

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.390 of 2004

[Ibrahim Suteria v. Manzoor Ahmed Abbasi and others]

Date of hearing	:	18.10.2021
Date of decision	:	18.10.2021
Plaintiff	:	Through Mr. Ali Asghar, Advocate Alongwith Mr. Samil Malik Khan, Advocate
Defendant Nos.1-4	:	<i>Nemo</i>
Defendant Nos.5 & 6	:	Through Mr. Ali Murad Memon, Assistant
Defendant No.7	:	<i>Nemo</i>
Defendant Nos.8-10	:	Through Mr. Asif Ali Pirzada, Advocate

JUDGMENT

Zulfiqar Ahmad Khan, J:- This suit was filed on 17.04.2004 for cancellation, declaration and permanent injunction against certain documents favouring the defendants, where a prayer was made that the plaintiff be declared owner of the suit property being Survey No.20, Survey Sheet No.LY-6/20 (old Survey No.P.O.19, Sheet K-3), Chatla No.8, admeasuring about 893 square yards, situated at Pritchard Road, Lyari, Karachi, bearing Unit No.AK3-7S-90, and for the cancellation of registered General Power of Attorney having registration No.585, page Nos.118 to 123, Vol. 149 IV Additional dated 09.06.1997 with the office of the sub-Registrar XI and the Conveyance deed registered as Serial No.1434 on 14.06.1997 and Registration No.301 in Book 1, by Registrar T Division, VI-A and M.F Roll No.3344 dated 20.04.2004 with the office of Sub-Registrar, T-Division, VI-A, Karachi and mutation made at the office of the defendant Nos.5 to 7 on the basis of the said power of attorney and subsequent documents prejudicing the interest of the plaintiff in the said property. Permanent injunction and cost of the suit was also

claimed. This Court through its order dated 26.04.2010 framed following issues:-

1. Whether the Suit is maintainable?
2. Whether Seth Fazal Bhai Ebrahim Suteria Khoja was original owner of the suit property?
3. Whether Power of Attorney dated 26.2.1997 allegedly executed by Seth Fazal Bhai Ebrahim Suteria Khoja in favour of Defendant No.1 is valid and legal document?
4. Whether Conveyance Deed allegedly executed on behalf of Seth Fazal Bhai Ebrahim Suteria Khoja through his Attorney in favour of Defendant 2, 3 and 4 is valid and legal?
5. Whether subsequent transfer of property by Defendant Nos.2, 3 and 4 in favour of Defendant Nos.8, 9 and 10 is legal transfer?
6. Whether the suit land was forfeited by the Government in 1967, if yes, what is its effect?
7. What should Decree be?

2. Cause of action in the matter arose when the plaintiff came to know about certain allegedly forged documents in respect of the suit property and tried to obtain certified copies thereof, and having been defeated in challenging such documents before the departmental officers, filed the instant suit.

3. Evidence from the plaintiff's side came from the plaintiff himself, who produced his affidavit-in-evidence. He also produced original documents marked as Exh.P/1 to P/3. The plaintiff claimed that originally the suit property was registered in the name of Seth Fazal Bhai Ebrahim Suteria Khoja purchased by him through a registered Sale Deed at Exh.P/1 in the year 1946. Evidence leads that late Seth Fazal Bhai Ebrahim Suteria Khoja had two wives, and he signed a declaration and confirmation of oral gift in favour of these two ladies jointly through the registered document dated 07.02.1950, whereafter per plaintiff, plaintiff's father Sher Ali, who was one of the close relative and hailing from the same village in India was given the subject property by

declaration and confirmation of oral gift dated 14.06.1975 alongwith the physical possession of the building constructed thereon on in which a number of dwellings were existing with some tenants residing. During the evidence, he has presented exhibits from the various tenants to confirm those tenants paying rents to the plaintiff himself. *In fact* this Court also performed this exercise of determination as to who was in the possession of the subject property and to whom rents, if any, were paid, on which, the Nazir report dated 28.06.2004 came forward stipulating that most of the occupants affirmed that rents are being paid by them to the plaintiff.

