

IN THE HIGH COURT OF SINDH AT HYDERABAD

Ilnd No.S-94 of 2021 : Islamuddin.
For the appellant : Mr. Muhammad Salman Unar, Advocate.
Date/s of hearing : 07.11.2023.
Date of announcement : 07.11.2023.

ORDER

Agha Faisal, J. Appellant had filed F.C.Suit No.278 of 2018 before learned Senior Civil Judge VI Hyderabad for declaration, cancellation and permanent injunction, in respect of immovable property. The trial Court passed an order dated 29.11.2008 holding that since no cause of action could be demonstrated and no entitlement could be shown under section 42 of Specific Relief Act, 1877, hence, the plaint was rejected per Order VII Rule 11 CPC. It is considered illustrative to reproduce pertinent observations herein below:

“Further the contents of plaint reveal that plaintiff wants to sell out Suit property in the year, 2016 due to some family disputes between his two wives, therefore, he issued one special/general power of attorney to defendant No.1, being his elder daughter. This contention of plaintiff does not appeal to prudent mind that at one hand he is facing family disputes between his two wives and on the other hand he is executing power of attorney in favour of his one daughter from his first wife. Similarly, in para 6 of plaint, it is mentioned by plaintiff that on 06.11.2017 “someone” disclosed him that defendant No.1 has given publication that he is exclusive owner of the Suit property. The plaintiff has not disclosed the name of that “someone” from where he got knowledge of such thing. Further, the plaintiff has also not disclosed the exact dates, time and mode when he cancelled the sub-power of attorney.

It is a matter of record that plaintiff has repeatedly mentioned in his plaint that he had taken back the original power of attorney from defendant No.1, however, after filing of written statement when defendant No.1 disclosed that original power of attorney is still in her possession, the plaintiff filed an application under order 6 Rule 17 CPC in instant matter. However, in para 13 of plaint, the plaintiff had already mentioned that title documents of Suit property were misplaced from his house for which he had made a report at PS on 14-11-2017. It is worth to mention that the plaintiff nowhere in instant Suit has prayed for cancellation of such general power of attorney. Moreover, it has also come on record that the original owner of Suit property who had executed power of attorney in favour of plaintiff is already expired on 14.02.2018. Such fact was disclosed by advocate for defendant No.2 before Court and thereafter plaintiff had filed an application under order 1 Rule 10 CPC to join legal heirs of deceased as party to the Suit, which was dismissed vide order dated 19.11.2018 that neither plaintiff has filed present Suit for specific performance against owner nor the sale agreement or power of attorney confers his right of ownership. In such circumstances plaintiff is no more agent/attorney of original owner of property. It is settled law that the relation of principal and agent(s) comes to an end with the death of either side. The reliance is placed on PLD 1980 Lahore 110, since the plaintiff cannot be declared as owner of Suit property, so also after expiry of principal Usman, his power of attorney automatically ceases to exist and lost its legal value. The reliance is placed on PLD 1980 Lahore 110. Hence the Suit of plaintiff does not fall within the ambit of section 42 of Specific Relief Act, 1877.

Under these circumstances, the Court is of the opinion that Suit is not maintainable as no cause of action arose to plaintiff and is barred Under Section 42 of Specific Relief Act, 1877. Consequently, the plaint is hereby rejected Under Order 7 Rule 11 CPC with no order as to costs”.

The petitioner filed Civil appeal No.211 of 2018 before learned VI Additional District Judge Hyderabad same was dismissed vide Judgment dated 07.08.2021. The pertinent observations are reproduced herein below:

“It is settled principle of law that while deciding an application filed U/O VII Rule 11 CPC, the disclosure made in the plaint of Suit is presumed to be correct.

It is the case of the plaintiff, as was set up in the plaint of Suit, that he purchased the Suit property for which the vendor executed an Irrevocable General Power of Attorney in his favour which is still in existence and since some persons were interested to purchase the Suit property he executed special/general power of attorney in favour of his daughter, the respondent No.1 which was cancelled by him subsequently and thereafter he came to know that his daughter executed sale deed in her favour illegally on the basis of such power of attorney which was already cancelled by him.

