

IN THE HIGH COURT OF SINDH AT KARACHI

J. M. No. 07 of 2016

along with

J. M. No.81 of 2015, Suit No.2070 of 2014 &
Suit No.Nil of 2016 [Pervez Rehman & others v. Muhammad Iqbal & others]

Date of hearing : 25.04.2019.

Date of Decision : 25.04.2019.

J. M. No. 81 of 2015

Applicant : Muhammad Hussain, through Mr. Mazhar Intiaz Lari, Advocate.

Respondents 1 & 2 : Pervaiz Rehman and Islamauddin, through Mr. Naveed Ahmed, Advocate.

Respondent No.3 : Muhammad Iqbal Pirani, through Mr. Mansoor Ahmed Sheikh, Advocate.

Respondent No.4 : Khurram Ashraf, through Mr. Irfanullah Khan, Advocate.

Respondent No.5 : The Sub-Registrar-I, through M/s. Shahryar Qazi, Additional Advocate General and Farkhunda Mangi, State Counsel.

Respondent No.6 : Defence Housing Authority, through Mr. Asif Rasheed, Advocate.

Respondent No.7 : Nemo.

J. M. No. 07 of 2015

Applicant : Muhammad Iqbal Pirani, through, Mr. Mansoor Ahmed Sheikh, Advocate.

Respondent No.1 : Khurram Ashraf, through Mr. Irfanullah Khan, Advocate.

Respondents 2 & 3 : Pervaiz Rehman and Islamauddin, through Mr. Naveed Ahmed, Advocate.

Case law relied upon by the Applicants' Counsel

Case law relied upon by Respondent No.5's Counsel

1. P L D 1984 S C (A J & K) page-157
[*Qurban Hussain and 2 others v. Hukam Dad*]
2. N L R 1985 AC page-511
[*Qurban Hussain ETC. v. Hukam Dad*]
3. P L D 1991 Karachi page-377
[*Zafarul Islam v. Mrs. Azra Malik*]
4. 1985 C L C page-2831
[*Mrs. Sarwat Siddique and others v. Muhammad Yousaf*]

Other precedents

1. 2002 S C M R page-1761
[*Messrs Dadabhoy Cement Industries Ltd. and 6 others v. National Development Finance Corporation, Karachi*] – **Dadabhoy Case.**
2. 2015 S C M R page-1708
[*Haji Farman Ullah v. Latif-ur-Rehman*]

- Law under discussion:**
1. Specific Relief Act, 1877.
 2. Civil Procedure Code, 1908 (“CPC”)
 3. Qanun-e-Shahadat Order, 1984 (Evidence Act, 1872); Evidence Law.
 4. Registration Act, 1908.

ORDER

Muhammad Faisal Kamal Alam, J: - By this common order, I intend to dispose of the two Judicial Miscellaneous Applications being J. M. Nos. 81 of 2015 and 07 of 2016 (“J.Ms.”). In both these J.Ms., the respective applicants have sought the relief of setting aside the Order dated 06.07.2015 and Decree passed in Suit No.2070 of 2014.

2. The relevant facts for deciding these two petitions are that the entire controversy revolves around two immovable properties viz. Plot Nos.38-C and 40-C, Murtaza Commercial Lane No.1, Phase VIII, D.H.A., Karachi, measuring 200 Square Yards each (the “**Subject Properties**”). The

Applicant / Petitioner in J. M. No. 81 of 2015 claims that both Subject Properties were purchased earlier by his son Abdus Samad from Respondent No.3 (Muhammad Iqbal Pirani) and then same were transferred to the Applicant through registered gift deed dated 16.05.2007. The said Respondent No.3 (in J. M. No. 81 of 2015), has subsequently preferred his independent J. M. No. 07 of 2016 (with the same relief), whereas, Respondents No.1, 2 and 4 in J. M. No. 81 of 2015 (namely, Pervaiz Rehman, Islamuddin and Khurram Ashraf), represented by M/s. Naveed Ahmed and Irfanullah Khan, respectively, claim that the Subject Properties were earlier sold to Respondent No.1 – Khurram Ashraf and then by the latter to Respondent No.1 and 2.

3. In J. M. No. 81 of 2015, the concerned Sub-Registrar-I, is impleaded as Respondent No.5, represented by the learned Additional A.G., whereas, Defence Housing Authority is Respondent No.6, represented by Mr. Asif Rasheed, Advocate, and since the custodian of record in this regard is MEO (Military Estate Officer), the latter has been made as Respondent No.7. For the sake of clarity, both Applicants / Petitioners in J. M. No. 81 of 2015 and J. M. No. 07 of 2016, to be referred to as **“Claimant and Owner”**, respectively, whereas, contesting Objectors / Respondents, namely, Pervaiz Rehman and Islamauddin shall be referred to as **“Objectors A”** and Khurram Ashraf as **“Objector B”**.

