

Order Sheet
IN THE HIGH COURT OF SINDH, KARACHI

Suit No. 855/2021

Ishrat Swaleh Vs. Mst. Farzana Shaikh & others

Date	Order with signature of Judge
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For orders on CMAs 2727/2022, 15731/2021, 15732/2021 and 3621/2022.
 For hearing of CMAs **14353/2021**, 16309/2021 and 98051/2021
 For orders as to Maintainability of suit.

Date of Hg:

10.03.2022

Mr. Abdul Latif Leghari, Advocate for Plaintiff along with Mr. Imtiaz Mirjat Advocate.

Mr. M. Noman Jamali Advocate for Defendant No.1.

Mr. M. Haseeb Jamali Advocate for Defendant No.2 along with M/s. Usman Tariq and Fawad Ahmed Tanwari Advocates.

ARSHAD HUSSAIN KHAN, J. Through this application [CMA 14353/2021], under Order VII Rule 11 read with Section of 151 CPC Defendant No. 2, seeks rejection of the Plaint of the present suit.

2. Relevant facts for deciding instant application are that the Plaintiff filed the present suit for Specific Performance and Permanent Injunction with the following prayers:-

- a. To award the Judgment and Decree for Specific Performance in favour of Plaintiff that the Plaintiff is real and lawful owner of Plot No.5-C, Itehad Lane-7, measuring 200 Sq. Yds., Phase-6, D.H.A. Karachi by virtue of General Power of Attorney with consideration and receipt and direct Defendants No. 1 & 2 to perform as per General Power of Attorney dated 18.4.1988.
- b. To award judgment and decree of the permanent injunction in favour of the Plaintiff regarding suit property.
- c. Any other relief which this Honourable Court deems fit and proper may be granted in favour of the Plaintiff.

3. Briefly, the case of the Plaintiff as averred in the plaint is that the property viz. Plot No.5-C, Itehad Lane-7, 200 Sq. Yds., Phase-6,

DHA, Karachi (**suit property**) was originally allotted to Mr. A.M. Qureshi by virtue of allotment order dated 17.11.1972. The said A.M. Qureshi expired on 30.9.1985, leaving behind him five legal heirs viz. (1) Mst. Mairja Qureshi [Wife], (2) Pervez Majeed Qureshi [Son], (3) Mrs. Rizwana Khan [daughter], (4) Javed Majeed Qureshi [Son and present defendant No.2] and (5) Farzana Shaikh [daughter and present defendant No.1]. On 18.04.2018, the above legal heirs entered into a sale transaction with the plaintiff in respect of the suit property and in this regard all the legal heirs after receiving the entire sale consideration executed an irrevocable General Power of Attorney [**GPA**] as well as the receipt for sale consideration of Rs.16,00,000/-. It is stated that the legal heirs had also undertaken to get the suit property mutated in the record of rights in DHA. Thereafter, the Plaintiff, though, time and again asked to the legal heirs to comply and fulfill their commitment regarding mutation as specified in the General Power of Attorney, the legal heirs initially avoided with lame excuses and subsequently, left the country. On 28.06.2014 the Plaintiff sold out the suit property to one Mr. Khurram Ashraf through Agreement of Sale and received entire sale consideration. The plaintiff also assured the vendee that he will get the suit property mutated from the legal heirs of the deceased A.M. Qureshi. It is also stated that when the Plaintiff failed to fulfil his commitment with regard to mutation, the said purchaser-Khurram Ashraf filed a civil suit No.2192/2016, before this Court for declaration, specific performance, possession and permanent injunction. The said suit was subsequently compromised and a compromise decree was passed. However, when Defendant No.3-DHA, did not comply with the decree and filed J.M. No.24/2017 against the compromise decree, the Plaintiff of Suit No.2192/2016 filed contempt proceedings against DHA [Defendant No.3]. This Court upon the contempt application on 09.03.2018 passed an order whereby directed the parties to appear before DHA along with Nazir for compliance of the decree. Thereafter, the Plaintiff and the said purchaser Khurram Ashraf appeared in DHA office, which kept the Original General Power of Attorney and the Sale Agreement in its custody and issued its receiving. On 21.01.2021, JM No. 57/2019 was allowed by this Court and the compromise order and decree

