

ORDER SHEET  
IN THE HIGH COURT OF SINDH, KARACHI

**Suit No. 233 of 2000**

Date	Order with signature of Judge
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Plaintiff : Mst. Nasreen  
Through Mr. Abdul Wahab Baloch,  
advocate.

Defendant No.1 : Faisal Jameed Kiyani  
(Nemo)

Defendant No.2 : Amir Ali  
Through Mr. Saleem Thepdawala,  
advocate.

Defendant No.3 : Haji Rasheed Ahmed  
(Nemo)

Date of hearing : 28.11.2017

Deceided on : 18.12.2017

**JUDGEMENT**

**Nazar Akbar.J,-** Brief facts of the case are that plaintiff is owner of a Commercial Premises bearing office NO.204 & 205, 2<sup>nd</sup> Floor, Business Arcade, Chandni Chowk, University Road, (East) Karachi, constructed on Plot No.SC-15, Scheme No.7, Karachi (hereinafter the suit property). The plaintiff was resident of United Kingdom and whenever she made investment in Pakistan in real estate she subsequently appointed defendant No.1 her duly a registered General of Attorney to look after the property. All the original documents of all the properties including the suit property was in possession of defendant No.1. The Power of Attorney was executed in 1993. The defendant No.1 used to collect rent from defendant No.3 (tenant) in the suit property. The plaintiff and her husband came to Karachi on **29.6.1999** and stayed in the house of father of defendant No.1 who is real uncle of the plaintiff (real chacha). The Plaintiff and her husband planned to raise multi-storied building on her property situated in PECHS, Karachi and demanded original documents. The father of defendant No.1 and uncle of the plaintiff

claimed 50% share in all the properties as they claimed to have been looking after the properties and her interest. The plaintiff and her husband refused to such proposal and consequently relationship was disturbed. The plaintiff and her husband were confined in one room by defendant No.1 with the help of his family members under the watch of gunman. The defendants also forcibly, illegally deprived the plaintiff of her cash and travelers cheques amounting to U.S Dollar 122,400.00. Defendant No.1 misused the position of his father in police department and caused serious harassment to the plaintiff and her family. The public at large has learnt it through news items published in newspaper regarding highhandedness of defendant No.1 and his family. The Plaintiff immediately on **07.7.1999** cancelled the power of attorney through registered revocation deed as well as published public notice of such revocation. The suit property was in the occupation of tenant namely Haji Rasheed Ahmed (defendant No.3) under tenancy agreement dated **01.4.1999** executed by Defendant No.1 on behalf of the plaintiff. The Plaintiff informed the tenant through legal notice dated **05.8.1999** that monthly rent should be paid directly to the Plaintiff in respect of the suit property. However, defendant No.3 did not tender the rent, therefore, Plaintiff filed rent case against Defendant No.3 and it was subsequently transpired that on the basis of Power of Attorney Defendant No.1 has sold out the suit property through registered sale deed dated **11.9.1995** to Defendant No.2 straightaway by presenting sale deed to the Registrar without issuing any public notice or entering into a sale agreement, therefore the plaintiff filed the instant suit.

2. Defendant No.1 and No.2 filed separate written statements and raised preliminary objection, that suit is misconceived, false, baseless, untenable and not maintainable and the plaintiff's claim against defendant No.2 has no substance, since defendant No.2 is the sole and

absolute owner of the suit property since he has purchased the same from defendant No.1 duly constituted attorney of the plaintiff. It is further averred by defendant No.2 that if there is any dispute between the plaintiff and defendant No.1 the same does not concern defendant No.2. It is further submitted that from the date of registration of Conveyance deed in September, 1999 the defendant No.2 is entitled for the rent as he is real owner of the suit property and anybody else is not entitled to claim the rent of the said premises. Regarding revocation of power of attorney by the plaintiff it is further averred that neither the defendants were informed nor any intimation thereof has ever been given by the plaintiff to defendant No.1, therefore, plaintiff cannot take advantage of her own wrong and deprive defendant No.2 from his valuable rights in the suit property which has been lawfully acquired by him against valid consideration and without any intimation.

3. Plaintiff and defendant No.2 had filed proposed issues and from these proposed issues on 12.12.2000 followings issues were adopted by the Court.

- i. Whether the suit as framed is maintainable?
- ii. Whether the relations between the plaintiff and the Defendant No.1 were extremely strained in the month of September, 1999?
- iii. Whether the transaction of sale between defendant No.1 and 2 was without consent and knowledge of the plaintiff and without any authority to defendant No.1.
- iv. Whether the transaction was collusive with a view to deprive the plaintiff of her properties and as such conveyance deed is liable to be cancelled?
- v. Whether the plaintiff received sale consideration if not is he entitled to decree in the sum of Rs.25,00,000/- being the sale consideration of the two apartments and also in the sum of Rs.20,00,000/- as and by way of damages?
- vi. Whether the plaintiff under the circumstances is entitled to possession of apartment No.204 and 205 Business Arcade Plot No.CS-15, Chandni Chowk, University Road, Karachi?

