Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

WRIT PETITION NO. 449 OF 2021

Mst. Asima Bibi and another

Vs

Mst. Naeema Akhtar and others

PETITIONER BY:	Dr. Adnan Khan, Advocate for petitioners in W.P No. 449 and 450 of 2022. Mr. Wahid Iqbal, Advocate for Petitioners in W.P No. 375 to 378 of 2021. Mr. Sajjad Muhammad Durrani, Advocate for petitioner in W.P No. 269/2021.
RESPONDENTS BY:	Mr. Ghulam Qasim Bhatti, Advocate for respondents (Khalid Hameed and Rabia Khalid) in W.P No. 269, 375, 376,377, 378, 449 and 450 of 2021. Ch. Muhammad Asif Khan, Advocate for CDA in W.P No. 269, 449 and 450 of 2021. Mr. Saqib Ali Mumtaz, Advocate for CDA in W.P No. 377/2021. Mr. Iqbal Hassan, Advocate for CDA in W.P No. 375, 376 and 378 of 2021.
DATE OF DECISION**:**	01.08.2022.

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BABAR SATTAR, J.- Through this judgment this Court will decide Writ Petitions listed as Annexure-A.

2. The petitioners have impugned the judgment and decree passed by the learned Additional District Court dated 09.12.2020 pursuant to which the judgment and decree passed by the learned Civil Court dated 23.05.2019 was set-aside.

3. The petitioners in Writ Petitions No. 375, 376, 377, 378, 449 and 450 of 2021 have impugned the judgment and decree

passed in appeal and petitioner in Writ Petition No 269 of 2021 has impugned the judgment and decree passed by the learned appellate Court only to the extent of award of rent.

4. The Petitioners in Writ Petitions No. 375, 376, 377, 378, 449 and 450 of 2021, who are all daughters of late Muhammad Asif Khan will be addressed as "Petitioners" and the petitioner, Amina Shahid, in Writ Petition No. 269 of 2021 as well as respondents, including Khalid Hamid, Shahid Hamid, Rabia Khalid, Farooq Khan and Robina Akhtar will be addressed as "Respondents".

5. The background facts are that Khalid Hamid, Shahid Hamid, Farooq Khan, Naeema Akhtar, Asima Bibi, Yasmin Akhtar, Robina Akhtar and Nazneen are all sons and daughters of late Muhammad Asif Khan and late Ameer Begum. Rabia Khalid is the wife of Khalid Hamid and Amina Shahid is the wife of Shahid Hamid. Rabia Khalid and Amina Shahid are also sisters. The subject-matter of the petitions relates to the respective rights of sons and daughters of late Muhammad Asif Khan and late Ameer Begum and rights of Rabia Khalid and Amina Shahid in the property left behind by deceased Muhammad Asif Khan and deceased Ameer Begum in their capacity as daughters-in-law. There is no dispute with regard to the relationship between the parties and their relationship with the deceased Muhammad Asif Khan and deceased Ameer Begum. The dispute is rooted in the fact that Rabia Khalid and Amina Shahid claimed 1/3rd shares each in House No. 3A, street No. 56, F-8/4 Islamabad **(F-8 House)** and "sharai share" equal to Khalid and Shahid in House No. 55, Street No. 39, F-10/4, Islamabad **(F-10 House).** The F-8

House is in the name of deceased Muhammad Asif Khan and the F-10 House is in the name of deceased Ameer Begum.

6. These petitions have emerged from a suit for declaration, possession through partition, permanent and mandatory injunction filed by Mst. Naeema Akhtar, which was contested by Khalid Hamid and his wife Rabia Khalid as well as by Shahid Hamid and his wife Amina Shahid on the basis that Rabia Khalid and Amina Shahid were granted shares in the F-8 House and the F-10 House as part of their dower as mentioned in their *nikahnamas* dated 29.04.1985 and that their respective shares in such properties ought to be excluded before shares of sons and daughters of deceased Muhammad Asif Khan and deceased Ameer Begum can be determined.

7. In judgment dated 23.05.2019, the learned Civil Court decreed the suit and found that Rabia Khalid and Amina Shahid had failed to establish that they were entitled to claim 1/3rd share each as dower in the F-8 House and any part of the F-10 House owned by their parents-in-law. The learned Civil Court also found that the plaintiff Mst. Naeem Akhtar was entitled to recover rent from the year 2000. The learned Additional District Court set-aside the judgment and decree passed by the learned Civil Court. It found that Rabia Khalid and Amina Shahid were owners of 1/3rd share each in the F-8 House and were owners of "sharai share" equal to that of their husbands in the F-10 House by virtue of such shares having been granted to them as part of their dower. It further found that Naeema Akhtar had failed to establish that the F-8 House was on rent and consequently there was no entitlement for rent in relation to such property. But that the F-10

House was on rent and Farooq and Amina Shahid who were in possession of such property were obliged to pay the rent from April, 2013, calculated on the basis of rent of Rs.120,000/- per month.

