

THE HIGH COURT OF SINDH, KARACHI

Suit No. 212 of 2000

[Haji Fazalur Rahman versus Abdul Sattar & 07 others]

Plaintiff : Haji Fazalur Rahman son of Haji Fariddudin through Mr. Muhammad Umer Lakhani alongwith M/s. Ishfaq Ahmed and Shaharyar Ahmed, Advocates.

Defendants 1 & 2 : Nemo.

Defendants 3 & 4 : Tauheed Umer Khan and Ali Umer Khan both sons of Muhammad Umer Khan through Mr. Owais Jamal, Advocate.

Defendants 5 to 8 : Government of Sindh through Secretary Land Utilization Department & 03 others through Mr. Ziauddin Junejo, Assistant Advocate General, Sindh.

Dates of hearing : 02-11-2023 & 14-11-2023

Date of decision : 20-02-2024

JUDGEMENT

Adnan Iqbal Chaudhry J. - The **suit property** comprises of 2 acres, 39 ghuntas in Survey No's. 79, 80, 81 and 82 of Deh Safoora, Tapo Malir, Taluka and District Malir, Karachi, in which the Defendants 1 & 2 held undivided share, and who sold the same to the Plaintiff by a sale agreement dated 16.08.1987 against a sale consideration of Rs.13,50,000/-, said to be paid in full. The sale agreement recited that it was coupled with an irrevocable General Power of Attorney executed by the Defendants 1 & 2 in favour of one Haji Abdul Malik for conveying the suit property to the Plaintiff.

2. The events leading to the suit were pleaded as follows. The Plaintiff came across a public notice dated 15.03.1995 by one S.M. Saeed Advocate inviting objections to the sale of the suit property by the Defendant No.3 acting as Sub-Attorney of the Defendants 1 & 2.

Exchange of notices with said Advocate revealed that the sale was intended to M/s. Bell Builders. Since the Plaintiff already had a sale agreement with the Defendants 1 & 2, he filed Suit No. 361/1995 for specific performance against the Defendants 1 & 2, and for an injunction against Bell Builders. From the latter's pleadings the Plaintiff discovered a registered Power of Attorney dated 20.02.1989 executed by the Defendants 1 & 2 in favour of one Shagufta Begum authorizing sale of the suit property, who in turn had allegedly executed a registered Sub-Power of Attorney dated 05.08.1989 in favour of the Defendant No.3 with the same power. However, by their written statement in Suit No. 361/1995, the Defendants 1 & 2 admitted the prior sale agreement with the Plaintiff and receipt of the entire sale consideration, and pending suit they executed a registered Deed of Revocation dated 12.08.1996 to revoke Shagufta's Power of Attorney, followed by a notice of revocation dated 21.08.1996 to Shagufta Begum, followed further by a public notice to that effect dated 28.08.1996. Right thereafter, the Plaintiff came across another public notice dated 13.10.1997 by one Syed Amin-uz-Zaman Advocate that his client had agreed to purchase the suit property from the Defendant No.3. When the Plaintiff brought that to the knowledge of the Defendants 1 & 2, they issued a public notice dated 21.10.1997 that the Sub-Power of Attorney held by the Defendant No.3 stands revoked.

3. Given the aforesaid events, the Plaintiff and the Defendants 1 & 2 made a compromise application in Suit No. 361/1995 whereby the suit was withdrawn against Bell Builders and a decree was passed on 27.10.1997 that the Nazir of the Court shall execute a conveyance deed of the suit property in favor of the Plaintiff.

4. The instant suit was brought when the Plaintiff discovered that despite the aforesaid revocation of the Sub-Power of Attorney held by the Defendant No.3, he had nonetheless conveyed the suit property to the Defendant No.4 by a registered sale deed dated 26.02.1998 [**the impugned sale deed**], and on that basis, the record of rights of the

suit property had also been mutated to the Defendant No.4; hence the prayer for declaration of title to the suit property, for cancellation of the impugned sale deed and mutation, for an injunction against dispossession, and for damages against the Defendants 3 and 4.