- vii. Whether the defendant No.2 is a bona fide purchaser of the disputed property against consideration and without notice, if so, to what effect?
- viii. What should the decree be?

My findings on the issues are as follows:-

**Issue No.1.** The parties have not pressed issue No.1 about the maintainability, therefore it is dropped.

**Issues No.2, 3 & 4.** The burden to proof of these issues is on the Plaintiff. Learned counsel for the plaintiff has contended that Plaintiff in 1993 was resident of United Kingdom and she had purchased properties in Pakistan since she knew one day her family would return to Pakistan. Therefore, she had appointed defendant No.1 as General Attorney being son of her real uncle (retired) Deputy Superintendent of Police namely Jamil Akhter Kiyani, through a registered Power of Attorney in respect of the various properties purchased by her in Karachi. The Power of Attorneys were executed in **1993**, however, in **June, 1999** when she came to Pakistan to settle here and demanded possession of the properties as well as original property documents, the relations between the plaintiff, her attorney and her uncle DSP Jami Akhter Kiyani were seriously disturbed and they refused to recognize her position as lawful owner. Defendant No.1 abused the position of his father in police department and caused serious harassment to the plaintiff and her family.

4. He contended that the severity of strained relationship between the plaintiff and defendant No.1 is fully explained in the evidence through the newspaper cutting, copy of FIR and different letters written by the Plaintiff to various authorities on the highhandedness of family of defendant No.1 and his family. He referred to documents produced in evidence which include applications addressed to the Prime Minister and the President of Pakistan both dated **10.8.1999**, (Ex.X/11 and Ex.X/12,) Cuttings of newspapers from Daily "AMN" Daily "Express" both dated

**19.7.1999**, Ex.X/14 Ex.15 and press clippings of Daily “Khabrain” dated **20.8.1999**, Exh.X/16, and Daily “Insaaf” dated **24.9.1999**, Ex.X/17 and FIR No.157/99 dated 24.11.1999 registered at Police Station Darkhshan Ex.X/22. The Defendant No.1 and his parents after lodging of the FIR had obtained bail before arrest from the High Court of Sindh but it was dismissed by order dated **17.12.1999** Ex.X/34. Learned counsel for the plaintiff contends that all these documents and other reflects that before execution of sale deed in respect of the suit property, the plaintiff and her attorney (defendant No.1) were not having good relations and therefore, he neither sought her permission to sell the suit property nor passed on single penny towards the sale consideration to her the real owner whose property was sold by defendant No.1 as attorney.

5. In view of the strained relation, the first step which the plaintiff took was to revoke the Power of Attorney executed by her in favour of defendant No.1. Learned counsel has referred to (Exh.8/5) revocation of power of attorney and newspaper dated **10.07.1999** showing publication of revocation in daily ‘Dawn’ and ‘Jang’ (Exh.8/6 & 8/7). The suit property was in possession of defendant No.3 Haji Rasheed Ahmed as tenant under written tenancy agreement, therefore, the Plaintiff through legal notice dated **5.8.1999** (Ex.X/38) informed the tenant that the rent should be given to her instead of attorney. However, defendant No.3 (the tenant) did not tender rent to the plaintiff under influence of defendant No.1 and therefore, Plaintiff filed rent case against Defendant No.3 in **October, 1999**. It was subsequently transpired that on the basis of another Power of Attorney, Defendant No.1 has suddenly sold out the suit property through registered sale deed dated **11.9.1999** on thrown away price to Defendant No.2 straightaway by presenting sale deed to the Registrar. Defendant No.2 got the sale deed registered in his favour without entering into a sale agreement. Learned counsel for the Plaintiff

while referring to the cross-examination of Defendant No.1 explained that on the date of filing of the suit or even subsequently power of attorney in respect of suit property was not revoked as it was inadvertently left out from the revocation deed executed on **07.7.1999** (Ex.8/5) as the plaintiff was under the impression that no other power of attorney was given to defendant No.1. It has later on came to the notice of the plaintiff that the separate power of attorney was executed in respect of the suit property. In both the powers of attorneys the attorney was same Defendant No.1. The second power of attorney was executed on **20.4.1993** only two days after the other power of attorney on **18.4.1993** which was revoked by the plaintiff through Ex.8/5, therefore, it was inadvertently left out otherwise it could have been mentioned in the revocation deed (Ex.P-8/5) or another revocation could have been made simultaneously when the Plaintiff was facing highhandedness of Defendant No.1 and his family under the cover of his father retired DSP. He has also referred to clause-3 of the relevant power of attorney, which has come on record (Ex.X/4), through PW-3 Muhammad Yousuf, attorney and husband of the Plaintiff. Learned counsel has contended that in any case Defendant no.1 by virtue of clause-3 of the power of attorney was under obligation to obtain permission and NOC to execute sale deed or any other registered document. He has relied on clause-3 of the power of attorney, which is reproduced below:-

3. To sell, mortgage, charge, encumber, after obtaining necessary NOC/Permission to execute conveyance deed, gift deed, redemption deed, and to present the same and to admit execution before the Sub-Registrar and obtain possession if not already with the Vendee and effect mutation and change the same in favour of the Vendee.

