IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE QAZI FAEZ ISA
MR. JUSTICE YAHYA AFRIDI

Civil Appeal No. 1348 of 2014
(Against the judgment dated 27.05.2014 passed by the Lahore High Court, Rawalpindi Bench, Rawalpindi in Civil Revision No. 200 of 2004)

Mst. Kalsoom Begum

...Appellant

Versus

Peran Ditta, etc.

...Respondents

For the appellant:	Mr. Muhammad Siddique Awan, ASC Syed Rifaqat Hussain Shah, AOR
For the respondents:	Mr. Haroon Irshad Janjua, ASC
Date of hearing:	27.01.2022

JUDGMENT

Qazi Faez Isa, J. The High Court had set aside the judgment of the Appellate Court in civil revision and had dismissed the suit filed by the appellant. Therefore, this appeal has been filed as of right under Article 185(2)(d) of the Constitution of the Islamic Republic of Pakistan ('**the Constitution**').

2. The appellant had claimed her right to the inheritance in the property left by her paternal grandfather, Ahmad. The appellant's father, Fazal Elahi, died in the 1971 war, when Fazal Elahi's father (Ahmad) was still alive. At the time the appellant was four years old. Her claim rests on section 4 of the Muslim Family Laws Ordinance, 1961 ('**the Ordinance**'), reproduced hereunder:

> '**Succession**. - (1) In the event of the death of any son or daughter of the *propositus* before the opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stripes receive a share equivalent to the share which such son or daughter, as the case may be, would have received if alive.'

3. The appellant alleged that to defeat her share in the estate of Ahmad her paternal uncles, namely, Muhammad Aslam and Peeran Ditta ('**the uncles**' and/or '**the donees**') prepared a gift document which they got registered on 7 January 1975 (exhibit P1) through which Ahmad was shown to have gifted his entire land, comprising 129 *kanals* and 14 *marlas* ('**the gift deed**' and '**the said land**') to his said two sons. This gift was recorded in the revenue records *vide* said mutation number 997 dated 18 February 1978 ('**the gift mutation**'). The gift deed was executed, and the gift mutation made and entered into the revenue records at a time when the appellant was a minor. The appellant filed the suit in 1997, and sought cancellation of the gift deed and gift mutation and claimed her inheritance in the estate of her grandfather, Ahmad, who died on 28 August 1987.

4. The learned Mr. Muhammad Siddique Awan, representing the appellant, relied on the judgment of the Appellate Court, which he submits accorded with the law and should not have been set aside by the High Court. He also made a number of submissions, including that Ahmad was illiterate and there was a thumb impression on the gift deed which purported to be his but was not established, and that the gift of the said land was not accepted by the donees/uncles; neither the gift deed nor the sub-registrar's register (exhibit D1) state that the gift was accepted by them.

5. The learned Mr. Haroon Irshad Janjua, representing the respondents, relies upon the decision in the case of *Allah Rakha v Federation of Pakistan*[1] to submit that section 4 of the Ordinance was held by the Federal Shariat Court to be repugnant to the injunctions of Islam, and thus could not be relied upon to prefer a

[1] PLD 2000 Federal Shariat Court 1.

claim, as was done by the appellant. He further submits that Muhammad Aslam (DW-4), who was one of the donees, had signed the gift deed which in itself constitutes acceptance of the gift, and that the gift deed states that the possession of the said land was handed over to the donees, which further endorses the acceptance of the gift.

6. We have heard the learned counsel and with their assistance have examined the documents on record. As regards the contention that section 4 of the Ordinance is no longer the law of Pakistan, the referred to decision of the Federal Shariat Court in the case of *Allah Rakha* (which had struck down section 4 of the Ordinance) was challenged in an appeal filed under Article 203F of the Constitution before the Shariat Appellate Bench of this Court, and leave was granted. Since the appeal is pending adjudication the said decision of the Federal Shariat Court (impugned therein) has not come into effect, because the second part to the proviso to clause (2) of Article 203(D) of the Constitution stipulates:

> 'Provided that no such decision shall be deemed to take effect before the expiration of the period within which an appeal therefrom may be preferred to the Supreme Court or, where an appeal has been preferred, before the disposal of such appeal.'

Consequently, section 4 of the Ordinance continues to be the subsistent law of Pakistan, and shall remain so till such time that the Shariat Appellate Bench of the Supreme Court either upholds the decision of the Federal Shariat Court in the *Allah Rakha* case or dismisses the said appeal.

7. We now proceed to consider the learned Mr. Siddique Awan's contention regarding non-acceptance by the donees/uncles of the said gift. To constitute a valid gift, it is settled that three essential ingredients must exist: (1) declaration of gift, (2) acceptance of the gift, and (3) delivery of the possession of the subject of the gift. D. F. Mulla in his celebrated *Principles of Muhammadan Law*[2] sets out these 3 essentials-

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[2] Section 149.

> '149. The three essentials of a gift. - It is essential to the validity of a gift that there should be (1) a declaration of a gift by the donor, (2) an acceptance of the gift, express or implied, by or on behalf of the done, and (3) delivery of possession of the subject of the gift by the donor to the done as mentioned in section 150. If these conditions are complied with the gift is complete.'

Recital in a letter that, '*I have ordered you can have all the house and everything in it*' was held not to contain any of the ingredients necessary for effecting a valid gift.[3] The learned Mr. Awan referred to a line of authorities[4] to submit that it has been consistently held that the *acceptance* of a gift is an essential ingredient to complete a valid gift. And, since the gift of the said land was not accepted by the donees/uncles it remained incomplete, submits learned counsel.