5. By written statement, the Defendants 1 & 2 admitted the Plaintiff's case and conceded to a decree. They admitted that they had executed the sale agreement dated 16.08.1987 in favor of the Plaintiff and received the entire sale consideration. They pleaded that the Power of Attorney in favor of Shagufta Begum had been obtained from them by misrepresentation, and they were not aware at the time that Shagufta Begum had given a Sub-Power of Attorney to the Defendant No.3; that they had revoked Shagufta's Power of Attorney by a registered Deed of Revocation dated 12.08.1996 and had also given notice of such revocation.

6. The suit was of course contested by the Defendants 3 and 4, who were brothers. They pleaded that the suit was time-barred; that the sale agreement did not bestow title of the suit property on the Plaintiff; that the Sub-Power of Attorney held by the Defendant No.3 was authorization to convey the suit property to the Defendant No.4; and that the compromise decree in Suit No. 361/1995 did not bind the Defendants 3 and 4. The official Defendants did not file written statement and were eventually debarred.

7. Issues were settled as follows:

- "1. Whether the suit is barred by limitation, if so its effects?"*
- 2. Whether after the revocation of power of attorney dated 20.2.1989 executed by the defendants 1 & 2¹ in favour of Mst. Shagufta Begum and decree dated 27.10.1997 in Suit No. 361/1995² passed by this Court, Tauheed Umer Khan (Defendant No.3) had any authority to act as sub-attorney of defendants No. 1 & 2?"*

¹ Substituted for 'plaintiff' which was a typo.

² Substituted for '362/1995' which was a typo.

3. *Whether the sale deed dated 26.2.1998 executed by the defendant No.3 as sub-attorney of defendants 1 & 2³ in favour of the defendant No.4 is nullity in law and liable to be adjudged as cancelled?*
4. *Whether the entries mutated in the record of rights maintained by the defendants No. 6 and 7 in respect of suit land, are liable to be cancelled?*
5. *Whether the plaintiff is entitled to the reliefs claimed?*
6. *What should the decree be?"*

8. The Plaintiff led evidence through an Attorney. Since the Defendants 1 & 2 were supporting him, they did not cross-examine him nor did they lead evidence. The Defendant No.3 examined himself. The official Defendants did not cross-examine any witness.

9. Mr. Umer Lakhani, learned counsel for the Plaintiff submitted that the Sub-Power of Attorney used by the Defendant No.3 to convey the suit property to the Defendant No.4 had already been revoked when the Defendants 1 & 2 revoked Shagufta's Power of Attorney; that the evidence showed that the Defendant No.3 had notice of such revocation; therefore, the impugned sale deed was executed without any authority and was fraudulent. He submitted that the fraud was also apparent from the fact that the Defendants 3 and 4 were brothers, the impugned sale deed reflected nominal consideration, and it was registered before the Sub-Registrar Agricultural Land while the suit property was non-agricultural. He further submitted that it was not the case of the Defendant No.3 that the Sub-Power of Attorney was given for consideration, and therefore he was required to seek the express permission of the Defendants 1 & 2 before transferring the suit property to his brother as held in *Fida Muhammad v. Pir Muhammad Khan* (PLD 1985 SC 341) and *Shahnaz Akhtar v. Ehsan Ur Rehman* (2022 SCMR 1398).

10. Mr. Owais Jamal, learned counsel for the Defendants 3 and 4 submitted that the suit was time-barred; that the Defendants 3 and 4

³ Substituted for 'Mst. Shagufta Begum' which was a typo.

were not party to the compromise decree in Suit No. 361/1995 and therefore no reliance could be placed on that; that the Plaintiff's cause of action could at best be against the Defendants 1 & 2 for specific performance of the sale agreement between them, and not against the Defendants 3 and 4; that the Sub-Power of Attorney with the Defendant No.3 was authorization to sell the suit property which could not be revoked as observed in *Abdul Rahim v. Mukhtar Ahmad* (2001 SCMR 1488); and that the Defendant No.4 was a *bonafide* purchaser of the suit property.

11. Heard learned counsel and appraised the evidence.

12. Though the Plaintiff claims the suit property on the basis of an unregistered sale agreement dated 16.08.1987 (Exhibit 4), that sale agreement is much prior to the impugned sale deed dated 26.02.1998. The sale agreement is admitted by the vendors, the Defendants 1 & 2, who also admit receipt of the entire sale consideration from the Plaintiff. There is also a compromise decree dated 27.10.1997 in favour of the Plaintiff in Suit No. 361/1995 for specific performance of the sale agreement (Exhibits 14 and 15), which decree is again prior to the impugned sale deed. Apparently, before the Plaintiff could seek execution of that decree, he was confronted with the impugned sale deed of the same property held by the Defendant No.4; hence this suit, which is essentially for cancellation of that sale deed. In other words, this is not a suit where the relief for cancellation would be incomplete without the relief for specific performance, the latter having already been granted to the Plaintiff. Therefore, the argument of Mr. Owais Jamal that the Plaintiff has no remedy but specific performance, is misconceived.

