

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.923 of 1997

[Muhammad Zubair Alam v. Irum Alam and another]

Date of hearing : 30.09.2021
Date of decision : 30.09.2021
Plaintiff : Through Syed Shoa-un-Nabi,
Advocate
Defendant No.1 : *Nemo*
Defendant No.2 : Through Mr. Muhammad Arif,
Advocate

JUDGMENT

Zulfiqar Ahmad Khan, J:- This suit for declaration, cancellation, mesne profits, possession, injunction and lease/transfer was originally filed by the plaintiff Mr. Muhammad Zubair Alam against his wife on 30.07.1997 where the following prayers were made:-

- a) It be declared that the plaintiff is the absolute, sole, true owner of the following properties and the defendant No.1 was/is simply a Benamidar in respect of;
 - (i) Bungalow on Plot No.63-(I) and 63-(2), 25th Street, Phase-V, Pakistan Defence Housing Authority, Karachi.
 - (ii) 50% share given to the defendant No.1 in the Company known as Kimblze Chatean De Glace (Private) Limited by the plaintiff and that the defendant No.1 is simply Benamidar in respect of the said property.
- b) Cancel Conveyance Deed in respect of immovable property bearing No.63/1, 25th Street, Phase-V, Defence Housing Authority, Karachi registered with the Sub-Registrar, DHA at Serial No.5183, M.F. Roll No.U-38758 dated 11-12-2000, and Conveyance Deed in respect of immovable property bearing No.63/II, 25th Street, Phase-V, Defence Housing Authority, Karachi registered with Sub-Registrar, DHA at Serial No.5182, M.F. Roll No.U- dated 11-12-2000, both executed by the husband of the Defendant No.2 (so-called attorney of defendant No.1 in favour of the Defendant No.2.
- c) Pass judgment and decree as against the Defendant No.2 and in favour of the Plaintiff to pay mense profits @ Rs.2 lacs per month since April 1999 till date of actual eviction / dispossession of the defendant No. 2 from the immovable properties fully described in prayer (b) above.
- d) Pass judgment and decree as against the Defendant No. 2 directing her to hand over vacant peaceful possession of immovable

property bearing No.63/I and 63/II, 25th Street, Phase-V, Defence Housing Authority, Karachi to the plaintiff.

- e) Decree for permanent injunction restraining the defendants or their employees, agents or workers on their behalf to sell, transfer and or to part possession or encumber the properties Plot Nos.63(1) and 63(2), 25th Street, Phase-V, Pakistan Defence Housing Authority, Karachi, in any manner.
- f) Direct the Nazir of this Hon'ble Court and / or any other relevant authority, office, officer to execute requisite lease and transfer in respect of the immovable property i.e. Plot Nos. 63(1) and 63(2), 25th Street, Phase-V, Pakistan Defence Housing Authority, Karachi in favour of the plaintiff.
- g) Cost of the suit.
- h) Any other relief or reliefs which this Hon'ble Court may deem fit and proper.

2. The case of the plaintiff is that he holds Ph.D in Pharmaceutical Chemistry from London and M.B.A (Finance, Management and Operation) from USA as well as M.Sc. in Applied Chemistry from Dhaka University and he is a person who is fully recognized in his area of expertise and has held various global positions including Production Manager in Pfizer Laboratories Ltd., Dhaka, Production/Project Manager in Pfizer Laboratories Ltd., Karachi, Plant Manager/Work Director in Pfizer International Premix Complex, Lagos, Nigeria, Work Director in Beecham Pvt. Ltd, Karachi, Production Director in Smith Kline Beecham Company, Karachi and Director Manufacturing Technology in Smith Kline Beecham Company, Karachi. Throughout this period, as per the plaintiff, he earned substantial amounts detailed out in paragraph 3 of the plaint to the tune of Rs.20 million in the year 1997. Plaintiff states in the memo of the plaint that he was married to the defendant No.1 on 05.11.1975 and mostly spent his working life out of Pakistan and only returned to Pakistan in the year 1983. The couple lived together and to nest themselves purchased the suit property built on Plot No.63, 25th Street, Phase-V, Defence Housing Authority, Karachi admeasuring 2000 square yards in the name of his wife on account of his love and affection. Whereupon he built a house on an area of 1100 square yards and left 900 square yards to be used as a garden. Through the documents attached with the plaint and his affidavit the plaintiff has tried to put forward a case that all the assets including the suit property were purchased by him from the funds generated by the plaintiff however as mentioned earlier on account of his love and affection, has put the suit property in the name of his wife. The case of the plaintiff is that he alongwith his wife started a business named as Kimblze Chatean De Glace (Private) Limited in the year 1995 having 50-50% share. Seemingly the said

company did not do well and resulted in a dispute in between the couple. As substantial liabilities accrued, which lead a part of the said property being mortgaged with Lever Brothers as well as certain Bank loans were also obtained. It is alleged by the plaintiff that his wife bifurcated the said plot without his consent and issued certain power of attorneys to a stranger in this regard. The couple got divorced soon after this suit was filed as stated by plaintiff's counsel.

