

IN THE HIGH COURT OF SINDH AT KARACHIS.M.A. No. **398 of 2020**

Petitioner : Batool Hussain Dharamsey, through
Mr. Nadir Khan Burdi, advocate

Date of hearing : 03.12.2020
Date of order : 24.12.2020

ORDER

ZAFAR AHMED RAJPUT, J:- The petitioner, through instant S.M.A. seeks grant of Letters of Administration under Section 278 of the Succession Act, 1925 (“**Act of 1925**”) in respect of assets/immovable property viz. Apartment bearing No. 4-C, Askari-I, situated at Chaudhry Khaleeq-uz-Zaman Road, Clifton, Karachi. The S.M.A. was presented on 02.11.2020 whereupon office raised various objections including one with regard to production of original proper title documents of the subject immovable property.

2. Learned counsel for the petitioner has contended that the predecessor of the petitioner, namely, Hussain Dharamsey purchased the subject property through Irrevocable General Power of Attorney (**GPA**) dated 23.12.1989, which was with consideration in terms of Agreement of Sale of even date and for which deceased paid entire sale consideration and possession of the subject property was delivered to him. He while placing reliance in the case of *Mst. Hajran Bibi and others v. Suleman and others* (**2003 SCMR 1555**), *Muhammad Tahir Nadeem v. Syed Qasim Ali Zaidi Zafar and others* (**2012 MLD 931**), *Muhammad Aslam and others v. Absar Fatima and others* (**2011 CLC 1521**) and *Nazir Ahmed and others v. Suleman and others* (**2000 YLR 527**) has further contended that alleged GPA executed in favour of predecessor of the petitioner by the vendee is irrevocable by virtue of provisions of Section 202 of the Contract Act, 1872 (“**Act of 1872**”) and the possession of subject property with the predecessor of the petitioner in his life time and now with the petitioner is protected by the provisions of Section 53-A of

the Transfer of Property Act, 1882 (“**Act of 1882**”); hence, the alleged GPA has acquired the status of title deed for the purpose of granting Letter of Administration in favour of petitioner.

3. The copies of the alleged registered Irrevocable GPA and Agreement to Sell are available in case file at page 43 to 51 and 53 to 57, respectively. It is specifically mentioned in GPA that it was registered against valuable consideration. I have also gone through the case-law cited by the learned counsel for the petitioner and have found that in none of the case-law it has been observed that the Irrevocable GPA acquires the status of title deed of subject-matter in which the power is to be exercised. Hence, the question as to whether an Irrevocable GPA coupled with interest has the effect of transferring title to the attorney/agent rendering the ownership right in his favour, requires deliberation of this Court under various relevant provisions of the law.

4. ‘Power of attorney’ is defined in the Black’s Law Dictionary, Sixth Edition, at page 1171, as *“an instrument in writing whereby one person, as principal, appoints another as his agent and confers authority to perform certain specified acts or kinds of acts on behalf of principal. Power of attorney is also defined under section 2(21) of the Stamp Act, 1899 as “any instrument (not chargeable with a fee under the law relating to the Court fees for the time being in force) empowering a specified person to act for and in the name of the person executing it.”* Thus, a power of attorney is a delegation of authority in writing by which one person is empowered to do an act in the name of the other. The person who acts on behalf of another person i.e. the principal by his authority is called an agent and the relation between him and his principal is called agency. Section 182 of the Act of 1872 expresses terms ‘agent’ and ‘principal’ as *“an “agent” is a person employed to do any act for another, or to represent another in dealings with third persons. The person for whom such act is done, or who is so represented, is called the “principal”*. The position of law relating to power of attorney is, however,

different when an agency is formed between the principal and agent where the agency is coupled with interest in the subject-matter of the agency. Black's Law Dictionary defines term 'Power coupled with interest' as "*a right or power to do some act, together with an interest in the subject-matter on which the power is to be exercised*". Section 202 of the Act of 1872 provides that where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

5. By its nature and intendment, a power of attorney is a document of convenience. Where circumstances require appointing an agent formally to act for the principal in a particular transaction, or a series of transactions, or to manage the affairs of the principal generally, the necessary authority is conferred by a power of attorney. However, it does not transfer any interest in the subject-matter on which the power of attorney is to be exercised neither does it alienate the subject-matter in favour of the attorney/agent. It is merely an instrument of delegation of power and mere possession thereof does not tantamount to valid title to the subject-matter.