8. The question which needs consideration in this case is whether the presence of one donee at the time of making the gift and to have signed the gift deed constituted acceptance of the gift. As noted (above), the gift deed does not state that the donees, or either of them, had *accepted* the gift of the said land. The gift deed has the purported thumb impression of the donor Ahmad and a donee, Muhammad Aslam is stated to have signed it, but it does not state whether the said donee signed it as a witness or as a donee. If it be assumed that he had signed the gift deed as a donee then whether his signature thereon constitutes *acceptanc*e of the gift needs to be considered.

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[3] *Shamsher Ali Khan v Major General Sher Ali Khan* (1989 SCMR 828, page 831)

[4] *Mir Haji Ali Ahmad Khan Talpur v Government of Sindh* (PLD 1976 Karachi 316, page 335), *Barkat Ali v Muhammad Ismail* (2002 SCMR 1938, page 1942), *Mst. Kalsoom Bibi v Muhammad Arif* (2005 SCMR 135, page 140), *Aurangzeb v Muhammad Jaffar* (2007 SCMR 236, page 245), *Mst. Raheeda Bibi v Mukhtar Ahmad* (2008 SCMR 1384, page 1391), *Mst. Nagina Begum v Mst. Tahzim Akhtar* (2009 SCMR 623, page 627), *Muhammad Ejaz v Mst. Khalida Awan* (2010 SCMR 342, page 347), *Mst. Shafqat Parveen v Muhammad Iftikhar Amjad* (2012 SCMR 1602, page 1605), *Mrs. Khalida Azhar v Viqar Rustam Bakshi* (2018 SCMR 30, page 47), *Fareed v Muhammad Tufail* (2018 SCMR 139, page 141), *Bilal Hussain Shah v Dilawar Shah* (PLD 2018 SC 698, page 702), and *Muhammad Sarwar v Mumtaz Bibi* (2020 SCMR 276, page 279).

9. We are cognisant that *acceptance* may be implied in certain circumstances, for instance, by simply saying *thank you* or by some other act signifying acceptance, such as a nod of the head,[5] but in this case the donees did not allege that they had specifically accepted the gift, nor that they had impliedly accepted it. The written statement, jointly filed by the donees/uncles, does not state that they, or either of them, had explicitly or impliedly accepted the gift. Therefore, evidence could not have been led by them beyond what was pleaded in their written statement. Nonetheless, we read their testimonies. Peeran Ditta (DW-1) did not testify that he had accepted the gift and Mohammad Aslam (DW-4) testified about the receipt of a gift from his mother (*walida*) but did not state that he had *accepted* the gift from his father. Therefore, it cannot be held that the gift of the said land was accepted by either of them. And, the mere fact that they were in possession of the said land is of no significance or consequence since they were the purported donor's sons, and as such tilling the land for him.

10. There is yet another aspect to this case. The purported gift was by a father in favour of his sons, who would have inherited the said land in its entirety from their father in the absence of section 4 of the Ordinance. Therefore, the only reason why Ahmad would gift the said land to his sons was to deprive the minor daughter of his martyred predeceased son from receiving any share in his estate, which she would on account of section 4 of the Ordinance. If this indeed was the intent of the appellant's grandfather, the donees had not established it.

11. The burden of proof to establish the gift and its validity, lay upon the donees/uncles as they were its beneficiaries. They also stood in a position of *active confidence*[6] to their elderly father. The sons claimed that their father had gifted to them the said land and had done so by affixing his thumb impression on the gift deed,

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[5] *Ali Ahmad v Government of Sind* (PLD 1976 Karachi 316, page 335), *Abdullah v Abdul Aziz* (1987 SCMR 1403, page 1407 B), *Nagina Begum v. Tahzim Akhtar* (2009 SCMR 623, page 627 D), *Khalid Hussain v Nazir Ahmad* (2021 SCMR 1986, page 1993 G).
[6] Article 127 of the Qanun-e-Shahadat, 1984

which was not accepted by the learned Judge of the Appellate Court. However, the learned Judge of the High Court set aside the judgment of the Appellate Court and did so by shifting the burden of proof onto the appellant, by holding that, as she had alleged that she had been defrauded of her share in the inheritance by the uncles (defendants-respondents), it was for her to establish such fraud. The learned Judge was also impressed by the purported belated filing of the suit, without appreciating that if the gift deed and the gift mutation could not be sustained then the appellant would be deemed to have immediately become the owner[7] of her share in the estate of Ahmad on his death, as prescribed by section 4 of the Ordinance. As noted above, the donees/uncles had failed to establish or sustain the said gift. There was also the additional factor (discussed above) that they had not *accepted* the said gift. Consequently, on the death of Ahmad, his legal heirs would inherit his estate, including his granddaughter (the appellant herein) as per section 4 of the Ordinance.

12. Therefore, for the reasons mentioned above this appeal is allowed and the impugned judgment of the learned Judge of the High Court is set aside and the judgment of the learned Judge of the Appellate Court is restored. However, since the High Court had set aside the judgment of the Appellate Court, there shall be no order as to costs.

Judge

Judge

Islamabad
27.01.2022
Approved for reporting.
Arif

[7] *Maqbool Ahmad v Hakoomat-e-Pakistan* (1991 SCMR 2063) [Shariat Appellate Bench] and *Muhammad Iqbal v Allah Bachaya* (2005 SCMR 1447, at page 1450 A).