Issue No.1

4. Issue No.1 relates to maintainability of the suit, the burden of proving which rested upon the plaintiff. There is no denial to the legally established principle of law that locus standi and legal character are mandatory requirement for one to maintain a suit and in absence thereof no suit is maintainable, the present plaintiff filed the instant suit not only for declaration of his own legal status as actual owner, but has also sought cancellation of the Power of Attorney and Conveyance Deeds, hence the plaintiff could maintain the suit for declaration of his legal status and could also maintain the suit for cancellation of documents under such declaration. This legal position becomes clearer from a reading to Section 39 of the Specific Relief Act, 1877 which provides as:--

“39. When cancellation may be ordered: Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it an order it to be delivered up and cancelled.”

5. It is obvious from the appraisal of the foregoing provision of law that any person can seek cancellation of a written instrument as 'void or

voidable' if leaving of such document outstanding may cause him serious injury. This view finds support from the judgment rendered in the cases of Muhammad Akram v. Mst. Sheedan Bibi (2004 YLR 577 LAHORE) which required that the plaintiff must allege that if the impugned instrument was allowed to exist, the same would cause him injury as under Section 39 of Specific Relief Act, 1877, a suit for cancellation of instrument is to be through a declaration for cancellation of the instrument declaring the same to be *void* or *voidable*. Case of Muhammad Shakeel v. Karachi Development Authority (2003 YLR 1570 Karachi) is also relevant where it was held that provision of Section 39 of the Specific Relief Act enable any person apprehending that a written instrument, which is *void* or *voidable*, and if left outstanding may cause him serious injury, to approach a competent Court for getting the document so adjudged. Also, the other issues being mixed questions of law and fact would require adjudication and determination too, hence suit cannot be said to be not maintainable, as this would frustrate delivery of justice. Accordingly, Issue No.1 is answered in affirmation.

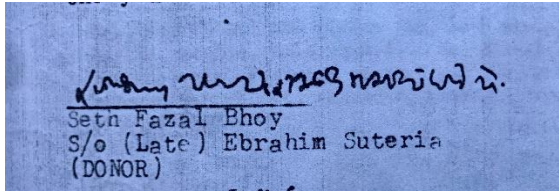
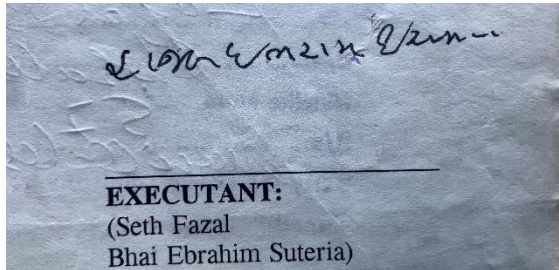
Issue No. 2

6. As evident from the evidence, there is no dispute between the rival parties that Seth Fazal Bhai Ebrahim Suteria Khoja was owner of the subject property as both the sides are drawing their title from him. Issue No.2 is accordingly answered in affirmative.

Issue Nos.3, 4 and 5

7. Issue Nos.3, 4 and 5 are clubbed together, as these relate to the documents challenged by the plaintiff. Learned counsel for the defendant states that his clients i.e. defendant Nos.8, 9 and 10 purchased the suit property from defendant Nos.2, 3 and 4 on 27.02.2004, whereas, the latter defendants purchased the suit property

through a conveyance deed on 14.06.1997 through defendant No.1 Manzoor Ahmad Abbasi, acting through a power of attorney dated 26.02.1997. Since all the subsequent transactions i.e. Sale Deed in favour of defendant Nos.2, 3 and 4 and finally by defendant Nos.8, 9 and 10 found their origin from the Power of Attorney granted to defendant No.1 Manzoor Ahmed Abbasi by late Seth Fazal Bhai Ebrahim Suteria which was produced by the defendant No.8 himself, examination of the said Power of Attorney shows that first of all it has no photographs of the parties. Not only so, the said power is not even signed by the attorney himself, even NIC number is not provided, thumb impression of the said attorney is also missing. Section 52 of the Registration Act, 1908 requires the registering officers to obtain signatures of every person presenting a document for registration and have such signatures endorsed on every such document at the time of its presentation, which is missing in the case at hand. An examination of the signature of the donor, as given at various pages of the Power of Attorney as well as on the various endorsements through naked eye shows that the signature does not match with the signature of said Seth Fazal Bhai Ebrahim Suteria Khoja, as examined from the Conveyance Deed dated 29.11.1946 and the gift documents issued by him in favour of his two wives as reproduced hereunder:

