

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
Suit No. 443 of 2007

Plaintiff : Humair Associates Builders (Pvt.) Limited,
through Mr. Wajahat Abbas, Advocate.

Defendants : M/s. Chappal Builders and others, through
No. 1 to 5 Mr. Abrar Hassan, Advocate.

Defendant : Muhammad Saleem s/o. Muhammad Sharif
No.6 (*Deleted*).

Defendant : C.D.G.K., through D.D.O (Revenue)
No.7 Nemo

Defendants : District Registrar (Registration) and others,
No. 8 to 10 through Mr. Ziauddin Junejo, Assistant A.G.

Date of Hearing : 25.02.2021

Date of Order : 12.03.2021

ORDER

ZAFAR AHMED RAJPUT, J: - By this order, I intend to dispose of C.M.A. No. 9340 of 2011, filed on behalf of the defendants No. 1 to 5 under Order VII, rule 11, C.P.C., seeking rejection of the plaint in the suit.

2. Precisely stated facts of the case are that the plaintiff has filed this suit for declaration, cancellation of documents, permanent injunction, possession and damages, alleging therein that it is a private limited company engaged in the business of town planning and land development and it had owned land admeasuring 25-24 acres, situated in Survey Nos. 66, 68 & 69 and land admeasuring 02-22 acres situated in Survey Nos. 34, 36, 39, 48, 52, 53, 40, 41, 28, 29, 30, 70, 33, 35, 51, 69 & 37, Deh Thoming, Distract East, Karachi (*total 28-06 acres*), which was utilized by the Government of Sindh in sectorization; hence, the Board of Revenue Sindh, vide Order No. PS/MBR/(LU)/1990/91, dated 30.07.1991, allowed exchange of State land in lieu of

plaintiff's aforesaid 28-06 acres land, with equivalent land in Sector 29 of Scheme No.33; however, due to non-availability of sufficient land in said Sector 29, the possession of only 16-00 acres was given to the plaintiff and the entry whereof was recorded in its favour in the Record of Rights vide Entry No. 7, dated 11.08.1991 (*hereinafter referred to as the "suit land"*) . It is further alleged that the plaintiff vide its letter, dated 09.02.2007, applied to the D.D.O (Revenue) (*Defendant No. 7*) to demarcate the suit land on site, who vide letter, dated 10.02.2007, disclosed that as per their record the plaintiff had already sold out the suit land through its attorney Muhammad Saleem s/o Muhammad Sharif (*Defendant No. 6*) to M/s. Chappal Builders (*defendant No.1*); as such, for the first time, the plaintiff came to know about the above said forgeries and fraudulent transactions perpetrated by the defendants No. 1 to 6. It is also alleged that the defendants No. 1 to 6 in connivance with each other and the concerned revenue staff, first fabricated a General Power of Attorney (**GPA**) fraudulently in respect of the suit land in favour of defendant No. 6 who; thereafter, executed a Registered Sub-Power of Attorney (**SPA**) in favour of Muhammad Amin Chappal s/o. Late Abdul Karim Chappal (*defendant No.2*) and then the defendant No.6 executed a sale deed in favour of defendant No.1 on the basis of forged GPA. It is case of the plaintiff that the said GPA, SPA and the Sale Deed being forged and fabricated documents are liable to be brought up before this Court and cancelled being nullity in law and the defendant No.1 has no right, title or interest in the suit land and the possession and construction thereon is illegal and without lawful authority, and since the plaintiff is the lawful owner of the suit land, the physical possession thereof is liable to be restored to it. Hence, the plaintiff has maintained this suit *inter alia* with the following prayers:

A) *Declare that the plaintiff and Managing Director of the plaintiff company have not executed any General Power of Attorney*

in favour of the defendant No. 6 and the so called General Power of Attorney alleged to have been registered at No. 6489 on 17.12.1991 and all subsequent documents registered on the basis of that General Power of Attorney registered on 24th June,1993 before the defendant No. 9 and the sale deed registered on 29th June 1994 before the defendant No.10 are forged and fabricated documents, having no legal force, and of no legal effect and consequently any transaction based on the same is nullity in the eyes of law and cannot be acted upon.

B) Declaration that the plaintiff is the lawful owner of the land measuring 16-00 acres, situated in Sector 29, Scheme 33, Karachi, as per Entry No. 7/49 dated 01.08.1994 in the Record of Rights and consequently the plaintiff continues to act for the same without any interference from any person.

