also be by presumptive or circumstantial evidence⁵. Such interpretation is also in accord with Article 76 of the Qanoon-e-Shahadat Order, 1984, for when a certified copy of a document is permitted into evidence which does not, on account of being a certified copy, bear the signature of the executant of the original document, to then say that absence of direct evidence of such signature results in not proving the execution of the document, would be a contradiction. In the case of *Qamar Sultan v. Bibi Sufaidan* (2012 SCMR 695), the question before the Supreme Court was whether the deceased was a *shia* or *sunni* by faith. To hold that the deceased was a *sunni*, one evidence relied upon by the Courts below was a certified copy of an application signed, amongst others, by the deceased and made to the Deputy Commissioner to oppose a license to *Mr. A* for taking out a Muharram procession, which demonstrated that the deceased was a *sunni*. One of the objections raised by the appellant before the Supreme Court was that the actual signature of the deceased on the application made to the Deputy Commissioner had never been proved. The Supreme Court held that:

“Yes, no secondary evidence has been produced in the Court to prove the signature of the deceased on the application mentioned above but, to our mind that was not necessary, because it was a certified copy of the application thus moved.”

⁵ See ‘Law of Evidence’ by M. Monir, 17th Edition, under commentary of section 67 of the Evidence Act.

27. Coming back to the point that the signature of the executant required to prove execution of a document under Article 78 of the Qanun-e-Shahadat Order, 1984 can also be proved by presumptive or circumstantial evidence, such point was elaborated by Justice Wajihuddin Ahmed in the case of *Qamrual Hasan v. United Bank Ltd.* (1990 MLD 276) as follows:

“14. Article 2(4) of the Qanun-e-Shahadat, 1984, envisages "a fact to be proved" when, after considering the matter before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. This provision, in the context of proof of documents, is, inter alia, to be read with Article 78 of the Qanun-e-Shahadat, which requires signatures or handwritings to be proved, without laying down any specific manner of proof. For such purpose several modes of proof have come to be judicially recognised the best mode being the examination of the person who signed or wrote the document. Such modes of proof also include presumptive or circumstantial evidence. Thus, in the case reported as *Abdool Ali v. Abdoor Rehman*, 21 Suther-Lands Weekly Reporter 429, a Division Bench of the Calcutta High Court consisting of Couch C.J. and Birch, J., observed that there was no provision in the Evidence Act, which required the writer of a document to be examined as a witness. Likewise, in the case of *Karali Prosad Dutta v. E.I. Railway Company*, AIR 1928 Cal. 498 Mukerji, J., speaking for a Division Bench consisting of Cuming, J., and himself, said that sections 60 and 67 of the Evidence Act (corresponding to Articles 71 and 78 of the Qanun-e-Shahadat) were somewhat ambiguous but it was never intended by section 67 that direct evidence of handwriting was always necessary and that the section merely stated with reference to deeds what was the universal rule in all cases that the person who makes an allegation must prove it and lays down no new rule as to the kind of proof to be given. It was observed that section 60 was never intended to exclude circumstantial evidence of a thing which could be seen, heard and felt though at first sight the section might appear to have that meaning. The case of *Govardhandas v. Ahmedi Begum*, AIR 1953 Hyderabad 181 also is to the effect that handwriting may, in addition to the usual methods, be proved on circumstantial evidence as section 67 of the Evidence Act prescribes no particular kind of proof. Zakiuddin Pal, J., in the case of *Gammon Pakistan Ltd. v. Pir Khan*, PLD 1979 Note 113 p. 84 also affirms this rule declaring that under section 68 (Article 79 of the Qanun-e-Shahadat) of the Evidence Act where a document was not duly proved by the person signing the same, but circumstances

proved its execution, reliance may be placed on such a document. In the circumstances of this case, where the letter from Janata Bank, dated 9-1-1973, Exhibit P/3, has been transcribed on the official letter pad of that Bank and addressed to the plaintiff No.2, who has produced the same and objection in that behalf has not been pressed in arguments such document, alongwith oral testimony in support, constitutes strong evidence and must be held to be proved in terms of Articles 2 and 78 of the Qanun-e-Shahadat, 1984, since, taking all the circumstances into consideration, it seems, uncontrovertedly, to have been written and addressed in manner it purports to have been written and addressed.”