were set aside. Subsequently, on 27.01.2021 Suit No.2192/2016 was withdrawn by said Khuram Ahsraf. It is stated that thereafter the Plaintiff approached Defendant Nos.1 & 2 for mutation but they denied for the same. The Plaintiff also visited the office of Defendant No.3 [DHA] to collect/receive his original General Power of Attorney and Sale Agreement but they also refused to hand over the same, which arisen the cause of action for filing instant suit.

4. Upon notice of this case, legal heirs of Defendant No.2 have filed the present application under Order VII Rule 11 CPC for rejection of the Plaint on the grounds that the suit is barred by law of limitation and the Plaintiff has no cause of action against Defendants 1 and 2, on the basis of unregistered power of attorney. It is stated that the unregistered power of attorney in terms of Section 49 of the Registration Act cannot be operated against Defendants 1 and 2 to create any right whatsoever on the suit property, the suit is also barred by law of Registration, hence the Plaint of the suit is liable to be rejected.

5. The Plaintiff filed his counter affidavit wherein he has denied the allegations levelled in the affidavit in support of the listed application. As regards objections of unregistered power of attorney, it is stated that from the year 1980 to 1996, the properties were being purchased through registered and un-registered power of attorney whereas in the year 1997, the registration of attorney made mandatory through an ordinance. It is also stated that the Plaintiff is lawful owner through General Power of Attorney and Sale Receipt but due to appreciation of market value of the property the Defendants have become greedy. It has been stated that instant application is not maintainable and liable to be dismissed with heavy costs.

6. Learned counsel for Defendant Nos.1 and 2, during the course of arguments, have contended that the Plaint of the suit is liable to be rejected as the same has been filed beyond the period of limitation. It is argued that as per Article 113 of the Limitation Act, limitation for filing a suit for specific performance of the contract is three years from the date fixed for performance of the contract or if no such date is specified then from the date when performance was refused. It is

contended that the plaintiff through instant suit, filed on 26.03.2021, seeks specific performance of a General Power of Attorney dated 18.04.1988, as such, the lapse of time between GPA and filing of case is thirty-three (33) years hence, the suit is hopelessly time barred and liable to be dismissed. It is also argued that without prejudice to the defendants' claim of the GPA being fake and forged, no express denial has been alleged by the plaintiff against the Defendants in the instant matter, therefore, the time for limitation, if any, should start from the date of alleged execution of the fake GPA. It is further argued that the said GPA cannot be treated as contract on the basis of which specific performance could be sought as it does not stipulate any such clause. It only creates a principal / agent relationship whereby the executant authorizes the agent to act on his behalf. It is also argued that under Section 17 (1)(b) of the Registration Act, 1908, an instrument, which grants power to an attorney or which constitutes an agreement to create, declare and assign, by way of sale, any right, title, or interest of the value of one hundred shall compulsory be registered and under Section 49 of the Registration Act, 1908, the alleged GPA, not being a registered document, does not operate to create, declare, assign, limit or extinguish any present or future right, title or interest in the subject property. It has been argued that the alleged GPA stands revoked by operation of law since four out of the five principals/executants have already died, much before the agent/plaintiff even acted on the alleged GPA, therefore, the said GPA has been impliedly repealed. Lastly, argued that the malafide and ulterior motives of the plaintiff is apparent from filing of the present misconceived and time barred suit, hence the Plaint of the present suit is liable to be rejected. In support of his contention he has relied upon the cases of *Muhammad Ali Zubair v. Sabira Khatoon and another* [2017 YLR 138], *Mst. Jaiwanti Bai v. M/s. Amir Corporation and others* [PLD 2021 SC 434], *Zafarul Islam v. Mrs. Azra Malik* [PLD 1991 Karachi 377], *Mehmood Rangoonwala v. Government of Sindh and others* [2006 CLC 611], *Muhammad Khan v. Muhammad Amin through L.Rs. and others* [2008 SCMR 913], *Haji Abdul Karim and others v. Messrs Florida Builders (Pvt) Limited* [PLD 2012 SC 247], *Muhammad Jameel and others v. Abdul Ghafoor* [2022 SCMR 348], *Muhammad*