C) Mandatory Injunction directing the defendants No.1 to 6 to handover the peaceful physical vacant possession of the land measuring 16-00 acres, situated in Sector 29, Scheme 33, Karachi to the plaintiff.

D) Permanent injunction restraining the defendants, their agents, subordinates, or any one claiming through or under them from claiming to be holding any title on the land measuring 16-00 acres, situated in Sector 29, Scheme 33, Karachi or any portion thereof under any sale deed or claiming to be the Attorney or Sub-Attorney of the plaintiff under any fabricated General Power of Attorney or Sub-Power of Attorney, dealing in any manner in respect of said land or nay portion thereof.

E) Directing the defendants No. 1 to 6 to pay, jointly and/or severally, damages to the plaintiff amounting to Rs.100,000,000/- for mental loss, torture, financial loss and agony sustained by the plaintiff.

3. The defendants No. 1 to 5 have contested this suit by filing their written statement, averring therein that the defendant No.6 entered into an agreement of sale, dated 24.06.1993, with the defendant No.2 as attorney of the plaintiff, who also executed SPA in favour of the defendant No.2 on the strength of GPA, executed by the plaintiff in his favour and; thereafter, the defendants No. 1 to 5 by virtue of a conveyance deed dated 29.06.1994 purchased the suit land for a total sale consideration of Rs.1,71,20,000/- through Pay Orders and

one payment on cash and obtained receipts from plaintiff through its attorney, defendant No.6. It is further averred that the defendants No. 1 to 5 after getting the development plan approved from Master Plan Environment Control Department, K.D.A. advertised their project over the suit land under the name and style of “Chappal Sun City” and disposed of all bungalows constructed thereon to the general public. It is further averred that prior to purchasing the suit land, the defendants No. 1 to 5 invited public objections to the proposed transaction; however, no objection whatsoever was raised at that time by any one and; thereafter, they widely advertised their project and created third party interest in respect of the said project;

4. Learned counsel for defendants No.1 to 5 while arguing application under reference has contended that the plaintiff duly executed a GPA in favour of defendant No. 6, which was registered with the concerned Sub-Registrar, and on the basis whereof the defendant No. 6 entered into a sale transaction with the defendant No. 1. He has further contended that during the course of proceedings of this suit on 10.05.2010, it was revealed that the defendant No. 6 had already died on 27.12.1994 and the present suit was filed on 12.04.2007 i.e. approximately 13 years after the death of defendant No. 6; therefore, the legal heirs of defendant No. 6 filed an application under Order I, rule 10 C.P.C. for impleading them as party by informing this Court that defendant No. 6 had expired on 27.12.1994 and such application was allowed on 10.08.2010 whereby the legal heirs of defendant No. 6 joined the suit as defendant No. 6(a) &(b), whereafter, on 01.09.2010 this Court, with the consent of plaintiff, deleted the name of defendant No. 6. He has further contended that the plaintiff cannot seek the cancellation of GPA by filing a suit in 2007 for the reason that the defendant No.6 in favour of whom said GPA was issued had already expired on 27.12.1994 and with his death, the

GPA executed in his favour came to an end. He has further contended that the plaintiff's suit filed against a dead person is also barred by limitation as the execution of the documents those were registered way back in 1994 has been challenged by the plaintiff in the year 2007, while the period to challenge the same under Limitation Act, 1908 (*Act of 1908*) is three years; as such, the plaintiff's suit is clearly time barred. He has also contended that the plaintiff's entire suit is based on the alleged "wrong doing" of defendant No. 6 who had already died 13 years ago before the allegations were leveled against him by the plaintiff; therefore, the allegations against him cannot be proved especially when the cause of action has not devolved upon the successor-in-interest and his legal heirs were dropped by this Court from the array of parties in plaint with the consent of the plaintiff; hence, the plaintiff's suit lacks cause of action against the present defendants and the same is also hit by Power of Attorney Act, 1882.