6. Transfer of property is defined under section 5 of the Act of 1882 as "*an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons; and "to transfer property" is to perform such act*". Section 54 (ibid) defines 'Sale' as "*a transfer of ownership in exchange for a price paid or promised or part paid and part-promised. Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.*" However, the tangible immovable property of a value less than one hundred rupees is transferred either by a registered instrument or by delivery of the property. Section 54 (ibid) expressly declares that the contract for the sale of

immovable property does not, of itself, create any interest in or charge on such property. Section 17 of the Registration Act, 1908 (**Act of 1908**) makes a deed of conveyance compulsorily registrable. Section 49 (ibid) provides that non-registration of documents required to be registered by section 17 shall not (a) operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title, or interest whether vested or contingent, to or in immovable property, or (b) confer any power to adopt, unless it is registered. The fiduciary character of the personal obligation created by a contract for sale is, however, recognized in Section 3 of the Specific Relief Act, 1877. It may be observed that the word 'transfer' is defined under section 5 of the Act of 1882 with reference to the word 'convey'. The word 'convey' in Section 5 (ibid) is used in the wider sense of conveying ownership and only on the basis of execution of conveyance deed, the ownership passes from one party to another. Hence, a transfer of immovable property can only be made by a deed of conveyance, duly stamped and registered as required by law, and in the absence thereof, no right, title or interest in an immovable property can be transferred in favor of vendor. Any contract of sale which is not a registered deed of conveyance would fall short of the requirements of Sections 54 of the Act of 1882 and will not confer any title nor transfer any interest in an immovable property.

7. In the case in hand, the GPA is claimed to be for consideration within the meaning of Section 202 of the Act of 1872, if so, then at the most an interest has been created in the property in favor of the deceased/attorney/ predecessor of the petitioner. Possession is also claimed to have been handed over. Thus, the provisions of Section 53-A of the Act of 1882 may also come into play. The net result of all this is that apparently the interest has been created in favor of the deceased/attorney. However, it may be observed that a power of attorney is not an instrument of transfer under any law in regard to any right, title or interest in an immovable property. Even an irrevocable GPA coupled with interest does not

have the effect of transferring title to the attorney/agent, rendering the ownership right in his favour as the law has never given such GPA a status of a title or ownership or conveyance as required by law and the courts have never treated such documents to be documents of ownership at any given point of time. Unless there is a proper registered sale deed, title of an immovable property does not pass.

8. Letters of Administration may be granted to a grantee under Section 218 of the Act of 1925, which provides that where any person has died intestate and was a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, the administration of his estate may be granted to a person who according to the rules for the distribution of the estate applicable in the case of the deceased, would be entitled to the whole or any part of the deceased's estate. The object behind granting ample discretion to the court under Section 218 (ibid) in the matter of grant of Letters of Administration is that the grantee is responsible to the court and is required to carry out the directions faithfully, diligently and effectively; that the administrator would avoid occurrence of personal consideration in the matter of administration and would perform various duties and functions with all efficiency, integrity and honesty and that the administrator is entrusted to act in a 'fiduciary capacity'. It is important to note that, though said provisions provide for grant of administration of the estate in the event of intestacy but Section 298 of the Act of 1925 commencing with non-obstante clause vests discretion in the Court to make an order refusing any such grant, for reasons to be recorded in writing. The power to grant Letters of Administration is, therefore, a discretionary power which is vested with the court and the proceedings for grant of Letters of Administration are summary in nature.

9. In view of above discussion, I hold that a power of attorney is not a title document even if it is coupled with interest. It is just a document of convenience. The protection under section 202 of the Act of 1872, read alone or with section 53-A of the Act of 1882, does not render any ownership or title to its

holder in any manner whatsoever but only grants limited protection as provided in section 202 of the Act of 1872 for possession or specific performance as envisaged under section 53-A (ibid) only against the transferor. Section 54 of the Act of 1882 expressly mentions that a contract of sale of immoveable property does not, of itself create any interest in or charge on such property and therefore even if a GPA coupled with interest does not convey the ownership or title to its holder in any manner whatsoever. The complicated questions of title of property cannot be appropriately conducted in summary proceedings under the Act of 1925. Where it is found that the matter does not relate to grant of Letters of Administration and what is in fact required is adjudication of the title and/or a contractual right and obligation in the property, the court is entitled, in exercise of discretion under Section 298 (ibid) to refuse the grant of Letters of Administration and to relegate the petitioner to the remedy under ordinary civil suit, and since there is no adverse claim between the legal heirs of the deceased in the instant matter, it cannot be termed as contentious case within purview of section 295 of the Act of 1925; hence, instant S.M.A. cannot be converted into a regular civil suit.

10. For the foregoing facts and reasons, instant S.M.A. is dismissed being not maintainable in law as it lacks conveyable title of the deceased in subject-matter, leaving the petitioner at liberty to seek his remedy before the competent Court under relevant law.

JUDGE

Athar Zai