3. When this suit was filed, notices were issued to the defendant. Vide order dated 05.08.1997 parties were directed to maintain *status quo*. It seems that the defendant No.1, his wife being agitated filed her own suit against the present plaintiff (husband) bearing No.1258 of 1997 and a perusal of the order dated 21.09.1998 reflects that this Court issued directions of maintaining *status quo* in both the suits. Seemingly both the suits were dismissed on account of non-prosecution on 29.11.2005, whereafter, only the instant suit was restored on 06.02.2006 and the other remained dismissed. This Court having noted that issues were filed and adopted in both the connected suits, vide order dated 21.08.2007 transported the issues from the dismissed suit for the purpose of the instant suit. A perusal of the issues reflects that at that juncture defendant No.2 was not a party. The instant suit was again dismissed for non-prosecution on 13.11.2007, whereupon a restoration application was filed, and the instant suit stood restored. While this dispute between the couple was going on, it appears that the defendant No.2 claimed that she had purchased the said property from defendant No.1 through Power of Attorney granted by the defendant No.1 to the husband of the defendant No.2 namely Adnan Asad and application under order I rule 10 CPC was made by her. A review of the order dated 04.10.2012 shows that the said application was allowed and the plaintiff was directed to file amended titles, however this Court through its order dated 18.09.2012 upon coming to know that the suit property had changed hands was alarmed. Thereafter, amended issues were framed incorporating the version of the newly added defendant and finally by order dated 12.09.2014, following issues were framed:-

1. Whether the suit as framed is maintainable?
2. Whether the defendant Erum Alam is Benamidar or ostensible owner in respect of the property bearing No.63/I and 63/II, 5th street, Phase V, DHA, Karachi?
3. Whether all the assets held in the name of M/s. Kimblze Chateau De Glace (Pvt) Limited is owned by the plaintiff and the defendant No.1 is simply Benamidar?

4. Whether the defendant No.1 has committed any contempt or disobedience of the order dated 21.9.1998?
5. Whether the defendant No.1 had executed lawfully General Power of Attorney in favour of the husband of defendant No.2 in respect of bungalow Nos.63/1 and 63/II, 5th Street, Phase V, DHA, Karachi, with power to sale the same?
6. Whether the husband of the defendant No.2 by virtue of General Power of Attorney had lawfully executed conveyance deed dated 06.12.2000 in respect of bungalow Nos. 63/1 and 63/II, 5th Street, Phase V, DHA, Karachi, in favour of the defendant No.2?
7. Whether the defendant No.2 has any right and/or any legal title in respect of bungalow Nos. 63/1 and 63/II, if no, its effect?
8. Whether the plaintiff has no cause of action to maintain the suit?
9. Whether the plaintiff is entitled for relief claim in suit?
10. What should the decree be?

4. Whereupon, parties were directed to file list of witnesses and documents. It appears that Ms. Naheed Naz, Advocate was appointed as Commissioner to record evidence vide this Court's order dated 26.03.2018.

5. In my considerate view, the nucleus of Issue Nos.1, 8 & 9 rests to the maintainability of the instant suit, cause of action and the relief claimed by the plaintiff. "Cause of action" is interpreted by courts to mean bundle of facts which if traversed, a suitor claiming relief is required to prove for obtaining judgment. Courts have held that totality of the facts must co-exist for a claim to succeed. It is also well established that not only the party seeking relief should have a cause of action when the transaction or the alleged act is done but also at the time of the institution of the claim and a suitor is required to show that not only a right has been infringed in a manner to entitle him to a relief. Since, there can be no denial to the legally established principle of law that *locus standi* and legal character are mandatory requirement for one to maintain a suit and in absence thereof a suit shall not be maintainable, but it can be seen that the present plaintiff has filed the instant suit not only for declaration of his own legal status as actual owner but also sought cancellation of the conveyance deeds. A plaintiff can always maintain a suit for declaration of his legal status as well as a suit for cancellation of a document per Section 39 of the Specific Relief Act, 1877 which reads as:-

"39. When cancellation may be ordered: Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it

adjudged void or voidable; and the Court may, in its discretion, so adjudge it an order it to be delivered up and cancelled.”