The same point had been discussed by the Indian Supreme Court in the case of *Mobarik Ali Ahmed v. The State of Bombay* (AIR 1957 SC 857) where it was held that:

“The proof of the genuineness of a document is proof of the authorship of the document and is proof of a fact like that of any other fact. The evidence relating thereto may be direct or circumstantial. It may consist of direct evidence of a person who saw the document being written or the signature being affixed. It may be proof of the handwriting of the contents, or of the signature, by one of the modes provided in ss. 45 and 47 of the Indian Evidence Act. It may also be proved by internal evidence afforded by the contents of the document. This last mode of proof by the contents may be of considerable value where the disputed document purports to be a link in a chain of correspondence, some links in which are proved to the satisfaction of the court.”

28. Having seen that the execution of a document can be proved by presumptive or circumstantial evidence in satisfaction of Article 78 of the Qanoon-e-Shahadat Order, 1984, we proceed to examine whether the execution of the registered Gift Deed dated 14-02-1977 was so proved or not.

29. The Appellants had summoned an officer from the Stamp Office Karachi (DW 3), to produce record pertaining to stamp duty of Rs.1780 paid under Challan No.29 dated 12-02-1977, which was stamp duty paid in respect of the Gift Deed dated 14-02-1977. That Challan number is mentioned on the certified copy of the said Gift Deed (Exhibit DW 2/1). The record produced by the Stamp Office (DW 3) was as follows:

"I have brought Bank Sheets register only. I produce copy of bank's sheet No. 2288 dated 12.02.1977. The copy is duly attested by DDO Stamp Office Karachi as Exbt DW 3/2. Original seen and returned. The DW 3/2 contains the entry of Challan No. 29 dated 12.2.1977. The Bank's Sheet No. 2288 dated 12.2.1977 being Exbt DW 3/2 contains name of Muhammad Khalid."

Though DW 3 was summoned only to produce documents and he was not administered oath by the Commissioner, he was nonetheless allowed to be cross-examined by Muhammad Khalid's counsel. Though on cross-examination he stated that the sale register in which the paid-up challan is entered, and the paid-up challan itself were missing and not available, but the authenticity of the 'Bank Sheet' (Exhibit DW 3/2), which recorded the name of Muhammad Khalid as the person who had deposited the challan on 12-02-1977, two days before the Gift Deed dated 14-02-1977, for the same amount of stamp duty affixed on the said Gift Deed, remained unrebutted.

30. During cross-examination, Muhammad Khalid was also confronted by the Appellants' counsel with two diaries said to be in his handwriting. That part of his cross-examination is as follows:

"I never maintained any personal and other diary. I see the diaries pertaining to the year 1974 and 1977 and say that yes it is mine and contain my writing, however, I do not remember the context thereof. I produce the said two diaries as Exhibit PW 1/33 and Exhibit PW 1/34."

The diary of 1974 produced as Exhibit PW 1/33 bears, on the pages dated 30-11-1974 and 02-12-1974, the following hand-written entries respectively (amongst other entries):

"Kharcha stamp banaam Habib-ur-Rehman, Obaid-ur-Rehman, Shafiq-ur-Rehman 1300/="

"Kharcha Gift deed Habib, Obaid, Shafiq 508/="

But, and as also pointed out by Mr. Ishtiaq Memon Advocate, the aforesaid entries in the diary of 1974 (Exhibit PW 1/33), refer to the other Gift deed dated 02-12-1974, the one executed by the mother

in favour of the Appellants for her 50% share in the Suit Property, which Gift Deed is undisputed.

