

**IN THE HIGH COURT OF SINDH AT
KARACHI**

Suit No. 482 of 2007

Plaintiff : Feroz Faizullah, through Mr. Abdul Kadir Khan, Advocate.

Defendant No.1 : Muhammad Hussain, through Mr. Ghulam Abbas Pishori, Advocate.

Date of hearing : 13.05.2017

Date of Judgment :

JUDGMENT

YOUSUF ALI SAYEED, J. The Plaintiff has assailed the Defendant No.1's right to property and ownership in land bearing Survey No. 41/3, Sheet No. SR-7) Old Survey No. B-5/PO 16/16/A) situated at Serai Quarters, Campbell Street, Karachi, admeasuring 810 square yards (the "**Subject Property**"), and has essentially concentrated his attack on a Sub-Power of Attorney on the strength of which the Defendant No.1 completed the transaction whereby he came into ownership.

2. In order for the challenge of the Plaintiff to be understood in its proper context, it is relevant to mention that the Subject Property was admittedly owned by the Defendants Nos. 2, 3 and 4, namely Rubabbai Badruddin, Shaukatali and Akberali respectively (hereinafter collectively referred to as the "**Principals**") and the Plaintiff was admittedly their tenant in relation to certain premises situated therein, designated as Tenement No.1 (the "**Rented Premises**"), carrying on business thereat under the name and style of Adamjee Shaikh Jivanjee.

3. The Subject Property then apparently came to be acquired by the Defendant No.1, who sought to assert his rights in his professed capacity as owner and landlord as against the Plaintiff and to evict him from the Rented Premises on the ground of personal need. Thus, the Plaintiff and Defendant No.1 came to be embroiled in a protracted course of litigation under the Sindh Rented Premises Ordinance, 1979 (the “**SRPO**”), in which the Plaintiff’s main line of defense was that of assailing the Defendant No.1’s acquisition of the Subject Property from the Principals through the Attorney and disavowing the Defendant No.1 as the owner thereof.

4. Turning to the aspect of the Defendant No.1’s rights in the Subject Property, briefly stated, the professed basis of acquisition is as follows:
 - (a) The Principals executed a Power of Attorney dated 14.01.1981 (the “**POA**”) in favour of one Badruddin Nazarali Dungarwalla (the “**Attorney**”), who was the husband and father of the Defendants Nos. 2 and 4 respectively, in relation to the Subject Property whereby they authorized him, inter alia, to delegate his power thereunder to anyone he deemed fit to appoint as Sub-Attorney. As per its terms, the POA was stated to be irrevocable and contained a power of sale, albeit couched in general terms.

 - (b) Pursuant to the POA, the Attorney entered into an Agreement of Sale dated 04.05.1987 with the Defendant No.1 in respect of the Subject Property on behalf of the Principals, and, as acknowledged therein Contemporaneously, the Defendant No.1 was put in possession and a Letter of Attornment was executed in his favour whereby the Plaintiff was notified of the sale and directed to henceforth

pay rent in respect of the Rented Premises to the Defendant No.1.

- (c) Furthermore, the Attorney apparently executed a Sub-Power of Attorney dated 31.05.1987 (the “**Sub-Power**”) in favour of the Defendant No.1, which referred to the transaction of sale in as much it was mentioned therein that an agreement had been executed to sell the Subject Property to the Defendant No.1 wherein it had been agreed that an instrument of the nature of the Sub-Power would be executed in his favour so as to complete the sale. Accordingly, the Sub-Power specifically authorized and empowered the Defendant No.1 to execute an appropriate instrument of conveyance in respect of the Subject Property in his own favour and also to seek a renewal of the underlying lease from the Karachi Metropolitan Corporation.
- (d) On the strength of the Sub-Power, a Conveyance Deed was then executed by the Defendant No.1 in respect of the Subject Property in his own name, which was duly registered at No. 1858 of Book No.I before the Sub-Registrar T.Div-I-B, Karachi on 21.04.2004 (the “**Conveyance Deed**”). The Defendant No.1 bases his title on this document.
5. As regards the parallel dispute inter se the Plaintiff and Defendant No.1 under the SRPO, an initial round of rent proceedings in the shape of Rent Case No.2022/96 instituted by the Defendant No.1 and the ensuing FRA No.566/99 proved fruitless from his standpoint, for whilst the Plaintiff did not dispute the relationship of landlord and tenant and admitted to having paid rent to and in the name of the Defendant No.1, he asserted that the capacity of the Defendant No.1 was that of a rent collector only and that he was not the owner. At that time, in the absence of the