Yousaf v. Munawwar Hussain and 5 others [2000 SCMR 204], *Karachi Electric Supply Corporation v. Muhammad Shahnawaz and others* [PLD 2017 Sindh 23].

7. Conversely, learned counsel for the plaintiff while reiterating the contents of the Plaint as well as counter affidavit to the application has argued that instant application is misconceived. It has been argued that the plaintiff has purchased the property upon payment of sale consideration and the defendants upon receiving the same have executed payment receipt and the GPA, as such the Plaintiff is lawful owner through GPA and Sale Receipt. It has further been argued that from the year 1980 to 1996, the properties were being purchased through registered and un-registered power of attorneys whereas in the year 1997, the registration of attorney was made mandatory through an Ordinance. It is also argued that the said GPA is irrevocable nature, being coupled with interest as such cannot be revoked / repealed upon the death of the executants / principals. It is further argued that the cause of action accrued to the plaintiff for filing the present case has been clearly mentioned in the plaint. It is also urged that for the purpose of deciding application under Order VII, Rule 11, C.P.C., the Court has only to consider the averments made in the plaint and has to presume that every fact pleaded in the plaint is true and correct. It is further urged that the limitation is a mix question of facts and law, as such cannot be decided without recording evidence. Lastly, he has argued that the Defendants have failed to make out a case for rejection of the Plaint, therefore, instant application merits dismissal with cost.

8. I have heard the arguments of learned counsel for the parties, considered the material available on the record.

From perusal of the records as well as the arguments of learned counsel for the parties, the points emerge for determination of this application are that (i) whether the suit is hit by limitation?, (ii) whether the purported General Power of Attorney [GPA] is a contract specific performance whereof could be sought?, (iii) Whether the purported GPA is coupled with interest as required under the law? and (iv) whether upon the death of the

executants/principals the GPA stands revoked/implicitly repealed by operation of law?

Before dealing with the point of limitation, I will advert to the points relating to GPA first.

The defendants including the DHA, although have disputed the GPA being bogus and fabricated, however, I am not inclined to deal with this issue, at this stage, as the same can only be determined after recording evidence. For the purposes of deciding the application in hand, I will consider only those facts and documents, which are not disputed being matter of record.

9. Point No. (ii)

A power of attorney is written authorization, whereby the 'principal' authorizes the 'agent' to do the acts specified therein on behalf of 'principal' which when executed will be bindings on the 'principal' as if done by him. Primary purpose of instrument of such nature is to assign authority of 'principal' to another person as his agent. In this regard, reliance can be placed on the case reported as *Imam Din v. Bashir Ahmed* [PLD 2005 Supreme Court 418] wherein, the Honourable Supreme Court of Pakistan, inter alia, has held as under:-

“The power of attorney is a written authorization by virtue of which the principal assigns to a person as his agent and confers upon him the authority to perform specified acts on his behalf and thus primary purpose of instrument of this nature is to assign the authority of the principal to another person as his agent. The main object of such type of agency is that the agent has to act in the name of principal and the principal also purports to rectify all the acts and deeds of his agent done by him under the authority conferred through the instrument. In view of nature of authority, the power of attorney must be strictly construed and proved and further the object and scope of the power of attorney must be seen in the light of its recital to ascertain the manner of the exercise of the authority in relation to the terms and conditions specified in the instrument.”

