

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT**  
**HYDERABAD**

**II<sup>nd</sup> Appeal No.19 of 2022**

[Haji Sawat Khan Vs. Baz Muhammad Khan & others]

**Appellant:** Through Mr. Zafar Iqbal Seenharo,  
Advocate.

**Private Respondents:** NEMO.

**Official Respondent:** Through Mr. Allah Bachayo Soomro

**Date of hearing:** 23.05.2025.

**Date of decision:** 30.05.2025

**J U D G M E N T**

**Dr. Syed Fiaz ul Hassan Shah, J:** This second appeal is directed against the judgment and decree dated 06.11.2021 & 10.11.2021 respectively passed by learned 3<sup>rd</sup> Additional District Judge Hyderabad in Civil Appeal No.130 of 2018 [Re: Haji Sawat Khan (Ex name Sawati Shah versus Baz Muhammad & others], whereby the learned Judge was pleased to maintain the Judgment dated 28.07.2018, through which learned 1<sup>st</sup> Senior Civil Judge Hyderabad dismissed the F.C Suit No.155 of 2014.

2. Briefly stated, the facts of the case are that the appellant/plaintiff filed a suit for declaration, possession, mesne profits, and permanent injunction against the respondents. The plaintiff asserted that he was allotted Shop No.1 and Flat No.1 (situated upper story of Shops No.1 and 2) by the Chief Officer, District Council Hyderabad, vide Allotment Order No.GEN/RC/8904 dated 06.06.1973. Shop No.2 was allegedly purchased by him through an irrevocable power of attorney from Bhooro Khan s/o Muhammad Bachal on 04.07.1974. It was further averred that the plaintiff also purchased Shops No.12, 13, 14, 18, and 19 in year 1974 from various individuals, situated at Tilock Chand Dharamshala near Elite Cinema, Market Tower, Hyderabad. The appellant claimed to have established a hotel under the name 'Azad Muhammad Hotel' by removing the partition wall between Shops No.1 and 2 after obtaining permission dated 01.08.1974 from the concerned authority. He also claimed ownership of Flat No.1 constructed over roof Shops No.1 and 2 by paying the requisite fee. The appellant alleged that defendants No.1, 5, 6, 7, and 8 who are his real brothers and residents of a village in Muhammad Agency with no concern to the properties attempted to forcibly occupy the premises. Consequently, the plaintiff had filed F.C. Suit No.170 of 2009 for permanent injunction and damages, which he later withdrew on 23.12.2013. It was further alleged that during pendency of said suit, defendant No.1 lodged a false FIR No.289 of 2009 against the plaintiff's sons, resulting in their arrest and detention. Taking advantage of their custody, defendant No.1, along with others, allegedly occupied the hotel and Flat No.1

illegally and took away the original documents, which remain in his possession. The plaintiff also claimed that defendant No.1, in collusion with Muhammad Ali Jaghsi, Superintendent, District Council Hyderabad, forged the master file and fabricated documents to support their illegal possession. Applications made by the appellant to the District Coordination Officer, Hyderabad, yielded no result hence he filed the subject suit with following prayers:

- “(a) To declare that the plaintiff is the allottee of suit property viz shop No.1 and Flat No.1 situated at Tilockchand Dhramshala Near Elite Cinema Tower Market Hyderabad.
- (b) To pass the judgment and decree for the possession of the suit property viz shop No.1,2, 12,13,14,18, 19 and flat No.1 situated at Tilockchand Dhramshala. Near Elite Cinema Tower Market Hyderabad and put the plaintiff in physical possession of the same.
- (c) To direct the defendants to pay mesne profit of Rs.36,00,000/- (thirty lac rupees) for last three years from February 2011 to January 2014 and for future period till the plaintiff is put in physical possession of the same.
- (d) The permanent injunction be issued against the defendants restraining them through themselves their sub ordinates, agents, from handing over possession to any other person or alienating, selling of the same.
- (e) That the cost of the suit be borne by the defendants.

- (f) Any other relief, as deemed fit and proper the granted in favour of plaintiff by this Honourable Court.”