First of all, if it is assumed to be correct that appellant purchased the Suit property and the vendor executed an Irrevocable General Power of Attorney in his favour, however, on the basis of this document he cannot seek declaration of his being exclusive owner as he was failed to produce on record any title document in his favour. Further again if it is assumed to be correct that he purchased the Suit property from the vendor, nothing is stated in the plaint that what was the total sale amount, how much amount he paid in advance and what was the remaining amount payable and further in whose presence such contract taken place. Further copy of Irrevocable General Power of Attorney annexed with the plaint of Suit does nowhere speak that the Suit property was purchased by appellant or it is the appellant who was empowered to get the Suit property transferred in favour. No doubt, today before announcement of Judgment, the learned Counsel for appellant sent statement enclosing with it photo stat copy of sale agreement dated 04.04.1996 but such simple photo stat copy, disclosure whereof is not made in the plaint Suit, cannot be given weight as parties are bound by their pleadings only. Thus on the basis of Irrevocable General Power of Attorney neither

appellant/plaintiff can seek relief of declaration of his being an exclusive owner nor he could seek declaration of any registered document as null and void. Another aspect of the matter is that instant Suit was filed on 27.2.2018 by the appellant in which an application U/O I Rule 10 CPC was filed with the disclosure that principal of Irrevocable General Power of Attorney namely Shaikh Muhammad Usman expired on 14.02.2018, prior to institution of the Suit filed on 26.2.2018 and if it is so; the Irrevocable General Power of Attorney ceased to exist after demise of its principal. To say that virtue of the provisions of section 202 of the Contract Act, 1872, the interest of agent survives though principal of such document expired, to my humble opinion, the like argument is not correct in the given facts of the case in hand as the Irrevocable General Power of Attorney is silent in respect of the own interest of the agent/appellant. Thus appellant accrued no cause to file instant Suit seeking declaration of his being owner on the basis of the Irrevocable General Power of Attorney which even otherwise ceased to exist prior to filing of Suit. Thus the instant Suit being against the provisions of section 42 of Specific Relief Act, 1877, is not maintainable, therefore, the impugned order being lawful does not call for interference of this Court, the point under discussion is answered in negative.

In view of discussion held in preceding point, instant appeal is dismissed and impugned order shall hold the field. The parties to bear their own cost. Office to send true copies of Judgment to learned trial Court along with R & Ps for information and record”.

The appellant has filed this second appeal seeking following relief:

- a) That, this Honourable Court may kindly be pleased to declare that the plaintiff is exclusive owner of the Suit property.
- b) That, this Honourable Court may kindly be pleased to declare the registered sale deed as null and void, illegal, unlawful which was executed by the defendant No.1 in her favour in the fraudulent manner on the basis of photocopy of cancelled sub-general power of attorney.
- c) That, this Honourable Court may kindly be pleased to pass the Judgment and decree and cancel the registered sale deed dated 27.11.2017 in respect of Suit property which was executed by the defendant No.1 on her own name by misusing the only photocopy of already cancelled sub-general power of attorney.
- d) That, this Honourable Court may kindly be pleased to pass the Judgment and decree and restrained the defendant No.3 not to enter the name of defendant No.1 in the record of rights as owner of Suit property.
- e) That, this honourable Court may kindly be pleased to restrain the defendant o.1,2&3 not to transfer/execute any further registered sale deed/power of attorney in the name of anyone else or not to mortgage and sale out the Suit property till the pendency of instant Suit.
- f) That, this Honourable Court may kindly be pleased to direct the defendant No.1 not to dispossess the plaintiff from the Suit property by declaring the permanent injunction and till the pendency of instant Suit grant them interim injunction.

It is contended by appellant's Counsel that since appellant was endowed with a power of attorney coupled with interest, therefore, same would be sufficient to claim a declaration of title. Learned Counsel also submitted that *interest* referred to supra is by virtue of a sale agreement with original owner, purported author of the power of attorney, however, admittedly deceased, of the property. It is contended that a subsequent registered conveyance in respect of suit property was unlawful, hence, the impugned judgment be set aside and the appeal allowed as prayed.

Heard and perused. The office has raised objection as to whether civil revision ought to have been preferred in the present facts and circumstances instead of second appeal. Learned counsel had no response when confronted with the said objection.