The Supreme Court of India in the case of *Suraj Lamp and Industries Private Limited v. State of Haryana & Anr.* [AIR 2012 SC 206], inter alia, has held as under:

“A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The power of attorney is creation of an agency whereby the grantor authorizes the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by

him (see Section 2 of the Powers of Attorney Act, 1882). It is revocable or terminable at any time unless it is made irrevocable in a manner known to law. Even an irrevocable attorney does not have the effect of transferring title to the grantee.”

The Supreme Court of India in the case of *State of Rajasthan v. Basant Nehata* (2005) 12 SCC 77, inter alia, has held as follows:

“A grant of power of attorney is essentially governed by Chapter X of the Contract Act. By reason of a deed of power of attorney, an agent is formally appointed to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally conferring necessary authority upon Another person. A deed of power of attorney is executed by the principal in favor of the agent. The agent derives a right to use his name and all acts, deeds and things done by him and subject to the limitations contained in the said deed, the same shall be read as if done by the donor. A power of attorney is, as is well known, a document of convenience.”

Insofar as the term ‘Contract’ is concerned, a contract is a legally enforceable promise, or, as defined in Black's Law Dictionary, Fifth Edition, an ‘*agreement between two or more persons which creates an obligation to do or not to do a particular thing*’. The Contract Act, 1872 [the Act] defines the term “Contract” under its section 2 (h) as ‘An agreement enforceable by law’. In other words a contract is anything that is an agreement and enforceable by the law of the land. This definition has two major elements in it viz – ‘**agreement**’ and ‘**enforceable by law**’. In section 2 (e), the Act defines the term ‘agreement’ as every promise and every set of promises, forming the consideration for each other. The Act in its section 2(b) defines the term ‘promise’ as ‘when the person to whom the proposal is made signifies his assent thereto, the proposal becomes an accepted proposal. A proposal when accepted, becomes a promise’. In other words, an agreement is an accepted promise, accepted by all the parties involved in the agreement or affected by it.

Insofar as the term ‘enforceable by law’ is concerned, in order to make a contract as per the definition of the Act, the agreement has to be legally enforceable. Thus, it can safely be said that for an agreement to change into a Contract as per the Act, it must give rise to or lead to legal obligations within the scope of the law.

In view of the above discussion, the cumulative effect in the context would be that the Power of attorney cannot be treated as contract and as such specific performance thereof cannot be sought.

10. Point No. (iii)

A perusal of the purported GPA, shows that the same was neither registered nor requisite stamp duty, as required under the law for power of attorney given for consideration has been paid/affixed, and therefore, the plaintiff's authority to alienate the property was hit by the provisions of Section 17(b) of the Registration, Act 1908 read with Section 2(21) of Stamp Act, 1899. In this regard, this Court in the case of Zafarul Islam v. Mrs. Azra Malik [PLD 1991 Karachi 377] relevant portion of the judgment is reproduced below:-

“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.”

The GPA (annexure C to the plaint) purported to have been executed by the legal heirs of [late] A.M Qureshi is written on the stamp paper of just Rs.75/- giving power/ authority to transfer/sale of immoveable property, at the relevant time worth Rs.16,00,000/- by all means was not duly stamped as required under the Stamp Act, 1899. It should have been sufficiently stamped in terms of Article 48(e) of Schedule-I of the Stamp Act, 1899. Thus, the GPA has not conveyed any legal authority to the attorney/plaintiff to transfer/alienate the suit property. It was mandatory for the beneficiaries of power of attorneys that while acquiring power to transfer / alienation immoveable property that their power of attorney, besides being compulsory registered should have been sufficiently stamped with the stamp duty chargeable on a conveyance deed in accordance with the Stamp Act, 1899.

11. Point No. (iv)

It is an admitted position that the majority of the executants /principals of the GPA have expired as such the GPA, even if executed, upon the demise of the executants, stands terminated by virtue of provisions of Section 201 of the Contract Act, 1872. Although, the plaintiff has claimed that the GPA is coupled with interest as such upon the death of the executants, it cannot be revoked/terminated, yet it may be observed that merely the use of

the word 'irrevocable' in a power of attorney will not make it so, unless it is clear from the terms that it is an agency coupled with interest of the agent without which it will be only an independent authority lacking the "interest" as envisaged in Section 202 of the Contract Act, 1872. From perusal of the GPA, it does not reflect that the same has been executed either upon consideration or in any way coupled with interest. As such, in absence of any specific term, as envisaged under the law, the said GPA cannot be treated as coupled with interest.

