

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

Second Appeal No.35 of 2017

Syed Fasih Iqbal
Versus
Hassan Sardar & others

Date	Order with signature of Judge
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1. For orders as to non-prosecution of CMA 290/21
2. For hearing of CMA 3426/17
3. For hearing of main case

Dated: 14.04.2021

Mr. Muhammad Safdar along with Ms. Roheela Nazar for appellant.
Mr. Fazal-ur-Rehman for respondents No.1.
Mr. Muhammad Aqil for respondents No.4 and 5.

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Heard learned counsel and perused record.

A suit for declaration and permanent injunction was filed by respondent No.1. He claimed to have acquired certain rights over the property in question by virtue of Sub-Power of Attorney coupled with sale agreement. Respondent No.1 as plaintiff in the suit sought declaration that he be declared as lawful bona fide purchaser of Plot No.C-237, admeasuring 600 sq. yards situated in Gulistan-e-Jauhar, Karachi. He acquired alleged rights by virtue of an instrument i.e. Power of Attorney allegedly executed between Fasih Iqbal (appellant herein) who is defendant No.1 in the suit and Talib son of Ismail (respondent No.2 herein), defendant No.2 in the suit. Talib who claimed himself to be the attorney of Syed Fasih Iqbal executed a sub-Power of Attorney.

The trial Court framed issues including issued No.1 i.e.

“Whether the defendant No.2 (Talib) has purchased suit property from defendant No.1(Fasih Iqbal) and paid him any amount or sale consideration Rs.750,000/- in connection of the suit property?”

To my utter surprise the trial Court had not given findings and considered the above issue to be redundant. The trial Court observed as under:-

“The main dispute between plaintiff and defendant No.1 is for execution of General Power of Attorney Ex.P/4 as a result of which the defendant No.1 exercised the authority in respect of plot in question on behalf of defendant No.1 and sold out the suit property to the plaintiff. Thus, issue has become redundant.”

This is an erroneous and surprised conclusion drawn by the trial Court and the appellate Court concurred with the same. First of all it has not decided conclusively in terms of Issue No.1 whether any right in terms of Power of Attorney was acquired by defendant No.1 (Fasih Iqbal) i.e. in terms of Section 202 of the Contract Act and/or whether Power of Attorney was coupled with interest. In case such Power of Attorney was coupled with interest only then it could have been further delegated to sub-attorney with interest for passing on further. Since first chain was not shown completed i.e. whether Power of Attorney was coupled with interest or not, further transaction is premature. Since this conclusion was not drawn by two Courts below, it cannot be conceived possibly that rights were further delegated in this regard. Respondent's contention that he may only be declared as lawful sub-attorney is also untenable because first chain has to be completed and the decree is of a lawful purchaser. The suit was not for specific performance.

Learned counsel for respondent No.1 has seriously argued that all such transactions i.e. registered Power of Attorney, sale agreement and receipts of sale consideration are available on record. He submits that even this Court in this Second Appeal can look into the matter to decide issue No.1 afresh. As illuck would have if the trial Court and appellate Court failed to give findings on said issue No.1, which is material and goes to the root of the case, this Court cannot proceed as Court of first instance.

Perhaps deciding issue No.1 afresh in this third tier of litigation would be harsh as any party aggrieved of it would be deprived of right of appeal. A fair judicial proceedings includes a right of appeal and only then the spirit of fair trial could be materialized. In my humble view this issue ought to have been decided on merit by the Courts below so that it could be decided conclusively whether any rights in the property were delegated by defendant No.1/applicant to defendant No.2/respondent No.2 as only then attorney could delegate such rights further to the plaintiff i.e. respondent No.1 herein as his sub-attorney and a decree of lawful purchaser could be passed in favour of respondent No.1.

With these observations I am of the view that the two Courts below erred while deciding issue No.1 and hence the matter is likely to be remanded to the trial Court for a decision afresh in accordance with law. Hence the two judgments dated 20.12.2011 and 24.11.2016 passed by trial Court and appellate Court in Suit No.751 of 2007 and Civil Appeal No.32 of 2012 respectively are set aside and the case is remanded to the trial Court to decide all issues including Issue No.1 on merit however on the basis of evidence already on record as no further evidence is required, as has been consented by the counsels present while this order is being dictated. Order accordingly. The trial Court shall decide the matter within a period of three months from today with notice to all parties concerned.

Judge