However, the other diary of 1977 produced as Exhibit PW 1/34 bears the following hand-written entry (amongst other entries) on the page dated 14-02-1977:

“Amma kay naam kharcha registry B-26”

That entry on 14-02-1977, the writing of which was admitted by Muhammad Khalid on cross-examination, clearly refers to the registration of the Gift Deed in question which took place on 14-02-1977. During his arguments, Mr. Ishtiaq Memon, learned counsel for the Respondents 1 to 9 attempted to argue that the mention of “B-26” in the said entry had been added later on by the Appellants. But such contention is not borne out of the evidence as Muhammad Khalid had never qualified his statement when he acknowledged on cross-examination that the writing in the diary was his. In fact, on cross-examination Muhammad Khalid had not categorically denied the execution of the Gift Deed dated 14-02-1977 and instead he said *“I do not remember if I got registered any document before Sub-Registrar on 14-02-1977.”*

31. It was the case of the Appellants that pursuant to the Gift Deed dated 14-02-1977, they had been in possession of the Suit Property to the exclusion of Muhammad Khalid (plaintiff); that from 1983/1984 till 1996, the Appellants along with their elder brother, Dr. Mustahibul Islam, ran a clinic in partnership at the Suit Property; and that Muhammad Khalid and his sons occupied the Suit Property unlawfully in 2008. On cross examination it was accepted by Muhammad Khalid that *“It is correct that myself and my family shifted from Suit Property to property No.F-37, Block ‘F’, North Nazimabad, Karachi, after the demise of my mother.”* Per the death certificate at Exhibit DW 1/17, the mother had passed away in 1982. On cross-examination Muhammad Khalid also accepted that:

“It is correct that from the year 1983 until 1996 Dr. Islam was running clinic in the Suit Property”

“It is correct that after the year 1982 I personally did not reside in the suit property.”

32. The center-piece of Muhammad Khalid’s evidence was the complaint dated 18-06-2008 made by the Appellant No.1 to the DSP (Exhibit PW 1/13) in which the Appellant No.1, while narrating the incident of unlawful occupation, had stated that Muhammad Khalid was 50% owner of the Suit Property. Per Mr. Ishtiaq Memon, learned counsel for the Respondents 1 to 9, that document showed that the registered Gift Deed had been fabricated sometime after 18-06-2008. But then, subsequent to the said complaint, the Appellant No.1 had also written letters dated 22-10-2008 (Exhibit DW 1/23 and Exhibit DW 1/24) to the SIO, PS North Nazimabad who was investigating FIR No.318/2008, in which letters he relied on the registered Gift Deed dated 14-02-1977 to state that Muhammad Khalid had divested his share in the Suit Property. On cross-examination, the Appellant No.1 was confronted with Exhibit PW 1/13 and a specific question was put to him as to which of the two facts were correct, the one made by him in his complaint to the DSP (Exhibit PW 1/13) that Muhammad Khalid was 50% owner of the Suit Property, or the one made in the Said Suit that Muhammad Khalid had gifted the said 50% to the Appellants. In reply the Appellant No.1 stated that the latter statement was correct, and he referred to his subsequent letters dated 22-10-2008 to the SIO, PS North Nazimabad (Exhibit DW 1/23 and Exhibit DW 1/24) to state that *“My statement made in application made to DSP was corrected later on”*. The Appellant No.1 further stated that the mention of Muhammad Khalid as co-owner of the Suit Property in Exhibit PW 1/13 was in the context of a family settlement arrived between the brothers in the year 1996. The mention of such a family settlement had also been made by the legal heirs of Mustahib-ul-Islam in CMA No.10413/2011 (see para 12 above). Therefore, on a preponderance of evidence, while Exhibit PW 1/13 may be considered as a piece of evidence to an agreement between the brothers arrived subsequent to the Gift Deed dated 14-02-1977, it is hardly any evidence to show that signatures of

Muhammad Khalid on the registered Gift Deed dated 14-02-1977 were forged.

33. Mr. Ishtiaq Memon, learned counsel for the Respondents had further submitted that there was no reason for Muhammad Khalid to have gifted his property to his younger brothers when he had his wife and children to think about. But then Muhammad Khalid had himself also produced as Exhibit PW 1/19 an unregistered Declaration of Gift dated 12-02-1977 whereby the Appellants are said to have gifted their 60% share in another property (Plot No.F-37, Block F, North Nazimabad, Karachi, measuring 2000 sq yds.) to their brothers, Mustahibul Islam and Muhammad Khalid (the plaintiff)⁶. If anything, that document, which purports to be two days before the disputed Gift Deed dated 14-02-1977, is an acknowledgment by Muhammad Khalid that there was natural love and affection between the brothers at the time.