8. Learned counsels for the Petitioners submitted that Rabia Khalid and Amina Shahid had no legal interest in the F-8 House and the F-10 House, as under the Islamic law the obligation to pay dower was that of the husband's and the said Respondents could not claim ownership in the property of the Petitioners' deceased parents. They submitted that *nikahnamas* on the basis of which Rabia Khalid and Amina Shahid claimed ownership interest in the F-8 House and the F-10 House had not been registered under the provisions of Registration Act, 1908, and could not be used to claim title to the properties. They further submitted that the *nikahnamas* and their content had also not been proved in accordance with Qanun-e-Shahadat Order, 1984 **(QSO)**, as the Respondents had not produced Nikah Registrar or the witnesses of *nikahnamas*. They submitted that the learned Additional District Court had misapplied the law in relation to burden of proof in making the presumption of legality and proof of content of *nikahnama* on the basis that presumption of genuineness regarding signatures and content of the document would attach to *nikahnama* being 30-year old document. The impugned judgment passed by the learned Additional District Court was liable to be set-aside and the judgment passed by the learned Civil Court ought to be restored.

9. Respondents, Farooq khan and Robina Akhtar, did not appear before the Court and were proceeded against ex-parte.

Learned counsel for the Respondents (excluding respondents Farooq Khan and Robina Akhtar) supported the impugned judgment and decree passed by the learned Additional District Court to the extent of declaration of shares in the F-8 House and the F-10 House. But opposed the part of the judgment that had recognized entitlement of daughters of the deceased Muhammad Asif Khan and deceased Ameer Begum to recover rent in relation to the F-10 House. The learned counsels for the Respondents submitted that Rabia Khalid and Amina Shahid had been duly granted their shares in the F-8 House and the F-10 House by their parents-in-law, as reflected in their *nikahnamas,* and the learned Additional District Court had correctly recognized such ownership rights. They submitted that the august Supreme Court had held that a gift in the form of dower as consideration for marriage by parents-in-law was legally recognized and enforceable. They submitted that the learned Additional District Court had correctly appreciated that execution and content of the *nikahnamas* stood proved by virtue of them being 30-year old documents in view of Articles 92 and 100 of QSO. And the learned Additional District Court had also correctly appreciated the law in relation to burden of proof which had to be discharged by the Petitioners to establish that *nikahnamas* were forged, which they had failed to do. In relation to the entitlement of rent with regard to the F-10 House it was argued that it had not been established in accordance with law that Farooq Khan and Amina Shahid had received such rent and the finding of the Additional District Court in relation to the entitlement to rent was therefore liable to be set-aside.

10. The theory on the basis of which the learned Additional District Court passed the impugned judgment rests on various planks. First is that where a father-in-law or mother-in-law vests his/her property in his/her daughter-in-law as part of her dower such declaration is to be treated as a declaration of gift and is enforceable. Second, the declaration of gift in lieu of dower can be a basis for transfer of immovable property, which need not be registered in accordance with the provisions of the Registration Act, 1908 and Transfer of Property Act, 1882 for title to vest in the daughter-in-law. Three, where the property granted in lieu of dower is that of a parent-in-law and not that of the husband, the parent-in-law is to be treated as a promisor and the promise made in relation to his/her property is enforceable under the provisions of the Contract Act, 1872. And four, *nikahnama* which relates to the conveyance of immovable property from a parent-in-law to a daughter-in-law is a document recognized and registered under the Muslim Family Laws Ordinance, 1961 **(MFLO)** and under section 5 of the MFLO the presumption of authenticity and correctness is attached to such document.

11. Let us consider these planks on which the opinion of learned Additional District Court rests. A marriage contract within the Islamic jurisprudence is a contract between husband and wife and the rights and obligations that it creates are inter se the husband and the wife. The marriage contract does not become a contract that bounds third parties merely because they have witnessed such contract and inscribed their signatures thereupon. The exception to this rule under the Islamic law is that the father is bound to discharge obligations of his son who is a minor. In the

present case at the time when Khalid Hamid and Shahid Hamid were married on 29.04.1985 they had both attained the age of majority.

12. Our constitutional Courts have, however, recognized that in our social and cultural setup parents of the bridegroom often undertake to discharge the obligation of the bridegroom to pay the dower amount, which obligation can also take the form of transfer of immovable property in lieu of dower amount. And when that happens the obligation undertaken by father of the bridegroom is enforceable against him by the daughter-in-law to whom the dower has been promised. The courts have regarded such promise as Hiba-bil-ewaz and have held that in case where Hiba-bil-ewaz was being made by father to his daughter or father-in-law to his daughter-in-law the same was enforceable in law. And in such case some conditions re establishing oral gift as valid, including the transfer of possession of such gift, was not a requirement to be strictly enforced. (See for example ***Inayat Ullah Vs. Mst. Parveen Akhtar (1989 SCMR 1871)***). The august Supreme Court in ***Kaniz Bibi Vs. Sher Muhammad (PLD 1991 SC 466)*** held that strict proof of transfer of physical possession could not be insisted upon in case of transfer of property by father-in-law to a daughter-in-law in view of our social realities where a man, including husband and father-in-law often took care of the properties of wife, daughters and daughter-in-law.