5. On the other hand, learned counsel for the plaintiff has maintained that the grounds raised by the defendants No. 1 to 5 for the rejection of the plaint cannot be ascertained without recording evidence of the parties. He has further maintained that there are specific allegations of fraud and forgery played by the defendants No. 1 to 6 on the plaintiff which cannot be resolved without recording evidence of the parties as held by the Honourable Supreme Court of Pakistan in the case of *Muhammad Altaf and others v. Abdul Rehman Khan and others* (2001 SCMR 953). He has further maintained that Article 91 of the Act of 1908 provides limitation of three years for seeking cancellation or setting aside an instrument from the date when the fact entitling the plaintiff to have the instrument cancelled or set aside become known to him and since the plaintiff for the first time came to know about the alleged forgery and fraudulent transaction perpetuated by the defendants No. 1 to 6 from letter

dated 10.02.2007 sent by the defendant No. 7, the limitation for the purpose of filing present suit started in February 2007, while the plaintiff filed the instant suit on 12.04.2007, which is within time. He has also maintained that it is well settled principle of law that the “fraud vitiates all transactions”; therefore, registration of the document cannot give any efficacy to the fraudulent and collusive documents merely on the ground that the same are registered documents. It is; however, necessary not only to prove the fraud on the part of executants but also that the transferee was a party to the fraud. He has added that where there is a fraud in registration of a document, such registration can be challenged through a suit for declaration and cancellation; hence, the plaintiff has definite cause of action to maintain instant suit against the beneficiaries of the alleged fraud/defendants No. 1 to 5 which is not barred by any provision of law; therefore, the application under reference is liable to be dismissed.

6. Heard the learned counsel for the parties and perused the material available on record.

7. It is an admitted position that the plaintiff maintained this suit on 12.04.2007, whereas the defendant No. 1 had already expired on 27.12.1994. The legal position by now is quite settled, in that where a suit/lis is against only one defendant of the case, undoubtedly it shall be invalidly instituted being against a sole dead person (defendant) and shall be a nullity in the eyes of law as a whole; it shall be a still born suit/lis; an altogether dead matter, which cannot be revived; it shall, thus not merely be a defect which can be cured, rather fatal blow to the cause. However, the position shall be different where the lis is initiated against more than one defendant and out of them only one or few are dead, while the other(s) is/are alive. In such a situation, it shall

be a validly initiated suit/lis in respect of the defendant(s), who are alive, but invalid qua those, who are dead. Reliance in this regard may be placed on *Muhammad Yar (deceased) through L.Rs. and others v. Muhammad Amin through L.Rs. and others* (2013 SCMR 464) and *Malik Bashir Ahmed Khan and another v. Qasim Ali and 12 others* (PLD 2003 Lahore 615). So far deletion of the legal heirs of defendant No. 6 is concerned, it may be observed that the ultimate beneficiaries of the alleged sale transaction on the basis of alleged GPA are the defendants No. 1 to 5; therefore, the cause of action still survives, even after the death of defendant No. 6, against the defendants No. 1 to 5 being ultimate beneficiaries. Deletion of legal heirs of defendant No. 6 even otherwise does not adversely affects the case of the plaintiff as they are not deriving any right, legal character or interest from defendant No. 6 in this suit. Since the plaintiff has challenged the sale transaction in respect of suit land on the ground that the GPA, under that the defendant No.6 acted and entered into sale transaction with defendants No. 1 to 5, is claimed to be a forged and fraudulent document, so also SPA and sale deed in respect of suit land; hence, the plaintiff's suit cannot be failed merely on the ground that alleged GPA expired with the death of defendant No. 6; as such, the plaintiff apparently has cause of action to challenge the alleged sale transaction on the ground of forgery and fraud. So far the question of limitation is concerned, it is claim of the plaintiff that he came to know about alleged execution of instrument and sale transaction few months before filing of the suit; therefore, the plaintiff's suit appears to be within time in terms of Article 91 of the Act of 1908.

8. It may be observed that for the purpose of rejection of the plaint under Order VII, rule 11 C.P.C., the settled principle of law is that only the contents of the plaint are to be perused. The entire case of the plaintiff rest on the claim

that by committing forgery and playing fraud its land has been transferred in favour of defendant No.1 with the connivance of deleted defendant No. 6 and officials of the Revenue Department, the issue of fraud averred in the plaint cannot be resolved without recording pro and contra evidence of the parties.

9. In view of what has been discussed hereinabove, I am of the view that the plaintiff's suit as per the averments of the plaint is not barred under limitation. The plaintiff has definite cause of action against the defendants to maintain the suit and the factual controversy raised in the pleadings of the parties with regard to their respective claims can only be resolved after framing of issues and recording of pro and contra evidence; therefore, this application being devoid of any merit is hereby dismissed, with no order as to costs.

JUDGE

Athar Zai