As regards the alleged failure of the Appellants to mutate the Suit Property to their names after the Gift Deed dated 14-02-1977, that stands explained by the evidence that the original of the Gift Deed dated 14-02-1977, which would be required to effect such mutation, was not with the Appellants. Therefore, the reliance placed by Mr. Ishtiaq Memon on the case of *Syed Mushtaque Ali Shah v. Bibi Gul Jan* (2016 SCMR 910) is entirely misplaced.

34. The case of Muhammad Khalid (the plaintiff) that the registered Gift Deed dated 14-02-1977 was forged, had to stand primarily on his own evidence, of which there was none. In fact, his evidence hardly inspires any confidence. In his affidavit-in-evidence, he had alleged that he was in uninterrupted possession of the Suit Property since 1971. But on cross examination he accepted that "It is correct that after the year 1982 I personally did not reside in the suit property." Further, the plaint of Muhammad Khalid's previous Suit No.494/2008 (Exhibit PW 1/31) reads as follows:

⁶ Here we do not intend to hold for or against Exhibit PW 1/19 as the same is not a question before us.

“16. That the defendants while launching the proceedings u/s 107/117 Cr.P.C. have come out with the plea that the 50% share of the deceased mother in the suit property has already been gifted to defendants 1 to 3 by the mother in her life-time. However, the copy of the said alleged Gift Deed has not been supplied to the Plaintiff, nothing can be said about the same, except that the Gift Deed if any, is forged and fabricated one. The defendants 1 to 3 neither during the life-time of mother or after her death, have implemented the Gift Deed.”

Thus in filing the previous Suit No.494/2008 Muhammad Khalid had even disputed the other Gift Deed dated 02-12-1974 that had been executed by the mother in favour of the Appellants for her 50% share in the Suit Property, and had expressed ignorance of its whereabouts. But then subsequently, in filing the Said Suit he admitted to that other Gift Deed dated 02-12-1974, and as discussed in para 23 above, he even admitted to have subsequently deposited the same with Bolan Bank as mortgage.

35. In our view, the Bank Sheet dated 12-02-1977 (Exhibit DW 3/2) which recorded the name of Muhammad Khalid as the person who had deposited the challan for the stamp duty affixed on the disputed Gift Deed on 12-02-1977, two days before the said Gift Deed was registered (on 14-02-1977), was proof of the fact that the said Gift Deed dated 14-02-1977 had been executed by him. Further, the entry *“Amma kay naam kharcha registry B-26”* in the diary dated 14-02-1977 (Exhibit PW 1/34), which was admitted by Muhammad Khalid to be his writing, was clearly a reference to the registration of the Gift Deed dated 14-02-1977 and was thus also proof of the fact that the said Gift Deed dated 14-02-1977 had been executed by him. Both these documents remained unrebutted by Muhammad Khalid. We have already discussed in para 24 above that the existence and contents of the registered Gift Deed dated 14-02-1977 stood proved by its certified copy (Exhibit DW 2/1). Therefore, we have no hesitation in holding that the plaintiff, Muhammad Khalid was not entitled to the reliefs decreed in his favor vide the impugned judgment and decree. Having found that the disputed Gift Deed had been duly executed and registered on 14-02-1977, the Said Suit,

which was essentially one under section 39 of the Specific Relief Act, 1877 for cancellation of the said Gift Deed, was also time-barred. Therefore, and in view of the case of *Dr. Muhammad Javaid Shafi v. Syed Rashid Arshad* (PLD 2015 SC 212), there will be no gain in discussing the validity of the gift under Muslim Law in a time-barred suit. Consequently, this appeal is allowed. The impugned judgment and decree dated 24-03-2015 passed in Suit No.1733/2008 are set-aside and the Said Suit is dismissed. Having concluded so, we need not consider CMA No.1690/2015 for additional evidence. Before parting with this judgment we observe that nothing herein shall be construed to prejudice any arrangement or agreement by or between the parties or their predecessor-in-interest which may have been made subsequent to the Gift Deed dated 14-02-1977.

The appeal stands disposed off along with pending applications.

JUDGE

JUDGE

Karachi
Dated: 23-04-2019