13. The same principle was reiterated in ***Mst. Mehr Bhari Vs. Bhag Bhari (1991 SCMR 897)*** by holding that the relationship of father-in-law to the property transferred by him to

a daughter-in-law would be that of fiduciary and in certain circumstances involving gift of property from a father-in-law to a daughter-in-law as Hiba-bil-ewaz, the revocation of complete control over the property as evidence of handing over possession of the corpus of gift would not be insisted upon. The august Supreme Court in ***Kaniz Bibi*** further noted that the possession had in fact been handed over by father-in-law to the daughter-in-law due to such transfer being reflected in the revenue record through mutation.

14. Likewise, in ***Mst. Mehr Bhari*** the fact pattern was that a father-in-law executed a gift deed in favour of his daughter-in-law, which was duly registered stating that he had alienated the agricultural land to his daughter-in-law. And on the basis of such gift deed the gift mutation was entered and attested. The marriage lasted three and a half year and after the mutation was duly sanctioned the father-in-law instituted a suit challenging the gift deed executed by him on the basis that it was not a valid gift as possession of the agricultural property was not handed over to the daughter-in-law. In those circumstances the august Supreme Court held that lack of strict proof of physical possession of agricultural property could not be made basis to defeat the gift made by father-in-law to the daughter-in-law.

15. Most of the other cases in our jurisdiction wherein the right of daughter-in-law to seek the benefit of Hiba-bil-ewaz and the property conferred on the daughter-in-law by a father-in-law emerged in circumstances where father-in-law attempted to resile from a gift and refused its benefit to the daughter-in-law when the marriage had broken down and the entitlement of the

wife/bride to the gift was challenged on the basis that it was not made by the bridegroom and the possession was not handed over to the daughter-in-law. In such circumstances the courts found that the gift made to a woman at the time of her wedding by father of the bridegroom could not be undone on the basis that the gift was made by father-in-law and not bridegroom himself or that the physical possession of the immovable property that constituted the gift was not handed over to the bride. In such circumstances the courts found that the making of gift was established and the maker of such gift could not resile from his promise to the extent that a father-in-law who made gift remained in physical possession of the property would be treated as retaining such possession for the benefit of woman/ bride/daughter-in-law.

16. In the present case equities demand striking a different balance. The facts here are that two brothers, Khalid Hamid and Shahid Hamid, were married with two sisters, Rabia Khalid and Amina Shahid, who are claiming that their deceased parents-in-law gifted them significant shares in the properties owned by such deceased parents by virtue of dower description in columns 15 and 16 of their *nikahnamas* relating to dower. The deceased parents are not around anymore to either confirm or deny the grant of benefit of the alleged gift to their daughters-in-law. It is the two brothers and their wives who are claiming significant shares in two properties left behind by their deceased parents, the consequence of which would be to squeeze the daughters of the deceased Muhammad Asif Khan and deceased Amir Begum from the shares they would otherwise inherit under Islamic law.

In this context, the facts of the case are close to the circumstances in which brothers deny sisters their due shares in the inherited property after the demise of their parents as opposed to the fact pattern where a daughter-in-law is being squeezed out of her right to dower by a father-in-law or by her husband after the breakdown of a marriage.

17. Let us consider the facts and evidence in relation thereto. It is not denied that the F-8 House and the F-10 House are in the names of deceased Muhammad Asif Khan and deceased Ameer Begum, respectively. Both deceased Asif khan and deceased Ameer Begum passed away in the year 2000. The Respondents claimed that they were given shares in properties in question when their marriages were solemnized. But 15-years after the execution of *nikahnamas* pursuant to which Rabia Khalid and Amina Shahid claimed share in the F-8 House and the F-10 House neither they nor their husbands made an effort to have the properties transferred in their names in the CDA record. It is only when Mst. Naeema Akhtar, as daughter of the deceased Muhammad Asif Khan and deceased Ameer Begum, claimed her share in the inheritance of parents' properties, that the entitlement of Rabia Khalid and Amina Shahid was setup by their husbands as a defence to the distribution of shares in the properties in accordance with Mohammedan Law on the basis that Muhammad Asif Khan deceased and Ameer Begum deceased had gifted a major part of the F-8 House and the F-10 House to their daughters-in-law in lieu of dower.

18. The title document on the basis of which Rabia Khalid and Amina Shahid claim their right in the F-8 House and the F-10

House are identical *nikahnamas* executed on 29.04.1985. They claim that it is mentioned in relevant columns of *nikahnama*s with regard to the dower that 1/3rd share of the F-8 House is to be given to each of Rabia Khalid and Amina Shahid and the sharai share in the F-10 House is also to be given to each of Rabia Khalid and Amina Shahid. The *Nikahnamas* are obviously contracts between Khalid Hamid and Rabia Khalid on the one hand and Shahid Hamid and Amina Shahid on the other. But the claim of the two daughters-in-law rests on the signatures of parents-in-law next to line item that mentions the dower amount to be paid. The claims is that the signatures of Muhammad Asif Khan and Ameer Begum are inscribed in the margin of *nikahnamas* and the presence of such signatures transform the parents-in-law to be promisor and sureties for transfer of such shares, which create a legal title in favour of Rabia Khalid and Amina Shahid enforceable against successors-in-interest of the deceased Muhammad Asif Khan and deceased Ameer Begum.