Conveyance Deed, it was found at first instance that the Defendant No.1 did not have a clear title, and hence was not entitled to seek ejectment on the ground of personal need.

6. Thereafter, subsequent to the Conveyance Deed, the Defendant No.1 filed ejectment proceedings anew in the shape of Rent Case No.1324/05 in the Court of the IVth Senior Civil Judge & Rent Controller Karachi (South), seeking eviction of the Plaintiff under Section 15(2) of the Sindh SRPO on the ground of default, personal need, subletting and impairing the material value and utility of the Rented Premises conversion of use, unauthorized subletting, nuisance and infringement of terms and conditions of tenancy. Vide Order made on 19.11.2011 the learned Rent Controller decided in favour of the Defendant No.1 and directed the Plaintiff to vacate. The ensuing FRA No.85/2011 of the Plaintiff was also dismissed on 13.05.2011. However, it was submitted that the matter of the Order made on 19.11.2011 stands suspended in a Constitutional Petition pending adjudication before this Court on the Appellate Side.

7. It is in this backdrop, whilst Rent Case No.1324/05 was still pending, that this Suit came to be filed. The case, as set up in the plaint, is that the Power of Attorney was never produced, shown and/or presented before any Court or authority, nor was it legally proved in evidence before any Court, tribunal and or concerned authority to lend credence to the validity to the subsequent aforementioned Sub-Power of Attorney, that the delegation of power and authority by the Attorney to the Defendant No.1 was even otherwise in excess of what had purportedly been conferred upon him by the Principals and that such excessive delegation was bad in law and liable to be struck down, and, moreover, that upon the demise of the Attorney on 28.11.1995 the POA and the Sub-Power ensuing

therefrom came to an end and there was thus no power vesting in the Defendant No.1 as on the date of the Conveyance Deed. Whilst it was contended on this basis that the Conveyance Deed was *ab initio* void, it was nonetheless also submitted further that the same ought to be cancelled.

8. The obvious object and purpose of the instant case, as is apparent on the very surface of the Complaint, is the desire of the Plaintiff to thwart the Defendant No.1's claim for eviction in terms of the SRPO, and towards this end, the following prayers have effusively been advanced:

“(a) Declaration that consequent upon death of Badaruddin Nazarali Dungarwalla purported Attorney of the Defendants No.2, 3 and 4 on 28-11-1995 the alleged General Power of Attorney in his favour and on its basis the alleged Sub-Power of Attorney dated 31-05-1987 given to the Defendant No.1- Muhammad Hussain relating to the subject suit property came to an end, and hence thereafter the Defendant No:1-Muhammad Hussain ceased to have or possess any authority or power to represent and act for and on behalf of Badruddin Nazarali Dungarwalla and/or even for the Defendants No: 2, 3 and 4 herein abovenamed in any manner whatsoever to deal with and/or do or cause to be done any act, deed or thing relating to the suit property either directly or indirectly.