3. Upon admission of the suit, summons issued to the defendants. Defendants No.6, 8, and 10 filed their written statements, whereas defendants No.1 to 5 and 7 remained absent and were proceeded ex-parte vide order dated 27.07.2015. Defendants No.6 and 8 denied any interest or involvement in the suit property, contending that they never attempted to occupy or encroach upon it and have been unnecessarily impleaded in the Suit. Defendant No.10, in his written statement, asserted that no one can become a tenant of government property through an attorney, nor can such property be lawfully purchased from a private individual. He stated that all relevant records reflect the name of Bhooro Khan, and denied any forgery by the answering defendant(s). He further contended that several under-construction flats of the District Council were unlawfully occupied by different groups, which led to suspension of construction work, and that only duly authorized officials of the District Council are competent to lease such properties.

4. From the pleadings, following issues were framed:

### **ISSUES**

1. *Whether suit of plaintiff is not maintainable?*  
(OPD)

2. *Whether suit property i.e shop No.1, 2, 12, 13, 14, 18, 19 and flat No.1 situated at Tilockchand Dharamshala near Elite Cinema Tower Market, Hyderabad belonged to District Council Hyderabad? (OPD)*
3. *Whether plaintiff was allotted a shop No.1 and flat No.1 situated at Tilock Chand Dharamshala near Elite Cinema Market Tower by chief officer District Council Hyderabad? (OPP)*
4. *Whether plaintiff has purchased the shop No. 12,13,14,18 and 19 situated at Tilock Chand Dharamshala Market Tower from different person on the basis of statement and irrevocable power of attorney? If yes, whether property under sale belonged to those private persons or belonged to Government? (OPP)*
5. *Whether the plaintiff converted shop No.1,2, 12,13,14,18 and 19 into a hotel with the name and style of Azad Mehmood Hotel? If yes, whether he obtained any permission from concerned department? (OPP)*
6. *Whether defendant No.1 and others have illegally occupied the hotel and flat No.1 so also took away original documents? (OPP)*
7. *Whether plaintiff was illegally dispossessed from suit property i.e shop No.1, 2, 12, 13, 14, 18, 19 and flat No.1 situated at Tilockchand Dharamshala near Elite Cinema Tower Market,*

*Hyderabad? If yes, whether he is entitled for recovery of possession of suit property? (OPP)*

8. *Whether plaintiff is entitled for mesne profits of Rs.12,00,000/- per year for the last three years and for future till the possession is handed over the plaintiff? (OPP)*
9. *Whether plaintiff is entitled for the relief claimed?*
10. *What should the decree be?*

5. This is a Second Appeal filed under Section 100 CPC and according to the learned counsel for the Appellant substantial question of law is involved as the trial court, as well as the appellate court has committed illegality and judgment has passed on erroneous finding that the power of attorney was not produced in the evidence during the trial before the learning trial court.

6. An inference of fact from the recitals or contents of a document is a question of fact, but the legal effect of the terms of a document is a question of law. Construction of a document, involving the application of any principle of law, is also a question of law. Therefore, when there is **misconstruction of a document** or **wrong application** of a principle of law in construing a document, it gives rise to a question of law.

7. The question raised require consideration of this court. Therefore, I framed the following substantial question of law.

- i. Whether the Courts below have committed illegality. While passing the judgment under order III Rule 1&2 CPC.?

- ii. Whether the Courts below have not followed the settled principle of law that non filing of power of attorney is mere irregularity and it is not barred by law?

**8.** It is admitted position that the appellant as a plaintiff through same Attorney, has filed a plaint along with the copy of power of attorney. The copy of such power of attorney is already attached with the memo of plaint before the trial court. However, the trial court has not taken into consideration the power of attorney and the trial judge has not carefully examined the record which copy was filed and the suit was registered without objection of the power of attorney.

**9.** I have noticed that the copy of power of attorney was available with the plaint. Understanding at the time of evidence when the pleadings were exhibited, the documents attached with the pleadings are also become the part of it and it can be taken into consideration while reading and handing down a judgment. However, the trial judge has not only ignored it, but he has avoided to handed down the detail Judgment on remaining issues on merits and the trial Judge has preferred to dismiss the suit on that ground alone.