4. Mr. Mazhar Imtiaz Lari, Advocate, has referred to various documents in support of his arguments starting from the Transfer Order dated 02.10.1998, Sub-Lease in Form ‘A’ (issued by Respondent No.6 / D.H.A.) and finally the Commercial Leases in respect of the Subject Properties, which is in the name of Owner (Muhammad Iqbal Pirani), to substantiate his arguments that the Subject properties were transferred from the rightful owner. He then referred to second set of the documents, that is,

Sale Deeds dated 10.03.2005 between the aforesaid Owner and Abdul Samad, the son of present Claimant, and finally registered Oral Gift Deed dated 16.05.2007, in which the said Abdul Samad has gifted the properties to the present Claimant, who is his father.

5. In his arguments the learned Advocate for the Claimant has assailed the impugned Order dated 06.07.2015 passed on the Compromise Application filed by the present Objectors “A” and “B”, collectively, in Suit No.2070 of 2014, which finally merged into the **impugned Decree dated 06.07.2015.**

6. Mr. Mansoor A. Shaikh, learned counsel representing the Owner (as referred above) in J. M. No.07 of 2016 has supported the case of Claimant by adding that the documents relied upon by the Objectors viz. General Power of Attorney dated 29.09.2003 and supporting Affidavit of the same date, which form basis of the Agreement (in Urdu) between the Respondents hereto or *inter se*, bear the forged signatures of Petitioner (Muhammad Iqbal Pirani).

7. On the other hand, Mr. Asif Rasheed, learned counsel representing D.H.A. – Respondent No.6 in J. M. No.81 of 2015, confirms that the Subject Properties are still in the name of Petitioner (Owner) – Muhammad Iqbal Pirani and the mutation has not been done.

8. Mr. Shahryar Qazi, learned Additional Advocate General Sindh along with Ms. Farkhunda Mangi, State Counsel, have confined their arguments only to the above General Power of Attorney and its legal effect, while further confirming that no subsequent registered instrument has been executed in the name of above Objectors A and B.

9. On the other hand, M/s. Naveed Ahmed and Irfanullah Khan, Advocates for the Objectors “A” and “B”, have vehemently argued while controverting the arguments of the learned counsel for the Claimant and Owner, that the fraud in fact has been committed by the Owner (Muhammad Iqbal Pirani), who kept on changing his name as reflected in the NADRA Report as well. It is further stated that the transaction between private Respondents (Objectors A and B) are *bona fide* and genuine and does not suffer from any illegality. It is further averred on behalf of Objector ‘A’, that a subsequent Suit Nil of 2016 has been filed, wherein, *inter alia*, Cancellation of Sale Deeds in favour of Claimant is sought.

10. Arguments heard and record perused.

11. Since, I intend to dispose of both J. Ms. on the basis of undisputed facts, therefore, now it is a settled rule that for deciding the applications of the nature, it is not necessary that Issues are framed and the evidence is led. The two reported Judgments handed down by the Honourable Supreme Court, viz. Dadabhoy and Iqbal Cases (*supra*) are relevant and the rule laid down therein is applicable to the facts of present *lis*. Consequently, Issues are not framed in these matters as the controversy can be decided on legal questions and undisputed record.

First, it is to be seen that whether both subject J. Ms. are within time or not. Admittedly, the impugned order and subsequent Decree was passed on 06.07.2015, whereas, the two subject petitions (J.Ms.) have been filed on 08.12.2015 and 10.02.2016, respectively. Article 181 of the Limitation Act, 1908, is applicable to the proceeding of the nature, which prescribes three years time. Consequently, both subject petitions (J.Ms.) are within time.