Moreover, this Court in the case of Zafarul Islam [supra], inter alia, has also held as under:-

".....Under section 201 of Contract Act, an agency inter alia is terminated by the death of the Principal. In Watson v. King (1515) 4 Camp. 272 at page 274 the Court held:

"This rule of the common law does not apply to prevent revocation by the death of the principal. A power coupled with an interest cannot be revoked by the person granting it but it is necessarily revoked by his death. How can a valid act be done in the name of a dead man?"

12. Point No. (i)

Insofar as the question of limitation is concerned, Article 113 of the Limitation Act, 1908, provides period of limitation of three years for filing of a suit for specific performance of contract. For the sake of convenience, Article 113 of the Act is reproduced below:

113 From specific performance of contract	Three years	The date fixed for performance, or, if no such date is fixed, when the Plaintiff has notice that performance is refused.
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From perusal of the above article, which runs in two parts, it is manifestly clear that insofar as specific performance of a contract is concerned, a limitation period of three years has been provided and any suit seeking specific performance of a contract is to be filed from the date fixed for the performance in the agreement or if no

such date is fixed, then the date on which the Plaintiff has noticed refusal of the performance by Defendant No.1.

In the instant case, the plaintiff through the present suit, filed on 26.03.2021, seeks specific performance of a General Power of Attorney dated 18.04.1988. Perusal of the GPA, does not show that through the said GPA any contract was entered between the parties and in pursuance thereof defendants No.1 and 2 had to perform their part of obligation(s) in certain period of time, as such, in absence of any specific date mentioned in the GPA for fulfillment of the part of the obligation, the present case would fall in the second part of Article 113 *ibid*.

The plaintiff did not annex any document along with the plaint, which could show that, at any point in time, he ever requested to the executants of the GPA to perform their part of obligation (s) under the GPA. There is also nothing available on the record to show refusal of the executants to perform their obligations, if any, under the GPA. In absence of any such document, the limitation would run from the date of execution of the purported GPA i.e., 18.04.1988 whereas the present suit is filed on 26.03.2021, after a lapse of approximately thirty-three (33) years. Even for the sake of arguments, if the denial is calculated from the time when executants of the GPA left the Country, as stated in para 8 of the plaint, even then 24 years have passed as the executant left the country in the 1997. Besides above, if the date of denial is calculated from the time when the plaintiff allegedly requested the executants of the GPA to mutate the property in favour of third party purchaser-Mr. Khurram Ashraf, in pursuance of the sale agreement executed on 28.06.2014, even then more than six years have elapsed between the alleged sale agreement and the filing of the present case. In the circumstances, it is apparent that the suit is *prima facie* barred by limitation under the Article 113 of *ibid*.

13. The upshot of the above discussion is that the suit is not only barred by law but also barred by limitation and as such not sustainable in law, therefore, the plaint is liable to be rejected.

It is well settled that an incompetent suit should be laid at rest at the earliest moment so that no further time is wasted over

what is bound to collapse not being permitted by law. It may be observed that in the trial of judicial issues i.e. suit which is on the face of it incompetent not because of any formal, technical or curable defect but because of any express or implied embargo imposed upon it by or under law should not be allowed to further encumber legal proceedings. Reliance, in this regard is placed on the case of *Ilyas Ahmed v. Muhammad Munir and 10 others* [PLD 2012 Sindh 92]

For the foregoing reasons, Civil Misc. Application No. 14353/2021 under Order VII Rule 11 CPC read with Section of 151 CPC is allowed. Consequently, the Plaint is rejected and all the other pending applications are also dismissed having become infructuous.

JUDGE

Karachi;
Dated **10.06.2022**

*Jamil****