It is also observed that while entire case of appellant is articulated to be predicated upon a power of attorney, sale agreement and registered conveyance, however, no record thereof is available on file; and this matter has subsisted since 2021 without any progress as even notice has not been issued till date.

The primary underlying order is the rejection of plaint under Order VII rule 11 CPC. The evolution of law with respect to rejection of plaints was chronologically catalogued in the *Florida Builders case*¹ wherein the Supreme Court demarcated the anvil upon which the decisions in such matters ought to be rested. The guidelines distilled by the Court in such regard are reproduced below:

“Firstly, there can be little doubt that primacy, (but not necessarily exclusivity) is to be given to the contents of the plaint. However, this does not mean that the court is obligated to accept each and every averment contained therein as being true. Indeed, the language of Order VII, Rule 11 contains no such provision that the plaint must be deemed to contain the whole truth and nothing but the truth. On the contrary, it leaves the power of the court, which is inherent in every court of justice and equity to decide or not a suit is barred by any law for the time being in force completely intact. The only requirement is that the court must examine the statements in the plaint prior to taking a decision.

Secondly, it is also equally clear, by necessary inference, that the contents of the written statement are not to be examined and put in juxtaposition with the plaint in order to determine whether the averments of the plaint are correct or incorrect. In other words the court is not to decide whether the plaint is right or the written

¹Per Saqib Nisar J in *Haji Abdul Karim & Others vs. Florida Builders (Private) Limited* reported as *PLD 2012 Supreme Court 247*.

statement is right. That is an exercise which can only be carried out if a suit is to proceed in the normal course and after the recording of evidence. In Order VII, Rule 11 cases the question is not the credibility of the plaintiff versus the defendant. It is something completely different, namely, does the plaintiff appear to be barred by law.

Thirdly, and it is important to stress this point, in carrying out an analysis of the averments contained in the plaintiff the court is not denuded of its normal judicial power. It is not obligated to accept as correct any manifestly self-contradictory or wholly absurd statements. The court has been given wide powers under the relevant provisions of the Qanun-e-Shahadat. It has a judicial discretion and it is also entitled to make the presumptions set out, for example in Article 129 which enable it to presume the existence of certain facts. It follows from the above, therefore, that if an averment contained in the plaintiff is to be rejected, perhaps on the basis of the documents appended to the plaintiff, or the admitted documents, or the position which is beyond any doubt, this exercise has to be carried out not on the basis of the denials contained in the written statement which are not relevant, but in exercise of the judicial power of appraisal of the plaintiff.”

It was never the appellant's case that rejection of a plaintiff could not have been actuated on the legal principles cited by the respective forums; the case was that such principles were not attracted in the relevant circumstances. It is observed that the learned counsel remained unable to dispel the preponderance of record relied upon in the respective judgments and could not befall the appellant outside the purview of the law relied upon.

The entire appeal appears to have been rested upon certain documents, however, the same have *admittedly* never been placed on record till date. Title is sought to be claimed via a power of attorney, the author whereof is *admittedly* dead. Under such circumstances no case has been made out to warrant any interference in the judgments impugned; upon the grounds articulated.

The learned counsel was confronted with the narrative contained in the impugned judgments, as particularized supra, and asked as to whether it was commensurate with the facts; he replied in the affirmative. Learned counsel was then asked to demonstrate any infirmity in the appellate order meriting interference under Section 100 of the Code of Civil Procedure, however, he remained unable to do so.

It is settled law that a second appeal may only lie if a decision is demonstrated to be contrary to the law; a decision having been failed to determine some material issues; and / or a substantial error in the procedure is pointed out. It is categorically observed that none of the aforesaid ingredients have been identified by the learned counsel. In such regard it is also important to advert to section 101 of CPC, which provides that no appeal shall lie except on the grounds mentioned in the Section 100 of CPC. While this Court is cognizant of Order 41 Rule 31 CPC, yet at this stage no case has been set forthwith to entertain the present appeal in view of the reasoning stated above. As a consequence hereof, in *mutatis mutandis* application of Order XLI Rule 11 C.P.C, this appeal is hereby dismissed *in limine*.

Judge