(b) Declaration that the conveyance deed dated 21-04-2004 for sale and transfer of the subject suit property bearing Registration No.1858, Book I, executed by the Defendant No.1 – Muhammad Hussain in his own name and registered with Sub-Registrar ‘T’ Division I-B, Karachi, and also all subsequent mutations on relevant records on its basis are illegal, without lawful authority or powers, void *ab initio*, nullity and of no legal consequences;

(c) Declaration that the letter of Attornment dated May 1987 (actually undated) issued by Badruddin Nazarali Dungarwalla as purported Attorney of the Defendants No.2, 3 and 4 without any valid supporting document of transfer asserting that the subject suit property was sold to the Defendant No.1 – Muhammad Hussain, without giving any date or particulars of sale deed/

conveyance deed and/or even particulars of agreement of sale therein, was fabricated for perpetuation of misrepresentation, fraud and deceit without any legal basis, valid or subsisting sale deed/conveyance deed for transfer/sale of the suit property to the Defendant No.1 – Muhammad Hussain, just to defraud, mislead and deprive the Plaintiff of his rights, entitlements and privileges and encumbering him for continuing/depriving and unnecessarily jeopardizing and/or prejudicing his tenancy and occupational rights over the subject case premises;

- (d) Declaration that both Badruddin Nazarali Dungarwalla and also the defendant No.1 – Muhammad Hussain acted without lawful authority and power to act, do or cause to be done acts, deeds and things beyond the scope and parameters of the purported General Power of Attorney dated 14-01-1981 and on its basis the Sub-Power of Attorney in favour of the Defendant No.1 Muhammad Hussain dated 31-05-1987, and hence all their such acts and deeds are invalid, void ab-initio, nullity and of no legal consequences;
- (e) Declaration that there is no relationship of landlord and tenant between the Plaintiff and the defendant No.1 – Muhammad Hussain in the events and circumstances obtaining in this case, and the Plaintiff was and even now continues to be the lawful tenant of the Defendants No.2, 3 and 4 ever since beginning of tenancy much prior to 1950 and continues to enjoy the same even now;
- (f) Cancellation of the conveyance deed/sale deed dated 21-04-2004 mentioned in clause (a) herein above along with related mutations there under and letter of Attornment dated May 1987 (actually undated) mentioned in clause (c) herein above, and also cancellation of purported General Power of Attorney dated 14-1-1981 and Sub-Power of Attorney dated 31.05.1987 and purported agreement of sale dated 14-05-1987 and also cancel the observations made in final orders/judgments in Rent Case NO.2022/96 and FRA No.566/99 regarding status of Muhammad Hussain as Rent Collector/landlord of the subject case property because of death of Badruddin Nazarali Dungarwalla on 28-11-1995 extinguishing his authority and power to deal with said property, because all these aforesaid documents interfere and legally affect, prejudice and jeopardize rights, entitlements, interests and

privileges of the Plaintiff as lawful tenant in the case premises;

- (g) Permanent Injunction restraining the Defendant No.1 – Muhammad Hussain from using and relying upon any of the afore-stated documents under clause (b), (c) and (e) herein above mentioned;
 - (h) Permanent Injunction restraining the Defendant No.1 – Muhammad Hussain from evicting, either directly or indirectly the Plaintiff from the subject case premise;
 - (i) Permanent Injunction restraining the Defendant No.1 – Muhammad Hussain from creating third party interest in and over the subject case property;
 - (j) Cost of the suit throughout; and,
 - (k) Any other relief(s) as may be deemed just and proper to protect/safeguard rights of the Plaintiff appropriately to meet the ends of justice.
9. The Defendant No.1 filed his written statement wherein he asserted that he was the owner of the Subject Property and admittedly the landlord of the Plaintiff in respect of the Rented Premises. He submitted that the Suit merited dismissal as in the face of the registered Conveyance Deed no case no was or could conceivably be made out on merit and, even otherwise, the Plaintiff had no locus standi to challenge the Conveyance Deed or the transaction culminating therein. The Defendants Nos. 2 to 4, who as per the address ascribed to them in the Plaint were all residing in the United Kingdom, also filed their joint written statement, executed in the presence of a Notary Public, whereby they affirmed the sale of the Subject Property in favour of the Defendant No.1, the issuance of the POA and issuance and validity of the Sub-Power, and categorically stated that they had no objection of any kind whatsoever to the

execution of the Conveyance Deed. They then took no further part in the proceedings.