19. The following questions arise here. One, whether the execution of signatures by deceased Muhammad Asif Khan and Ameer Begum transform *nikahnamas* into an agreement between the deceased and their daughters-in-law? Two, were the Respondents able to prove that the *nikahnamas* were signed by the deceased Muhammad Asif Khan and deceased Ameer Begum? And three, if the signatures of deceased Muhammad Asif Khan and deceased Ameer Begum are found to have been proved, would they satisfy the requirement of a valid gift made by the deceased Muhammad Asif Khan and deceased Ameer Begum in

favour of their daughters-in-law, which is enforceable against the children of the deceased?

20. The nikahs admittedly took place in Kohat on 29.04.1985. But copies or originals of the nikahnama was not adduced in evidence through Record Keeper of Nikah Register. The *nikahnamas* were adduced by the Respondents themselves. DW-3, Amina Shahid, during her testimony on 06.10.2018 admitted that her nikah was not registered in Kohat. Rabia Khalid, DW-4, in her testimony on the same date i.e. 06.10.2018, stated that her nikah was registered in Kohat. *Nikahnamas* were deemed to have been proven by the Respondents as held by the learned Additional District Court on the basis that they were public documents which were thirty years old and could not be challenged. Article 85 of QSO defines public records kept in Pakistan of private documents as public documents. *Nikahnama* is one such document, as its registration under section 5 of the MFLO makes it a public document. Pursuant to Article 87, 88 and 89 of QSO a public document can be proved by production of original record or a certified copy of record by the public officer having custody of such document.

21. In the instant case no public record of *nikahnamas* in question was summoned and *nikahnamas* adduced in evidence were those that were in the custody of the Respondents. While the public document i.e. a registered *nikahnama* was never proved in accordance with requirements of QSO, the privately held counterpart of the *nikahnama* was accorded the sanctity of a public document. The learned Additional District Court did not appreciate this, and further that the law in relation to

presumption as to the documents which are thirty years old applies where such document is not disputed or denied by any party. It has been held by the august Supreme Court that where the execution of a document is denied, the onus was on the party who produced the same to prove the authenticity of such document (see for example ***Nazir Ahmed Vs. Karim Bakhsh (2017 SCMR 1934)*** and ***Allah Ditta Vs. Aimna Bibi 2011 SCMR 1483)***). *Nikahnamas* were thus to be proved by procuring the original or certified copies of the same from the Nikhah Register. The Respondents have failed to establish where the *nikahnamas* were registered under section 5 of the MFLO. The learned Additional District Court took into account the fact that *nikahnamas* had been stamped by Consulate General of Pakistan in Dubai and it had been admitted that Shahid Hamid and Khalid Hamid were in Dubai and their deceased father also stayed in Dubai. But the learned Additional District Judge did not appreciate that such fact that it had nothing to do with the proof of *nikahnamas* that were executed on 29.04.1985. The attestation of the *nikahnamas* in the Consulate General of Pakistan in Dubai twenty-days after the execution of *nikahnamas* did not constitute proof of their execution or signatures of deceased Muhammad Asif Khan and Ameer Begum, which were purportedly inscribed in Kohat and not in Dubai. The seal of the authorized officer and the Consulate General of Pakistan subsequently is therefore of no use to the Respondents to prove the validity and authenticity of the signatures of deceased Muhammad Asif Khan and deceased Ameer Begum in the *nikahanmas*. The Respondents also did not produce any witness to the *nikhah* or the Nikah Registrar.

22. There is nothing on record except the testimonies of Mr. and Mrs. Khalid Hamid and Mr. and Mrs. Shahid Hamid to prove that the *nikahnamas* were signed by deceased Muhammad Asif Khan and deceased Ameer Begum. The learned Civil Court correctly appreciated the evidence adduced before it and concluded that signatures of deceased Muhammad Asif Khan and deceased Ameer Begum had not been proved. The learned Additional District Court misapplied the law by making an assumption regarding the authenticity of signatures of Muhammad Asif Khan and Ameer Begum based on the statements made before the learned Civil Court by the Respondents. In doing so the learned appellate court misapplied itself with regard to the provisions of Article 84 of QSO where a court can itself compare signatures on a document with another set of signatures which had been provided to the court. The assumption that as the deceased parents were present at the time of wedding of their sons they must have signed the *nikahnamas* was not based on balance of probabilities but on conjecture.

23. The second issue is even if the *nikahnamas* were signed by deceased Muhammad Asif Khan and deceased Ameer Begum, could signatures on the margin of *nikahnamas* be deemed as an execution of a valid gift by them in favour of their daughters-in-laws. As has been stated above nikah is a contract between bride and bridegroom and not the bride and her parents-in-law. The F-8 House and the F-10 House are admittedly in the names of deceased Asif Khan and deceased Ameer Begum, respectively, and could not have been gifted to Rabia Khalid and Amina Shahid by their husbands. There is no independent gift deed executed by

deceased Muhammad Asif Khan and deceased Ameer Begum in favour of Rabia Khalid and Amina Shahid. The claim of Rabia Khalid and Amina Shahid is that signatures of deceased Muhammad Asif Khan and deceased Ameer Begum in the margin of their *nikahnamas* ought to be treated as a declaration of gift of immovable property in lieu of dower. In order for a gift or contract to be legally given effect there must be clear expression with regard to the gift. But there is no such language in the line item that describes the properties in the *nikahnamas* that supports the claim of a purported gift by the deceased Asif Khan and deceased Ameer Begum.