Issue 1: Whether the suit is barred by limitation, if so its effects?

13. The cause of action for the suit is the impugned sale deed dated 26.02.1998 and not the sale agreement dated 16.08.1987. Even if limitation is computed from the date of that sale deed, the suit filed

on 02.02.2000 is within the limitation of 3 years prescribed by Article 91 of the Limitation Act, 1908. Therefore, Issue 1 is answered in the negative.

Issue 2: *Whether after the revocation of power of attorney dated 20.2.1989 executed by the defendants 1 & 2 in favour of Mst. Shagufta Begum and decree dated 27.10.1997 in Suit No. 361/1995 passed by this Court, Tauheed Umer Khan (Defendant No.3) had any authority to act as sub-attorney of defendants No. 1 & 2?*

14. As noted above, the impugned sale deed was executed by the Defendant No.3 acting as Sub-Attorney of the Defendants 1 & 2 under a registered Sub-Power of Attorney dated 05.08.1989 executed by Shagufta Begum (Exhibit 20), preceded by a registered Power of Attorney dated 20.02.1989 executed by the Defendants 1 & 2 in favor of Shagufta Begum (Exhibit 9). Though the Defendants 1 & 2 admitted Shagufta's Power of Attorney, they denied having knowledge of the Sub-Power of Attorney executed by her. Nonetheless, it was the case of the Plaintiff and the Defendants 1 & 2 that Shagufta's Power of Attorney had been revoked by the latter by a registered Deed of Revocation dated 12.08.1996, followed by a notice of revocation dated 21.08.1996 addressed to Shagufta Begum, followed by a public notice to that effect dated 28.08.1996. The Deed of Revocation, the notice of revocation and the public notice thereof were produced by the Plaintiff as Exhibits 10, 11 and 12 respectively, and said documents were admitted by the Defendants 1 & 2. It was therefore the case of the Plaintiff that the Sub-Power of Attorney allegedly held by the Defendant No.3 was automatically revoked, and the impugned sale deed subsequently executed by him was without authorization. The Defendants 3 and 4 denied having knowledge of the said revocation.

15. It is settled law that a Power of Attorney creates an agency between the executor/principal and his Attorney/agent. Section 201 of the Contract Act, 1872 states that an agency is terminated by the

principal revoking the agent's authority. By virtue of section 210, termination of authority of the agent causes termination of the authority of the sub-agent. However, termination of agency is subject to certain restrictions, such as where the agent has himself an interest in the property subject matter of the agency (section 202); and where the agent has already exercised authority to bind the principal (sections 203 and 204).

16. It was never pleaded by the Defendant No.3 that the Sub-Power of Attorney given to him by Shagufta Begum was for consideration or that it was coupled with any other interest in the suit property. On cross-examination he admitted that the original of Shagufta's Power of Attorney was not in his possession. Both the Power of Attorneys, the one given by the Defendants 1 & 2 to Shagufta Begum, and the one given by the latter to the Defendant No.3, do not expressly state that those are for consideration. Though the Defendant No.3 stated in his examination-in-chief that he had purchased the suit property from Shagufta Begum, the sale agreement dated 03.07.1989 produced by him as Exhibit 21, is with one Tufail Ahmed Khan, who allegedly purchased the suit property from Shagufta Begum. But again, that was neither the case pleaded by the Defendant No.3 nor was that sale agreement proved by him. In any case, the Defendant No.3 brought no evidence of any payment made by him for the suit property. Therefore, section 202 of the Contract Act is not attracted and the Defendant No.3 was at best a sub-agent simpliciter.

17. Admittedly, when Shagufta's Power of Attorney was revoked by the Defendants 1 & 2, the Defendant No.3 had not executed the impugned sale deed in favor of the Defendant No.4 so as to bind the Defendants 1 & 2 with that transaction in terms of sections 203 and 204 of the Contract Act. There is also no evidence of any prior agreement with the Defendant No.4. Therefore, sections 203 and 204 of the Contract Act were also no impediment to the revocation made by the Defendants 1 & 2.