10. On 16.03.2012 on the basis of the pleadings and with the consent of the contesting parties this Court framed the following issues:

- (i) Whether the plaintiff has legal character to maintain the present suit against the defendants?
- (ii) Whether Defendant No.1 had the authority under law to transfer the suit property in his own name?
- (iii) Whether Sale Deed in respect of the suit property executed and registered on 21.4.2004 is liable to be cancelled?
- (iv) What should the decree be?

11. The Plaintiff and the Defendant No.1 filed their respective Affidavits-in-Evidence during the course of proceedings on commission, and were cross-examined accordingly.

12. The Plaintiff produced photocopies of the pleadings and depositions in the rent proceedings under the SRPO as well as certain correspondence in the shape of the Letter of Attornment as well as the legal notices exchanged between legal counsel in relation to the dispute ensuing thereafter. He also produced photocopies of the POA and the Sub-Power, as well as a photocopy of a page from the edition of 30.11.1995 of a newspaper published in the Gujarati language under the name of "Daily Millat", containing the obituary of the Attorney. A number of these photocopies were kept on record under objection subject to the determination of this Court. For the purposes of the determination to follow it is not necessary to digress on this matter as

the documents in question are of little or no relevance in that regard.

13. The Defendant No.1 produced the original Deed of Assignment whereby the Principals derived their title to the Subject Property, as well as the original Agreement to Sell, POA, Sub-Power, Conveyance Deed and extract from the property register showing the entry in his name. The original documents were seen and returned, and photocopies thereof were marked and placed on record.
14. Having considered the arguments advanced at the bar and examined the material on record in light thereof, the findings in relation to the Issues are as follows herein below.

Issue No. 1 (Whether the plaintiff has legal character to maintain the present suit against the defendants?)

15. With reference to Section 42 of the Specific Relief Act, 1877 (the “**SPA**”), learned counsel for the Plaintiff contended that the case of the Plaintiff fell squarely within the scope thereof, specifically as envisaged in terms of Illustration (g), and hence the Plaintiff was entitled to maintain the present action and seek declaratory relief as claimed. The aforesaid Section of the SPA and the relevant Illustration are reproduced for ready reference as follows:

“42. Discretion of Court as to declaration of status or right. Bar to such declaration. --- Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation - A trustee of property is a "person interested to deny" a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee."

Illustration (g)

“(g) A is in possession of certain property. B, alleging that he is the owner of the property, requires A to deliver it to him. A may obtain a declaration of his right to hold the property.”

16. Conversely, learned counsel for the Defendant No.1 strongly controverted this contention and submitted that the case of the Plaintiff was mala fide and misconceived. He submitted that the Plaintiff lacked legal character and had no locus standi to challenge the transaction of sale of the Subject Property or the ensuing process of transfer thereof vide the registered Conveyance Deed and culminating in the name of the Defendant No.1 being entered in the land record.

17. When the case of the Plaintiff is examined in juxtaposition with Section 42 of the SPA and Illustration (g) thereunder, what immediately becomes evident is that the Plaintiff's case does not fall within the parameters of Section 42 or indeed Illustration (g) in as much as the right of the Plaintiff in respect of the Rented Premises is admittedly only that of a tenant, and the Defendant No.1 has not sought to deny the existence of the tenancy. On the contrary, the course of conduct adopted by the Defendant No.1 in instituting proceedings under the SRPO demonstrates that he has accepted the

Defendant No.1 as the tenant in possession of the Rented Premises, and thus affirmed the existence of his right. The Defendant No.1 has then sought, as he is entitled in law, to exercise the remedies available to a landlord under the SRPO. This cannot conceivably be regarded as a denial of the Plaintiff's legal character or right in the Rented Premises for the purposes of Section 42.