24. The claim in relation to the F-10 House is that Amina Shahid and Rabia Khalid are to be given their "sharai share" in such property. Given that the property had not belonged to their husbands, they had no "sharai" or Islamic law based share in such property. This aspect of the matter was addressed by the learned Civil Court and observed that the claim to such gift could not be given effect. Even the gift were not treated as a gift pursuant to a written deed, but as an oral gift, nothing has been adduced in evidence by Rabia Khalid and Amina Shahid to prove such oral gift or to prove the acceptance of any offer and the transfer of immovable property in order to be treated as valid Mohammedan gift.

25. Amina Shahid and Rabia Khalid both testified as DW-3 and DW-4, respectively and confirmed the fact that deceased Muhammad Asif Khan and deceased Ameer Begum were in possession of the F-8 House and the F-10 House till such time that they were alive. It is evident that there was no question of

handing over possession of the properties in question to Rabia Khalid and Amina Shahid up until 2000. Khalid Hamid, Shahid Hamid, Rabia Khalid and Amina Shahid as DW-1 to DW-4 admitted that Khalid Hamid and Shahid Hamid continued to live in Dubai. And consequently it has not been established that Mrs. and Mrs. Khalid Hamid and Mr. and Mrs. Shahid Hamid were living in Islamabad and were in constructive possession of the F-8 and the F-10 Houses. The law in relation to deemed transfer of possession by a father-in-law to a daughter-in-law on the basis of their existing fiduciary relationship is not applicable in the present case. In the instant case there is absolutely nothing on record to establish that the deceased Muhammad Asif Khan and the deceased Ameer Begum executed any deed transferring their properties to Rabia Khalid and Amina Shahid during their life time or handing over possession of such properties.

26. The law laid down by the august Supreme Court which has been referred above in every case where the existence of fiduciary relationship and the lack of strict enforcement of the principles of transfer of possession was applied by the courts, the very fact of a gift having been made by father-in-law to daughter-in-law was not denied. In the instant case other than the *nikahnamas,* which were not independently proved (and were only backed by the testimonies of beneficiaries Rabia Khalid and Amina Shahid and their husbands), there was nothing on record to establish that the properties in question were gifted by deceased Muhammad Asif Khan and deceased Ameer Begum to their daughters-in-law. Consequently all of the law relied upon by the learned counsel for the Respondents regarding rights of the

Respondents Rabia Khalid and Amina Shahid to ownership rights in the F-8 House and the F-10 House on the basis of Mohammedan gift is distinguishable.

27. In the written statement filed by the Respondents before the learned Civil Court the position taken by Mr. and Mrs. Khalid Hamid on the one hand and Mr. and Mrs. Shahid Hamid on the other, was that shares in the F-10 House were gifted by deceased Ameer Begum because the property in question had been acquired by her as benami property and the said property was then given by deceased Ameer Begum to her daughters-in-law through *nikahnamas* in lieu of dower. No evidence has been adduced by the Respondents in support of such contention and a claim of entitlement to property for it being benami is altogether different to a claim based on the property being gifted as Hiba-bil-ewaz. It appears that the Respondents have taken contradictory position in the written statement and the claim asserted on the basis of right to property flowing from Mohammedan gift made by their parents-in-law in lieu of dower. Learned Additional District Court also did not appreciate that in view of Articles 117 and 118 of QSO, the burden of proof rests with the party that seeks to establish the existence of facts on the basis of which it asserts its claim.

28. The suit before the learned Civil Court was that of partition of inherited properties among successors-in-interest of deceased Muhammad Asif Khan and deceased Ameer Begum. It was thus Mrs. Rabia Khalid and Mrs. Amina Shahid to discharge the burden that their parents-in-law made a valid gift as Hiba-bil-ewaz during their life time and to prove that the ingredients of a

valid Mohammedan gift were satisfied. It was the Respondents upon whom the burden of proof for establishing such facts rested. It was not for the Petitioners to disprove such gift transaction. The Respondents failed to discharge the burden with regard to proof of the content of *nikhanamas*, the proof of execution of signatures by deceased Muhammad Asif Khan and deceased Ameer Begum on such *nikahnamas,* the proof of *nikahnamas* constituting a valid gift by deceased Muhammad Asif Khan and deceased Ameer Begum to Rabia Khalid and Amina Shahid, and the proof of possession of purported gift having been handed over to Rabia Khalid and Amina Shahid during their life time. Consequently, the learned Civil Court had correctly decreed the suit and declared that Rabia Khalid and Amina Shahid had no entitlement of shares in the F-8 House and the F-10 House.