**10.** It may be observed that the respondents have not appeared and have not cross examined the appellant/ plaintiff before the trial Court. Hence the evidence of the plaintiff / appellant has gone unrebutted and uncontroverted. It is settled law that the execution of power of attorney is specific between the principal and its

attorney and any confirmation, dispute or variance can only be adduced or confirmed by the principal and no one else.

**11.** I have also noticed that the learned trial Judge has passed the impugned judgment while placing reliance on Order III rule 1 CPC. A plain reading of the said order III Rule 1&2 CPC reveals that the same is directory in nature and no panel consequences can be drawn.

**12.** It is appropriate to draw an inference at all and, if so, the precise nature and extent of such an inference will depend on the particular circumstances of each case. Relevant considerations will include the proximity between a breach of duty and the non-available evidence, the effect of the other evidence before the court and what other evidence might have been available but which is not before the court. The appellant has presented the original power of attorney as well as the appellant is himself appeared in person and sworn affidavit endorsing and confirming the execution of power of attorney in favor of his son and attorney, who had appeared before the trial court for recording evidence.

**13.** Additionally, the copy of power of attorney was already on record before the trial Judge and same has also been exhibited with the pleadings of the appellant / plaintiff. And this power of attorney, as well as the evidence of the Appellant / plaintiff, has remained uncontroverted, unchallenged. Therefore, the trial Judge, so also the appellate court, have not taken into consideration the record and have passed erroneous judgments which are impugned before me. The judgments impugned have passed again. The settled principle of law that non filing of copy of the power of



attorney or even non signing of the plaint is not barred by law but mere irregularity which can be rectified subsequently. The honorable Supreme Court in case ***“Ismail vs Razia Begum”***, **(1981 SCMR 687)** clarified that one should not be confused with the term “barred by law” and a curable irregularity. It was held that ***“In these circumstances, the non signing of the plaint by them at the proper stage was a mere irregularity, and consequently the learned District Judge was entirely justified to direct that the said irregularity may be rectified.”***

14. A perusal of the unreported order passed by the Hon’ble Supreme Court on 01.03.2011 in Civil Appeal No.4-K/2009 relied upon by the learned counsel for the appellant, shows that a copy of the power of attorney was available on record, and after perusing the same, it was observed by the Hon’ble Supreme Court that it may not have been produced at the time of filing of plaint due to inadvertence. It was held that the defect of non-production of power of attorney at the time of filing of the plaint was of technical nature and was curable.

15. The learned division bench held in case Karim Dad Khushk vs United Bank limited (PLD 2010 Karachi 158) that ***“Merely for the reasons that copies of power of attorney were filed subsequently will not make the suit incompetent as it is now established law that even if the plaint is not competently filed, such anomaly can be rectified subsequently. Reference in this regard is made to the case of Habib Bank limited vs. Messer ESS EMM ESS Corporation, Pakistan and others”, (2005 CLD 854).***

16. Consequently, the judgment dated 06.11.2021 pass by 3<sup>rd</sup> Additional District Judge, Hyderabad in Civil Appeal No. 130 of 2018 upholding the judgment dated 28<sup>th</sup> July 2018 passed by 1<sup>st</sup> Senior Civil judge, Hyderabad in Suit No. 155 of 2014 is a set aside and the matter is remanded back to the trial court with direction to provide an opportunity to the appellant to once again produce the power of attorney in original after notice to all. Thereafter, the trial court will pass afresh judgment in accordance with law.

17. The instant Second Appeal stands disposed of.

18. Office is directed to return the original power of attorney filed in the present case, enabling the appellant to present before the trial Court. The learned Registrar of this Court is directed to take necessary action against the then Presiding Officer Mr. A. Zahoor Chandio 1<sup>st</sup> Senior Civil Judge, Hyderabad who has not only ignored the copy of power of attorney available with the plaint annexure-C page-43 but has lacking knowledge of the elementary principle of law to differentiate irregularity and barred by law. The said Presiding Officer must undergo capacity building program with regard to rule of evidence and rule of appreciation, while the Presiding Officer of Appellate Court would be careful in future.

**JUDGE**