18. Illustration (g) is also of no avail in this regard, for if the only right of the Plaintiff in respect of the Rented Premises is in his capacity as a tenant, he may at best seek a declaration of his status to that effect and right to hold the same in that capacity. The sweeping declarations sought in terms of Prayers (a) to (d) of the plaint, however, are not open to him within the contemplation of Section 42, especially as the same pertain to the aspect of ownership of the Subject Property, in respect of which the Plaintiff admittedly espouses no competing personal claim. Furthermore, the declaration sought in terms of Prayer (e) is also couched in negative terms and is even otherwise predicated on the preceding prayers, which are themselves not grantable. In this regard, it also has to be considered that the underlying motive of the Plaintiff quite evidently appears to be that of frustrating the Defendant No.1 in his endeavours under the SRPO. Towards that end, the Plaintiff has thus sought to assail a private transaction to which he is not a party, which cannot be countenanced.

19. Under the given circumstances, the Plaintiff has no locus standi to assail the transaction or the Conveyance Deed on the basis of any gap or defect that may have come to exist in the relationship of agency inter se the Principals and the Defendant No.1 when he is neither the donor nor donee, and the Principals themselves have not raised any

objection in that regard. It is an elementary legal principle that a power of attorney can only be challenged by the principal and not a third party, as held in *Khayam Films v. Bank of Bahawalpur* 1982 CLC 1275, *Qadir Bakhsh v. Ghulam Moeenuddin* 1994 CLC 1949 and *Sadiq Ali Khan v. Abdur Rehman* 1995 CLC 977. Accordingly, the finding on Issue No.1 as to legal character and maintainability is in the negative.

Issue No. 2 (Whether Defendant No.1 had the authority under law to transfer the suit property in his own name?)

Issue No. 3 (Whether Sale Deed in respect of the suit property executed and registered on 21.4.2004 is liable to be cancelled?)

20. Both these Issues are interconnected and can be considered together. In this regard, learned counsel for the Plaintiff contended that the power and authority ostensibly conferred by the Attorney in terms of the Sub-Power exceeds the very mandate granted to the Attorney in terms of the POA, which is not permissible in law, and that if an agent deals in the property of the principal on his own account (i.e. if he purchases it through the agency himself or for his own benefit) the instrument of agency must expressly so provide through a power of self-dealing. He placed reliance on the Judgments of the Honourable Supreme Court in the cases reported as *Muhammad Yousuf Siddiqui v. Haji Sharif Khan* through. LRs & others PLD 2005 SC 705, *Jamil Akhtar & others vs Las Baba & others* PLD 2003 SC 494, and *Fida Muhammad v. Pir Muhammad Khan (Deceased) Through Legal Heirs and Others* PLD 1985 Supreme Court 341, as well as the Judgment of a learned Division Bench of this Court in the case reported as *Syeda Abida Sultana v. Sub Registrar T. Division & 5 others* 2008 YLR 1900. He further submitted that upon the demise of the Attorney, which preceded the date of the Conveyance Deed, the POA as well as the Sub-Power had even otherwise come to an end by operation of law. In this

regard he referred to Section 201 of the Contract Act, and the Defendant No.1 lacked the capacity to execute the Conveyance Deed pursuant to any authority as may have been conferred upon him on behalf of the Principals in terms of the Sub-Power. It was also submitted that at the time of registration of the Conveyance Deed, the Defendant No.1 perpetrated a fraud by concealing the fact that the Attorney had expired, and that the transaction thus stood vitiated.