And, therefore, according to the learned counsel for the plaintiff the authority exercised by defendant No.1 to sell the suit property to Defendant No.2 on **11.09.1999** after the relationship was already severely strained was illegal act on his part. He also knew the other

power of attorney in his favour has already stand revoked and he was not even on talking terms to his principal. He further contended that collusiveness of the transaction between defendant No.1 and defendant No.2 may be appreciated from the fact that Defendant No.2, the beneficiary of the sale has straightaway purchased the suit property without entering into agreement to sell with the attorney. Defendant No.2, knowingly well that the Plaintiff is already in the town, did not ask about the whereabouts of the Plaintiff whose property was sold by Defendant No.1 to him on the basis of power of attorney wherein power to sale was conditional and the authority was limited only to look after the suit property in absence of the principal (the plaintiff) for the purpose of renting out and other repair works. Defendant No.2 knew that there was specific embargo on the authority of the attorney that he should not execute registered deed without permission or NOC. Learned counsel for the plaintiff has relied on the case law reported as *Fida Muhammad ..Vs.. Pir Muhammad Khan (deceased) through LR's and others (PLD 1985 SC 341)*.

6. Lastly he has contended that none of the Defendants have chosen to appear in witness box to deny and dispute the claim of the Plaintiff on oath and / or in support of their own claim of benofide in the transaction of sale and purchase of the suit property by and between Defendants No.1 & 2. The absence of the Defendant No.2 is only because of the fact that the sale was sham sale and it was never practically intended to transfer the suit property to Defendant No.2. The buyer (defendant No.2) was neither put in possession of the suit property even after registration of the sale deed nor the tenant has ever tendered rent to him, the new landlord. Defendant No.2 has not filed any receipt of having received rent from Defendant No.3 who continued to be in possession until 2006 when he voluntarily handed over possession of the suit property to the Nazir of this Court in terms of the order dated **02.02.2006**. Both defendant No.1

and Defendant No.2, did file their separate written statements but they failed to lead evidence. Defendant No.1 even filed affidavit-in-evidence but he never turned up in the witness box to be subjected to cross examination on oath. He had never sent even notice of purchase of the suit property to Defendant No.3 (the tenant) for claiming rent as the lawful owner having acquired the title.

7. Mr. Saleem Thapdewala, learned counsel for defendant No.2 has contended that defendant No.2 is bonafide purchaser of the suit property as on the date of execution of registered sale deed in his favour, the power of attorney in respect of the suit premises was in existence and even the plaintiff has conceded that the said General Power of Attorney had not been revoked in writing. He has contended that the dispute between the plaintiff and her attorney has nothing to do with the bonafides of defendant No.2 in purchasing the suit property. He has further contended that the plaintiff has to succeed on the strength of his own merits and not on the weaknesses of the defendants whether contesting and any evidence was led by them or not. He has relied on the following case law:-

- i. *Mst. Shabana Irfan ...Vs... Muhammad Shafi Khan and others.* **(2009 SCMR 40)**
- ii. *Muhammad Suleman ..Vs.. Rasheeda Bibi and 7 others* **(2012 CLC 79)**
- iii. *MD. Anwarullah Mazumdar ..Vs.. Tamina Bibi and 5 others* **(1971 SCMR 94)**
- iv. *Muhammad Jamaal Shikho and 7 others ..Vs.. Director General Hyderabad Development Authority and another.* **(1996 CLC 408)**

8. He has relied on 2009 SCMR 40 in support of his contention that dispute between the principal and her attorney could not affect the third party, i.e his client. He has relied on 2012 CLC 79 in support of his contention that defendant No.2 being a bona fide purchaser from



attorney could not be held responsible for defect, if any, in the power of attorney. The last two cases 1971 SCMR 94 & 1996 CLC 408 are in support of his contention that the plaintiff has to succeed on the strength of her own evidence and weakness of other side cannot be considered as ground for discretion in favour of the plaintiff. He has, however not disputed the facts that his client has never been put in possession of the suit property. It was in possession of defendant No.3, who surrendered the same to the Nazir of High Court in 2006.