18. This brings us to the argument of the Defendants 3 and 4 that they did not have knowledge of the revocation before the impugned sale deed. Section 208 of the Contract Act stipulates that: "The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them." This provision of course embodies the doctrine of apparent authority, and it seems that by virtue of section 210, a sub-agent too can seek refuge under section 208.

19. Since the Defendant No.3 was appointed sub-agent by Shagufta Begum, there was no privity of contract between the Defendants 1 & 2 and the Defendant No.3. As already noted, the agency was not coupled with an interest in the suit property. In such circumstances learned counsel for the Plaintiff argued that the notice of revocation to Shagufta Begum, followed by a public notice thereof, constituted notice to the Defendant No.3 as well. Though the Defendant No.3 produced his passport (Exhibit 26) to contend that he was out of Pakistan, that is of no help to him, for that passport only indicates that he was in and out of Pakistan in 1995, whereas the public notice of revocation was made in 1996. Shagufta Begum was not summoned as a witness by either side. Since the aforesaid evidence by itself may not be sufficient proof of the knowledge of the Defendant No.3 as to the revocation, I proceed to examine the other evidence on the record.

20. In his examination-in-chief the Defendant No.3 acknowledged that the public notice dated 15.03.1995 (Exhibit 5) made by S.M. Saeed Advocate was at his behest when he proposed to sell the suit property to M/s. Bell Builders. On cross-examination he admitted that he had knowledge of Exhibit 6 which was the Plaintiff's objection dated 22.03.1995 to such sale setting-out the prior sale agreement with the Defendants 1 & 2. Bell Builders was then sued by the Plaintiff in Suit No. 361/1995. They entered appearance and acquired knowledge that the Defendants 1 & 2 were admitting the prior sale agreement with

the Plaintiff and had agreed to a decree for specific performance in favor of the Plaintiff. It appears that such fact was communicated by Bell Builders to the Defendant No.3 who was the vendor of the failed sale, for then the Defendant No.3 admittedly made another public notice dated 13.10.1997 (Exhibit 16) through Syed Aminuzzaman Advocate inviting objections to a fresh sale of the suit property, apparently to the Defendant No.4. (By that time, the Defendants 1 & 2 had already revoked Shagufta's Power of Attorney). In response to the second public notice, the Defendants 1 & 2 issued their public notice dated 21.10.1997 (Exhibit 17) to inform the public that Sub-Power of Attorney held by the Defendant No.3 stood revoked and he was not authorized to sell the suit property on their behalf. Yet, the Defendant No.3 proceeded to execute the impugned sale deed on 26.02.1998.

21. On a preponderance of the evidence, the Defendant No.3 had knowledge of the prior sale agreement of the suit property between the Plaintiff and the Defendants 1 & 2, and of the fact that the Defendants 1 & 2 had acknowledged such transaction, and of the consent decree of its specific performance. These acts of the Defendants 1 & 2 clearly implied to the Defendant No.3 that the Sub-Power of Attorney held by him for the same property stood revoked notwithstanding that he may not have been subsequently served with the notice of the Deed of Revocation. Section 207 of the Contract Act provides that revocation of agency may be expressed or may be implied in the conduct of the principal.

22. The other aspect of the matter is that admittedly the Defendants 3 and 4 were real brothers. Ever since the case of *Fida Muhammad*⁴, where a power of attorney is not coupled with an interest in the underlying property, the superior courts have viewed the alienation of immovable property by the Attorney to a close relative as the Attorney dealing with the property "on his own

⁴ *Fida Muhammad v. Pir Muhammad Khan* (PLD 1985 SC 341).

account” within the meaning of section 215 of the Contract Act. It has been held that in such cases, notwithstanding the Attorney’s authority to alienate the principal's property, the Attorney is required to seek the express approval of the principal failing which the principal is entitled to repudiate the transaction.⁵ In the instant case that was not done by the Defendant No.3, and that is another reason to annul the impugned sale deed. The case of *Abdul Rahim v. Mukhtar Ahmad* (2001 SCMR 1488) relied upon by learned counsel for the Defendants 3 and 4 is in circumstances where it was established that the power of attorney was coupled with an interest in the property, and therefore does not apply here.