	Signatures on the Gift Deed dated 07.02.1950
	Signatures on the Power of Attorney dated 26.02.1997

8. Plaintiff has also brought evidence before the Court to show that the principal Seth Fazal Bhai Ebrahim Suteria Khoja, who is shown to be 57 years old in the Power of Attorney *in fact* died in the year 1950 as per the extract from the Register of Deaths within the Municipal Limits of Karachi Exh. P/2 and by no stretch of imagination he could be presumed to be alive to sign the Power of Attorney in the year 1997. The said Power of Attorney allegedly granted in favour of Manzoor Ahmed Abbasi is also shrouded with doubts as the said attorney never appeared before this Court, neither filed any written statement. Section 70-E of the Registration Act, 1908 stipulates that the thumb impression or proper identification of the parties is to be given on each side of each page, in their absence veracity of such documents will always be doubtful. While the original documents favouring the defendant Nos.2, 3 and 4 have been produced in this Court, which allegedly have been produced by defendant No.1 acting on the strength of the said Power of Attorney, authentication of the signature of the Attorney, which as mentioned earlier, do not appear anywhere in the original Power of Attorney to show that subsequent documents are signed by the same person to whom the POA was given. None of the marginal witnesses were examined either. In the case of Abdul Rehman v. Ghulam Muhammad (2010 SCMR 978) in identical circumstances the Hon'ble Supreme Court held that after denial to the Power of Attorney onus shifts to defendant to prove that he was appointed as his attorney and where defendant did not examine marginal witnesses and where even trial court dismissed suit as time-barred and where the High Court had decreed suit on the ground that defendant had failed to prove execution of the general power of attorney, holding that the impugned sale-deed and subsequent transactions pursuant thereto were *void* and did not exist in eyes of law, and that the matter be governed by Art.144 of Limitation Act, 1908 and not Art.91 or 120 thereof, directed that while considering question of

limitation in such like suit, court must keep in view distinction between *void* and *voidable* documents, and dismissed the appeal filed by defendant, resultantly this Court reaches to the conclusion that the Issue Nos.3, 4 and 5 be answered in negative making the said Power of Attorney not a legal document and therefore all the subsequent transactions made on the strength of the said Power of Attorney become *void* and superstructure built thereupon collapses by its own weight.

Issue No.6

9. With regard to Issue No.6, this Court through its order dated 26.04.2010 directed the official defendants to communicate their fee demand to the leaned counsel for the plaintiff, and on receipt of the said demand, if plaintiff feels, it to deposit the demanded amount in Bank or treasury, but it seems that despite a reminder per order dated 13.12.2011 no such dues were communicated to the plaintiff, hence the notion that suit property belonged to CDGK was not proved. It is also alarming to observe that defendant No.5 (through its officer Mr. Gahanwer Ali) has filed two versions of written statements, one on 17.11.2005 and another on 07.03.2006. The said defendant in his second written statement came up with a novel proposition that the property *in fact* belonged to CDGK, as it was forfeited by the Government in the year 1957 however with the said written statement, no document has been attached to prove these assertions. He did not appear in the witness box and hasn't adduced any evidence either. Resultantly, as none of his versions could be believed, the Issue No.6 is also answered in negative.

Issue No.7

10. Suit is accordingly decreed while granting prayers 1 and 2 that the said Seth Fazal Bhai Ebrahim Suteria Khoja was real owner of the

property; Power of Attorney dated 26.02.1997 (registered on 09.06.1997) allegedly executed by Seth Fazal Bhai Ebrahim Suteria Khoja is forged document; sale executed on behalf of Seth Fazal Bhai Ebrahim Suteria Khoja on the strength of the aforementioned Power of Attorney by Defendant No.1 in favour of defendant Nos.2, 3 and 4 is *void*, as well as the subsequent sale/transfer to defendant Nos.8, 9 and 10 is also *void*, so are any and all mutations in the names of the private defendants, and holding that the suit land was never forfeited.

Judge

B-K Soomro