9. There is no cavil to any of the principles advanced in these citations. I am of the considered opinion that while examining the case the plaintiff on the basis of evidence led by the plaintiff, the Court has also to examine the conduct and interest of the defendants in pursuing the cases in which their valuable ownership rights in expensive immovable property are at stake. Once a particular defense has been taken and the defendant fails to appear in witness box, to deny the claim asserted by the plaintiff on oath before the Court and to assert his own defense on oath then it becomes a case of no evidence against the evidence of the plaintiff. May be for this reason, it has been repeatedly held by the Superior Courts that every case has to be decided on its own merits. The case laws do pronounce certain principle of law which are binding on Courts but each principle of law discussed in reported judgments for its binding effect need to be examined in the light of the facts of the case in hand to appreciate its relevance for accepting or rejecting the contentions of either side. In the case in hand the only contestant is a lawyer of defendant No.2 whose case is that he is a bona fide purchaser of the suit property through an attorney and the power of attorney has not been revoked. This fact alone, in presence of several other facts on record which are against the interest of defendant No.2 and have not been denied by defendant No.2, is not sufficient to

outweigh the evidence of the plaintiff. Therefore, mere existence of power of attorney, is not sufficient to be accepted as convincing evidence of bona fide purchase of suit property by him. He did not appear in the witness box to discharge his burden. Whatever the plaintiff has alleged about collusiveness between defendants No.1 & 2 has gone un-rebutted. The plaintiff has very elaborately explained the circumstances in which she has revoked one power of attorney given by her to defendant No.1 and the reason of her failure to revoke the other power of attorney which was also given by her to the same defendant in respect of the suit property was quite plausible. The evidence of strained relationship between the plaintiff and defendant No.1 immediately before the execution of sale on the basis of the power of attorney has also gone un-rebutted. The plaintiff contentions that defendant No.2 himself has never claimed ownership of the suit property even after having purchased the same through a registered document too has been proved since defendant No.2 has not denied it on oath. The suit property was in possession of Haji Rasheed Ahmed (defendant No.3) through a written tenancy agreement and he was informed by the plaintiff through a legal notice that he should tender monthly rent to the plaintiff before the execution of sale deed has gone un-rebutted. This fact has not been denied by defendant No.3 that he has never tendered rent to defendant No.2 nor defendant No.2 has ever claimed that rent has been received by him from defendant No.3 in respect of the suit property. How is it that defendant No.2 has acquired ownership right on payment of consideration but he has never exercise ownership rights even to collect rent from the tenant in occupation of his property? Why he has never exercise his authority as absolute owner of the suit property and why he has not objected when defendant No.3 on **02.02.2006** in presence of advocate for defendant No.2 voluntarily surrendered possession of the

suit property to the Nazir of this Court? It is pertinent to reproduce order dated 02.02.2006 as follows:-

“The learned counsel appearing for the defendant No.3 states that Hiaji Rasheed Ahmed is prepared and willing to vacate the suit premises and hand over the physical possession to the Nazir. **It is admitted position that the status of the defendant No.3 is that of the tenant, he had been paying rent to Jamil Akhtar Kiyani father of defendant No.1 before filing of the present suit, till the decision of the issue regarding the ownership of subject property.** The Nazir is directed to receive vacant and physical possession of the demise premises from defendant No.3 and to retain it's possession and key till the decision of the dispute impose seal upon the outer door of the premises, in order to safeguard it's existing condition, also to prepare the inventory and submit report within ten days hereof. The matter is adjourned to date in office for final hearing of the case”.

The so-called bona fide owner of the suit property has never filed even a formal application to claim that defendant No.3 was in possession as his tenant and therefore, the possession of suit property should be handed over to him pending the suit. He never asked for the rent from September, **1999** till February, **2006** from defendant No.3, who was in possession of the suit property. In view of the above facts and discussion, Issues No.2, 3 & 4 are decided in affirmative.

**Issues Nos.5, 6, 7 & 8.** Once the plaintiff has brought sufficient evidence on record the burden was shifted on defendant No.1 and No.2 to prove the sale transaction particularly payment of sale consideration and also that defendant No.2 was not aware of contents of power of attorney. He has failed to discharge the burden on him. Defendant No.2 has not even inquired from Defendant No.3 (tenant) who was in possession of the suit property that whether defendant No.1 was authorized to sell the suit property without any hindrance. Neither he has even claimed possession nor demand possession of suit property.

In view of the evidence discussed and examined in my findings on issue No.2, 3 and 4, I hold that the plaintiff has not received sale consideration, however in the facts and circumstances of the case I am of the considered view that the plaintiff is entitled for the possession of the suit premises and therefore, the issue No.5 need no answer and issue No.6 is decided in favour of the plaintiff. Therefore, I hold that Defendant No.2 was not bonafide purchaser of the suit premises and issue No.7 is answered in negative. Consequently the suit is decreed as prayed except prayer clause 'B' & 'C' with cost.

**JUDGE**

SM