23. As regards the Defendant No.4, he was not an independent third-party. He was admittedly the brother of the Defendant No.3 and had never set-up a case independent of the Defendant No.3. Evidence was led only by the Defendant No.3 for himself. He did not say that he was authorized to lead evidence for the Defendant No.4. Therefore, the Defendant No.4 led no evidence to rebut the Plaintiff’s case to demonstrate that he was a *bonafide* purchaser of the suit property who had no notice of the revocation of the authority of the Defendant No.3.

24. Having concluded that both the Defendants 3 and 4 had knowledge that there was a prior sale agreement between the Plaintiff and the Defendants 1 & 2 which had been decreed for specific performance, and consequently the knowledge that the Sub-Power of Attorney held by the Defendant No.3 had been revoked, the impugned sale deed dated between the Defendants 3 and 4 was without lawful authority and *malafide*. Issue No. (ii) is answered in the negative.

⁵ *Feroze Bano v. Bilquis Jehan* (1987 SCMR 1009); *Faqir Muhammad v Pir Muhammad* (1997 SCMR 1811); *Rasool Bukhsh v. Muhammad Ramzan* (2007 SCMR 85); *Hajyani Bar Bibi v. Rehana Afzal Ali Khan* (PLD 2014 SC 794).

Issue 3: *Whether the sale deed dated 26.2.1998 executed by the defendant No.3 as sub-attorney of defendants 1 & 2 in favour of the defendant No.4 is nullity in law and liable to be adjudged as cancelled?*

25. Having answered Issue 2 as above, the impugned sale deed dated 26.02.1998 is liable to be cancelled, for if left outstanding it operates to the Plaintiff's detriment. Therefore, Issue 3 is answered in the affirmative.

Issue 4: *Whether the entries mutated in the record of rights maintained by the defendants No. 6 and 7 in respect of suit land, are liable to be cancelled?*

26. Since the impugned sale deed is adjudged for cancellation, the entry made in the record of rights on the basis of that sale deed in favor of the Defendant No.4 is also liable to be cancelled.

Issue 5: *Whether the plaintiff is entitled to the reliefs claimed?*

27. Prayer clause (a) is for a declaration of title to the suit property on the basis of the decree passed in Suit No. 361/1995. Though such decree in favor of the Plaintiff is for specific performance of a sale agreement of the suit property, admittedly it has yet to be enforced and the suit property has yet to be transferred to the Plaintiff. It is settled law that a plaintiff cannot seek a declaration of title on the basis of a sale agreement. Prayer clause (a) is therefore declined.

Prayer clause (b) is for an injunction to restrain the Defendants 1 to 4 from interfering with the Plaintiff's possession of the suit property. However, there is no evidence to show who is in physical possession of the suit property. Therefore, prayer clause (b) too is declined.

Prayer clause (c) is for an injunction directing the Defendants 1 & 2 to execute a sale deed of the suit property in favour of the Plaintiff. To that end, the Plaintiff already holds a decree for specific performance in Suit No. 361/1995. To enforce that decree, the Plaintiff's remedy is an Execution Application under Order XXI CPC,

not a separate suit. Prayer clause (c) is therefore misconceived and declined.

Prayer clause (e) is for damages against the Defendants 3 and 4. However, no evidence was led by the Plaintiff in that regard, and apparently for this reason no argument was advanced by the Plaintiff's counsel in support of that prayer. Prayer clause (e) is also declined.

Issue 6: What should the decree be?

28. The suit is decreed in favor of the Plaintiff and against the Defendants 3, 4, 5 to 8 in terms of prayer clause (d) for cancellation of the impugned sale deed dated 26.02.1998 and the mutation made to the Defendant No.4 on that basis. The impugned sale deed on the record as Exhibit 22, so also its certified copy as Exhibit 18, is impounded for cancellation. The office shall convey a copy of this decree to the concerned Sub-Registrar for compliance of section 39 of the Specific Relief Act, 1877. For cancelling the entry in the record of rights standing in favor of the Defendant No.4, the Plaintiff shall approach to the concerned land revenue officer with this decree.

Prayer clause (g) for cost of the suit is allowed against the Defendants 3 and 4.

JUDGE

Karachi

Dated: 20-02-2024