21. Learned counsel for the Defendant No.1 refuted such contentions and pointed out that the Sub-Power POA had been executed by the Attorney on behalf of the Principals on the strength of the Sale Agreement in respect of the Subject Property, under which the sale consideration in respect thereof had been paid and received in full, as acknowledged by the Principals, and that the Sub-Power was thus coupled with an interest and hence irrevocable. He also denied any concealment as to the demise of the Attorney and submitted that the Defendant No1 had no knowledge thereof at the relevant time. He also pointed out that the Principals had not challenged the capacity of the Defendant No.1 or sought to assail the Conveyance Deed, and had in fact reaffirmed the correctness of all actions taken by the Defendant No.1 in respect of the Subject Property. He submitted that the Plaintiff had no locus standi to raise any objection as to the Sub-Power or the Conveyance Deed.

22. Having considered the citations on which reliance has been placed by learned counsel for the Plaintiff, I am of the opinion that the same are clearly distinguishable from the matter at hand. In Muhammad Yousuf Siddiqui's case (Supra) the principal was himself the aggrieved party and the initiator of the action before the Court. In the case of Jamil Akhtar (Supra), a

vendee under a sale agreement had filed a suit for specific performance against the vendor under circumstances where the vendor had cancelled the registered power of attorney that had been issued by him in favour of the vendee and had sold the property to a third party, who had then sold it on further. Ergo, a claim of ownership was involved in light of the question as to whether the registration of the power of attorney was sufficient to have put the purchasers on notice of the sale agreement in favour of the vendee or whether they were bona fide purchasers for consideration without notice. In Fida Muhammad's case (Supra), the contesting parties were rival claimants to ownership of the property in question in those proceedings and the point raised by one of the claimants was that the property had been sold to him by the attorney of his adversary, who in turn had contended that the act of the attorney was beyond the powers conferred. Similarly, in the case of Syeda Abida Sultana (Supra), the petitioner was the owner of the property and the issuer of the power of attorney was herself challenging certain acts performed by the attorney as being in excess of the powers conferred.

23. Hence, the basis of the proceedings in the aforesaid precedents is far removed from the instant case, where the Plaintiff is neither the donor nor donee and also has no claim to ownership over the Subject Property, and thus, as previously discussed in relation to Issue No.1, lack *locus standi* in the matter. As such, in the matter at hand it does not lie in the mouth of the Plaintiff to question the scope of the Power vis-à-vis the Sub-Power or the integrity of the transaction culminating in the Conveyance Deed. In the wake of the registered Conveyance Deed it is only the Principals who are possessed of the requisite legal standing to assail the validity of the Sub-Power and the actions taken by the

Defendant No.1 on the basis thereof, which is not the case in this Suit.

24. Section 39 of the SPA is also clear on this point in as much as it stipulates inter alia that an action for cancellation of a written instrument may be brought by a person against whom such written instrument is void or voidable. Even if the alleged defects referred to on behalf of the Plaintiff are considered for the sake of argument, the Conveyance Deed could not be said to be void or voidable as against the Plaintiff. Furthermore, it merits consideration with reference to Section 201 of the Contract Act, as relied upon by the Plaintiff, that the Principals remain alive and well and it is the Attorney (an intermediary who during his lifetime had already made the delegation to the Defendant No.1 on their behalf) who is no more. It also merits consideration that the Sub-Power, being coupled with the interest of the Defendant No.1 in the Subject Property, could not be said to have been revoked as it is well settled that Powers, held by one who also hold a title or interest in the *res*, do not terminate on the death of the creator. Section 202 of the Contract Act encapsulates this very principle. For the reasons discussed, the Suit is visibly baseless and bereft of merit and the Issue as to authority (Issue No.2) is answered in the affirmative whereas the issue concerning cancellation (Issue No.3) is answered in the negative.

Issue No. 4 (What should the decree be?)

25. In view of the finding in the negative on Issues Nos.1 and 3 and in the affirmative on Issue No.2, the Plaintiff has failed to make out a case for grant of any of the

reliefs prayed, with the result that this Suit fails and is dismissed accordingly, with no order as to costs.

JUDGE

Karachi
Dated _____