29. It was held by the learned Peshawar High Court in ***Umar Bakhsh Vs. Mst. Zamrut Jan (PLD 1973 Peshawar 63)*** that a dower deed creating interest in immovable property valuing more than Rs.100 was compulsorily registerable under section 17 of the Registration Act, 1908, and non-registration would have consequences under section 49 of the Registration Act. In ***Muhammad Anwar Khan Vs. Sabia Khanam (PLD 2010 Lahore 119)*** the learned Lahore High Court held that a father agreeing to give his property to a daughter-in-law is an exception to the rule that the husband can only give his property to his wife as dower. In that case the father-in-law had testified to being at the nikah and not objecting to grant of property as dower through *nikahnama* while being aware of it. In ***Maj. Riffat Nawaz Vs. Mst. Tahira (2008 CLC 803)*** a partition suit was decreed on the

basis of a claim by a woman that her father-in-law had granted her such property as part of dower. In ***Mst. Razia Begum Vs. Jang Baz*** ***(2012 CLC 105)*** the learned Lahore High Court held that a daughter-in-law could file a suit for recovery for dower against a father-in-law who has stood surety for payment of dower, while relying on ***Mst. Shehnaz Akhtar Vs. Fida Hussain (2007 CLC 1517)***. Similarly in ***Mst. Shumaila Bibi Vs. Zahir Khan*** ***(PLD 2015 Peshawar 182)*** the learned Peshawar High Court held that where "a father consented to give his daughter-in-law specific property or portion of the property as her share in lieu of dower", and the father assumed direct liability and stood surety for his son, which consent was established by his presence at the nikah, the woman entitled to dower would have a claim against the father-in-law.

30. This Court in ***Zohra Begum Vs. Fazal-e-Rab Pirzada (2015 YLR 2602)*** held that a Mehramnama "could not be termed as a document transferring title in favour of Zohra Begum because under section 17 of Registration Act, 1908, any document that transfers title with respect to property has to be compulsorily registered and if the same is not registered then under section 49 of the Registration Act, 1908 no right is created with respect to transaction." It was further held that the beneficiary claiming an interest in property had to prove the document on which the claim rested in accordance with section 17 of QSO. The dicta in ***Zohra Begum*** is binding on this Court.

31. A perusal of the judgments in ***Razia Begum*** and ***Shumaila Bibi*** reflect that the learned Lahore High Court and Peshawar High Court, respectively, have not clearly stated the

basis of which requirements of Registration Act are to be excused where a claim to property is based on a gift in lieu of dower made by the father-in-law to daughter-in-law, given that the *nikahnama* is not a registered document for purposes of Registration Act, 1908. Further, it is unclear whether claim to title in such case rests on the *nikahnama* being deemed to be a gift deed issued by the father-in-law or by virtue of the father-in-law being treated as a surety by virtue of him signing the *nikahnama* or simply being present at the nikah ceremony and his salience in face of the content of the *nikahnama* mentioning his property as gift being deemed proof of consent.

32. One possible legal argument with regard to transfer of immovable property through a *nikahnama* by a father-in-law to a daughter-in-law is that the father-in-law has stood surety to the obligation undertaken by his son in lieu of dower and the *nikahnama* is to be treated as a surety agreement. Let us consider this argument. The *nikahnama* itself is an agreement between the husband and the wife. The obligation to pay dower is an obligation of the husband. Merely because against line items 13, 14, 15 and 16 (that relate to the quantum of dower and its form), it is mentioned that the dower has acquired the form of property owned by father-in-law or mother-in-law, can a *nikahnama* be deemed to be a surety agreement? Section 126 of the Contract Act, 1872 **("Contract Act")** defines a contract of guarantee or surety that states that *"a contract of guarantee is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the surety: the person in respect of whose*

default the guarantee is given is called the principal debtor, and the person to whom the guarantee is given is called the creditor. A guarantee may be either oral or written." In view of the provisions of section 128 of the Contract Act*,* the liability of the surety is co-extensive with that of the principal debtor*.* In the event that the *nikahnama* in which the property in lieu of dower is that of a parent-in-law of the bride and the *nikahnama* is to be deemed as a contract of guarantee, the *nikahnama* itself would need to be regarded as an agreement between a parent-in-law and the bride. It is however hard to read the constituent elements of a contract between a parent-in-law and a bride within the *nikahnama,* which is essentially a contract between a bride and the bridegroom, merely because the parent-in-law is present at the time of nikah or has otherwise signed the *nikahnama* as a witness. The *nikahnama,* in the event that it is registered pursuant to section 5 of the MFLO, would be treated as a public document and presumption of truth may attach to its content. But it would still be for the beneficiary of such document to prove that the *nikahnama* is the manifestation of an oral or written contract of guarantee between parent-in-law and the bride, to the extent that bride claims immovable property pursuant to such *nikahnama* which is owned by the parent-in-law.