12. On a specific query, learned counsel representing the Objectors “A” and “B” have stated that when the Subject Properties were firstly sold by

the Petitioner (Muhammad Iqbal Pirani), the Objector “B” has asked the Petitioner / Owner for getting the afore-mentioned General Power of Attorney registered, but, as per the learned counsel, the Owner (Muhammad Iqbal Pirani) disclosed to Khurram Ashraf (Objector “B”) that since former’s CNIC [Computerized National Identity Card] was not available with him as he had applied for correction of his name, therefore, the said Owner (Iqbal Pirani) had sworn an Affidavit which is available at page-197 of the main case file of J. M. No. 81 of 2015. Learned counsel further states that this Affidavit is part and parcel of General Power of Attorney having caption “General Power of Attorney with Consideration”, which is available at page-187 of the main case file (of J.M. No.81 of 2015)

13. Per Legal Team of the private Respondents (Objectors A and B), these two documents were the basis of the first transaction entered into between Objector “B” and Muhammad Iqbal Pirani (Owner and Petitioner in J. M. No. 07 of 2016), whereafter the Subject Properties were sold to Objector “A” under the Agreement (in Urdu) dated 03.06.2010 (**available at page-179 of J. M. No. 81 of 2015**).

14. For the Specific Performance of the above Agreement (in Urdu), the *lis* being Suit No. 2070 of 2014 was filed on 17.10.2014. Perusal of this *lis* shows that a formal Written Statement was filed by the Defendant. It is also interesting to note that Muhammad Iqbal son of Hashim Muhammad Ali (the above named Owner / Petitioner) though was mentioned as sole Defendant but was impleaded through his attorney Khurram Ashraf, that is, Objector “B”. Admittedly, it is the latter who has filed the Written Statement. Consequently, C.M.A. No.10002 of 2015 was filed under Order XXIII, Rule 3 of C.P.C. (available at page-249 of the J. M. No.81 of 2015), on which the aforementioned impugned order was passed which merged with the impugned Decree. This Application has also been examined. It

bears the signature of the present Objectors 'A' as Plaintiffs No.1 and 2 and admittedly does not contain the signature of Defendant (Muhammad Iqbal Pirani) being the actual owner, that is, above named Petitioner of J. M. No. 07 of 2016, but, instead, the above named attorney – Khurram Ashraf (Objector 'B' herein) has signed the above Application, as Defendant.

15. The other undisputed aspect of the case is that the basis of the transaction in Suit No. 2070 of 2014 is the above Sale Agreement (in Urdu) between the Objectors 'A' and the Objector "B" (Khurram Ashraf); the latter is claiming his ownership on the basis of afore-referred 'General Power of Attorney with Consideration' and the supporting Affidavit. Both these documents have no legal sanctity in the eyes of law as General Power of Attorney with Consideration is not only required to contain the stamp duty that of a sale deed, but is also to be compulsorily registered. In this regard, the learned Additional A.G. has also referred to Sections 17, 32, 33 and 49 of the Registration Act, 1908, and also relied upon the case law mentioned in the opening part of this Decision; *particularly*, the reported decision of this Court in the case of *Zafarul Islam v. Mrs. Azra Malik (supra)* is of relevance. In the said reported case also Application under Section 12(2) of C.P.C. preferred by filing Judicial Miscellaneous Petition was allowed. While dealing with the issue of Power of Attorney, the following pertinent observation was made_

“ I will first advert to the question relating to irrevocability of Power of Attorney vis-à-vis the demise of the Principal (Donor). It would be useful to reproduce the definition of "Power of Attorney" as found in section 2(21) of the Stamp Act.

" `Power of Attorney' includes any instrument (not chargeable with a fee under the law relating to court-fees for the time being inforce) empowering a specified person to act for and in the name of the person executing it."

Reference here may also be made to three English cases referred to in "Powers of Attorney Act" by Dhirajlal P. Shah 1961 Edition at page 35:

"Under the common law, a power, if coupled with an interest, cannot be recalled until that interest has been satisfied or abandoned. `Where a power of attorney is part of a security for money, then it is not revocable (Per Lord Kanyon). In Walsh v. Whitcomb (1797) 2 Wsp. 564 at p. 565. The principle is applicable to every case where a power of attorney is necessary to effectuate any security.'..... In the leading case of Smart v. Sandars it was said by Wilde, C.J. (1948) 5 C.B. 895 at page 917"... Where an agreement is entered into on a sufficient consideration whereby an authority is given for the purpose of security some benefit to the attorney of the authority such authority is irrevocable.' "The power must be given for the purpose of protecting some interest of the attorney. The interest must be in the subject-matter of the power itself and not merely arise incidently". Barclays Bank Ltd. v. Bird (1954) ICH 274."

In Frith v. Frith (1906) A.C. 254 the view of the Court was that "A power of attorney is revocable except when made for due consideration and forms part of security".