33. It is also unclear that how the *nikahnama* in and of itself can be regarded as a registered title document. The Transfer of Property Act, 1882, contains a whole host of provisions that relate to transfer of immovable property and it is only section 53A that creates an exception to the requirement that transfer of property is to be affected through a registered document (i.e. where a

transferee in part-performance of the written contract has taken possession of the property). But in such case it is deemed that third party interested in the property after having performed due diligence would come to know that the property is in the possession of such transferee. Section 123 of the Transfer of Property Act, 1882, likewise provides that in case of gift of immovable property the transfer must be affected by a registered instrument. The Registration Act, 1908, under section 17(1) makes it mandatory for an instrument transferring immovable property of a value greater than Rs.100 to be compulsorily registered. Section 17(2) then provides exceptions to the rule but does not exclude within such exceptions the transfer of property through a *nikahnama* in lieu of dower. The Registration Act details the manner in which registration of an instrument for transfer of immovable property is to be registered. Section 28 of the Registration Act provides that the place of registration of property must be the office of Sub-Registrar within whose sub-district the whole or some portion of the property to which such document relates is situated. Such registration is pursuant to payment of fees as prescribed by the Provincial Government under section 78 of the Registration Act. Likewise, section 49 of the Registration Act provides that the document that needs to be compulsorily registered, including an agreement seeking to transfer of immovable property, if not registered creates no rights or title or interest in immovable property.

34. Let us compare these provisions with the provisions of Muslim Family Law Ordinance, 1961. Pursuant to section 5(1) of the MFLO every marriage solemnized under Muslim law is to be

registered. Such registration is undertaken by a Nikah Registrar appointed for such purpose who then maintains record of the *nikahnama* in the form prescribed. What is registered with the Nikah Registrar is the *nikahnama* as the document bearing testament that the marriage has been solemnized between two individuals under Muslim law. The Nikah Registrar appointed pursuant to the provisions of MFLO cannot be confused with a Sub-Registrar appointed for purposes of the Registration Act, 1908. The purpose of provisions of Transfer of Property Act, 1882, and the Registration Act, 1908, is to create certainty with regard to ownership and title of the property and to prevent any fraudulent transfers and enable the prospective buyers to undertake diligences and confirm the title of the property sought to be purchased. To hold that registration of a *nikahnama* will automatically create title in relation to immovable property mentioned in the *nikahnama* in lieu of dower and such *nikahnama* need not be registered in compliance with the provisions of the Transfer of Property Act, 1882, and the Registration Act, 1908, would amount to saying that the provisions of MFLO have implicitly overridden and repealed the mandatory provisions of the Registration Act. Such does not seem to be the legislative intent behind promulgation of the MFLO, which is a specialized law promulgated to regulate matters relating to marriage and family as applicable to Muslims and not to regulate property transactions.

35. The law laid down by the august Supreme Court in ***Ashiq Ali Vs. Mst. Zamir Fatima (PLD 2004 SC 10)*** was cited before the Court as a precedent for the proposition that *nikahnama*

operated as a title document. In the said matter the property in question was that of the husband who had gifted the property to his wife in lieu of dower. The august Supreme Court did not declare the *nikahnama* as a title document. The apex Court in the judgment noted that the house, that formed the subject-matter of the suit filed by the wife, was transferred to her by her husband through a registered deed and the factum of such transfer of property in lieu of dower was also recorded in the *nikahnama.* When the husband subsequently sought to sell the already gifted property to a third party, the Court found that the property had already been transferred by the husband to the wife through a registered deed and such transfer was also supported by the content of the *nikahnama* and the possession had also been delivered by the husband to the wife. And consequently the husband had no remaining title or interest in the property which could be sold out to a third property. ***Ashiq Ali*** is therefore not a precedent for the proposition that *nikahnama* can also double as a title document or that by virtue of being registered as a *nikahnama* pursuant to section 5 of the MFLO it can be deemed to be a registered deed for transfer of immovable property for purposes of section 17 of the Registration Act, 1908.

36. In the instant case it has already been held in para 15 above that the equity in the matter does not support exempting the strict application of provisions of the Registration Act, 1908, and the Transfer of Property Act, 1882. Principles of equity evolved within the common law whereby courts of equity refused strict application of black letter law where such application was found to be perpetuating unfairness. It is questionable whether in

exercise of equitable powers, a court of law can exempt the application of the provisions of section 17 of the Registration Act or hold that the registration of *nikahnama* for purposes of section 5(1) of the MFLO satisfies the requirement of registration under section 17 of the Registration Act, given that registration of the former is not before the Sub-Registrar appointed under the Registration Act in the relevant district where the property is situated or subject to payment of prescribed registration fee. Such interpretation does not seem to be in consonance with either the literal or purposive interpretation of provisions of MFLO read together with provisions of the Registration Act, 1908, and the Transfer of Property Act, 1882. Such interpretation also does not find support in a public policy perspective. If the object of mandatory requirements of the Registration Act is to create certainty with regard to the title of the immovable property, holding that the registration of *nikahnama,* which mentions payment of dower in the form of immovable property, is to be treated as the registration of a deed for transfer of immovable property, the purpose of maintaining a registry in relation to immovable property would stand defeated. There would then be no single registry that can be inspected to determine the title and ownership of the property in question. Much of the litigation pending before the courts in relation to property is due to lack of a credible title system across Pakistan. Such problem need not be accentuated by declaring that a Nikah Registrar is akin to a Sub-Registrar appointed for purposes of Registration Act, 1908, and Nikah registry is also a repository of title documents for immovable property.