In the present case there is nothing to show that the power of attorney was for consideration or that it was coupled with interest. If a power of attorney purports to create right, title, or interest, whether vested or contingent, of the value of one hundred rupees or upward, to or in immovable property, it requires compulsory registration under section 17(b) of the Registration Act besides payment of duty under Stamp Act. A power of attorney does not become irrevocable by merely saying so." {Underlined to add emphasis}

16. Not only this, at present, the rival claims of the parties in respect of the Subject Properties have to be weighed in the light of the two sets of documents. First set of documents is relied upon by the Claimants as mentioned hereinabove, that is, the two registered Sale Deeds of 10.03.2005, available at pages-73 and 91 of J. M. No. 81 of 2015; vide these registered instruments the Subject Properties have been sold by Owner (Petitioner – Muhammad Iqbal Pirani) to the above named son of present Claimant. The ownership of Petitioner / Owner is not in question

and is acknowledged by all the parties to the litigation. Subsequently, through another registered document, viz. the two Gift Deeds dated 16.05.2007 (as also mentioned in the foregoing paragraphs), which are available at pages-113 and 141 of J. M. No. 81 of 2015; through these two documents the Subject Properties came to vest in the present Claimant. The title documents of the Subject Properties in the form of 'C' Lease (executed by Defendant No.6 in favour of Owner), stands till date in the name of Owner / Petitioner (Muhammad Iqbal Pirani); these are available at pages-41 and 57 of the main file of J. M. No. 81 of 2015. Authenticity of these title documents has been confirmed by the learned Advocate of Respondent D.H.A. (Mr. Asif Rasheed); *whereas*, the second set of documents on which the private Respondents / Objectors ('A' and 'B') are basing their claim is the aforementioned unregistered General Power of Attorney dated 29.09.2003, together with the Affidavit, *purportedly*, of the Owner / Petitioner of J. M. No. 07 of 2016, which as per learned counsel for the Respondents should be read as part of the General Power of Attorney; regarding this the Petitioner / Owner has taken a stance that these are bogus documents. The third document is the afore-referred Agreement (in Urdu) between the private Respondents / Objectors 'A' and 'B'. *Ex facie*, these documents are not registered and particularly, the General Power of Attorney with Consideration (Annexure 'P-1', available at page-187 of the main file of J. M. No. 81 of 2015), does not have any legal sanctity, in view of the discussion mentioned in the preceding paragraphs. If these registered documents, to which presumption of genuineness (though rebuttable) as envisaged in Article 90 and 92 of the Qanun-e-Shahadat Order, 1984, are evaluated with the documents relied upon by the Objectors, then obviously the finding at this stage goes in favour of the Owner and Claimant, both Petitioners of J. M. No. 07 of 2016 and J. M. No. 81 of 2015, respectively.

17. In the intervening period, the site inspection was also ordered and Nazir has given his Report, which has been objected to by the Objectors. Similarly, the Report of NADRA with regard to change of name is also on record and same is also objected to, therefore, at this stage it is not proper to decide those Issues in which further proceedings and evidence are required.

18. The upshot of the above is that the impugned Order and Decree passed on the basis of the Application filed under Order XXIII, Rule 3 of C.P.C. was collusive and has been obtained through misrepresentation and fraud, therefore, the impugned Decree dated 06.07.2015 along with the order dated 06.07.2015 passed on the above Application, is set aside. As a consequence thereof, both these J. Ms. are accepted to the extent mentioned herein above.

19. Accordingly, after setting aside the impugned Order and decree in Suit No.2070 of 2014, the proceeding in Suit No.2070 of 2014 stands revived but is subject to following directions_

- i. Amended title will be filed by the Plaintiff impleading Muhammad Iqbal son of Hashim Muhammad Ali in his personal capacity and separately impleading Khurram Ashraf son of Muhammad Ashraf (that is, Objector "B") as well as present Claimant and Official Respondents No.5, 6 and 7 (of J. M. No. 81 of 2015), viz. Sub-Registrar, Military Estate Officer and Pakistan Defence Officers Housing Authority, Karachi.
- ii. Written Statements will be filed by the above newly added Defendants in Suit No.2070 of 2014, whereafter Issues will be framed and evidence will be recorded on Commission, if the Court so deems fit.
- iii. Similarly, since another proceeding has been filed in the shape of Suit No. Nil of 2016, therefore, latter suit will be

tagged along with Suit No.2070 of 2014 and both suits will be proceeded together and Court will consider whether both suits can be consolidated or not.

- iv. On the next date of hearing, when both Suits are fixed, then first maintainability of both suits will be argued before proceeding further.

Judge

Karachi Dated: 25.04.2019.

Riaz/P.S.