37. In any event all that has been held by the august Supreme Court in ***Ashiq Ali*** is that presumption of truth is attached to the *nikahnama* that is registered. It would still be for the beneficiary of such *nikahanma* to prove that the *nikahnama* constitutes either a gift of immovable property, whether oral or written, or it constitutes an agreement of guarantee by a person other than the bridegroom who has assumed the responsibility of acting as a surety to discharge the bridegroom's obligation to pay dower to his bride. A definitive judgment in relation to the aforementioned discussion can be rendered in a matter where a daughter-in-law seeks to enforce a claim to property owned by parent-in-law either as a donor of gift or as a surety, where such parent-in-law is alive. So notwithstanding the difficulty of this Court in agreeing with the reasoning of the judgments in ***Razia Begum*** and ***Shumaila Bibi***, even if those were binding precedents, given that (i) no declaration was sought against deceased Muhammad Asif Khan and Ameer Begum during their lifetimes, and (ii) *Nikahnamas* themselves cannot be regarded as title documents, the said case law is distinguishable.

38. The judgments cited before this Court above treating the father-in-law as surety are thus distinguishable. In all such cases the claim was being brought by the daughter-in-law against the father-in-law and his property. In the instant case Rabia Khalid and Amina Shahid, as daughters-in-law, brought no claim against their parents-in-law. But in relation to a claim to inherited property by their sisters-in-law, they are relying on the inscription on their *nikahnamas* as creating title and ownership rights in the F-8 House and the F-10 House. This claim falls foul of the

requirements of section 17 of the Registration Act, 1908, and such document can create no rights in view of section 49 of the Registration Act. Even if the parents-in-law of Rabia Khalid and Amina Shahid were alive today, seeking a declaration might have fallen on the wrong side of limitation.

39. Given that Khalid Hamid, Rabia Khalid, Shahid Hamid and Amina Shahid were in possession of parts of the F-8 House and the F-10 House, the remaining siblings, who were not in possession of their inherited property, were entitled to the benefit of their share in the properties calculated in terms of rent by such properties. The learned Civil Court correctly held that other successors-in-interest of the deceased Muhammad Asif Khan and deceased Ameer Begum had been denied the benefit of such properties and were entitled to recover rent from their siblings who had been in possession of such properties.

40. The judgment of the learned Civil Court is wanting to the extent of omission of determination of the date from which the relevant Respondents were in possession of the F-8 House and the F-10 House, and determination of the respective shares of the successors-in-interest of the deceased Muhammad Asif Khan and Ameer Begum in the compensation payable by those successors-in-interest who were in possession of such properties or part thereof.

41. For the aforementioned reasons, all the Writ Petitions are **allowed**, except Writ Petition No. 269 of 2021, which is being **dismissed**. Consequently, the impugned judgment and decree passed by the learned Additional District Judge is set-aside and the judgment of the learned Civil Court is restored. Rabia Khalid

and Amina Shahid failed to prove any entitlement regarding shares in the F-8 House and the F-10 House.

42. To the extent that some of the successors-in-interest of the deceased Muhammad Asif Khan and Ameer Begum have derived benefit from the F-8 House and the F-10 House by occupying such properties or renting them out, the learned Civil Court ought to issue a clear declaration in view of the evidence produced before it as to the respective shares in lieu of rent that would be due while taking into account the period when the Respondents were in possession of such properties and began to derive benefit from such properties. To the extent of the determination of shares in lieu of rent the matter is **remanded** back to the learned Civil Court and the parties are directed to appear before the learned Civil Court on **22.11.2022** and the learned Civil Court after affording the parties an opportunity to be heard will issue a clear declaration with regard to entitlement as to the respective shares in lieu of rent payable by the Respondents i.e. successors-in-interest of deceased Muhammad Asif Khan and deceased Ameer Begum who have been in possession of the F-8 House and the F-10 House or parts thereof.

43. There is no order as to costs.

(BABAR SATTAR)
JUDGE

Announced in the open Court on **11.11.2022.**

JUDGE

Approved for reporting.

Saeed.

ANNEXURE-A

Sr. No.	***Case No.***	***Case Title***
1.	*W.P No. 449/2021*	*Mst. Asima Bibi Vs. Additional District Judge and others*
2.	*W.P No. 269/2021*	*Mst. Amina Shahid Vs. Mst. Naeema Akhtar*
3.	*W.P No. 375/2021*	*Mst. Naeema Akhtar Vs. Additional District Judge and others*
4.	*W.P No. 376/2021*	*Mst. Yasmeen Akhtar Vs. Additional District Judge and others*
5.	*W.P No. 377/2021*	*Mst. Naeema Akhtar Vs. Additional District Judge and others*
6.	*W.P No. 378/2021*	*Mst. Yasmeen Akhtar Vs. Additional District Judge and others*
7.	*W.P No. 450/2021*	*Mst. Asima Bibi Vs. Additional District Judge and others*