6. As seen from foregoing provision of law, “any person” can seek cancellation of a written instrument as ‘void or voidable’ if remaining of such document outstanding may cause him serious injury. The plaintiff claims ownership of the property and has also sought cancellation of defendant’s documents, which would require adjudication and determination hence suit cannot be said to be not maintainable in its present form and it also can’t be said that the plaintiff has no cause of action. Accordingly, Issue Nos.1 and 9 are answered in **Affirmative**, while Issue No.8, which reads that *whether plaintiff has no cause of action to maintain the suit* is answered in **Negative**, as discussed above, that the plaintiff has cause of action.

7. It is interesting to note that throughout these proceedings, the defendant No.1 Mst. Irrum Alam never appeared, nor did Mrs. Anjum Asad, the defendant No.2, while written statements were filed by both the ladies, hence the battle only remained between the plaintiff and Adnan Asad acting as an attorney of his wife Anjum Asad, who claimed having purchased the said property through power of attorney granted by ex-wife of the plaintiff in his favour and thereafter on the strength of the said power of attorney, having executed the conveyance deed of the suit property on 06.12.2000 in favour of his wife. The extracts of the affidavit-in-evidence of the said defendant are reproduced hereunder:-

“I Adnan Asad son of Asad Jan Hameed, muslim, adult, Resident of House No.63/i, and 63/ii 25th Street Phase-V DHA Karachi, do hereby state on oath as under:

1. That I am the attorney of Defendant No.2 in this case and as such fully conversant with the facts mentioned herein.
2. That the Plaintiff has not come with clean hands before this Honourable court and has filed the instant suit by concealing the true facts and above said suit of the Plaintiff is not maintainable under the eyes of law as per preliminary objections raised by the Defendant No.2 in her written statement and the same may be treated as part and parcel of this affidavit in evidence.
3. That the Defendant No.1 alongwith her husband Plaintiff had obtained the loan facility from M/s. Saudi Pak. Leasing Co Ltd by mortgaging the suit properties and subsequently the Plaintiff and Defendant No.1 were facing the litigation in shape of banking suit No.607/1997 and execution proceeding No.235/1999 and the Plaintiff and Defendant No.1 had also mortgaged the said properties with the Lever Bros Pak Ltd and to finalize the loan facility and save the properties from the auction proceeding the Plaintiff and Defendant No.1 approached Defendant No.2 and requested her to purchase the suit property and on their request, the Defendant No.2 has purchased the said properties and had paid the sale

consideration amount to M/s Saudi Pak Leasing Co Ltd and Lever Brothers Pak Ltd and after satisfying the loan facility Defendant No.1 had executed registered conveyance deed bearing Registration No.3968 Book 1 with the office of the Sub Registrar T Division II-A Karachi dt 6.12.2000 and conveyance Deed bearing Reg No. 3967 Book 1 with the office of the Sub Registrar T. Division II-A, Karachi dated 6-12-2000 and there after the suit properties were mutated in the name of Defendant No.2 as per transfer order dt 8-6-2001 issued by the Military Estate Office Karachi and change of ownership letter dated 30-1-2004 issued by the Clifton Cantonment Board DHA Karachi in favour of Defendant No.2 on the basis of agreement of Release dt 8-2-2000 Deed of Redemption dated 8-2-2000 and B Lease issued by the DHA. Photo state copies of the De Attachment of Properties orders passed in banking suit No.607/1997 execution No.235/99, "Conveyance Deed dated 6-10-2000 transfer order dt 8-6-2001 and 30-1-2004 DHA letter dated 20-10-2007 Redemption Deed B Lease are attached herewith as Annexure D1 to D-12.

4. That the Plaintiff and Defendant No.1 have jointly mortgaged the suit properties with M/s. Saudi Pak Co Ltd and also mortgaged the same with the Lever Brothers Pak Ltd and after the attachment of the suit properties through execution proceeding of banking suit the said properties were sell out by the Defendant No.1 alongwith the Plaintiff to the Defendant No.1 just to save the said properties from the auction and on the request of Defendant No.1 the Defendant No.2 purchased the said properties and had paid the entire loan amount to M/s. Saudi Pak Leasing Co ltd and M/s. Lever Brothers Ltd. Thereafter the said properties were transferred by the Defendant No.1 in favour of Defendant No.2 through executing valid registered conveyance deed and other documents but the Plaintiff with the malafide intention and ulterior motive has not mentioned the said facts in the instant suit which shows the malafide and ulterior motives of the Plaintiff.
5. That when the Defendant No.2 came to know about the pendency of above said suit, she Immediately filed application U/O 1 Rule 10 CPC R/W Sec 151 CPC for impleading her as a party in the above suit and after hearing the above application was allowed by this Honourable court vide order dt 4-10-2012.
6. That the Plaintiff and his wife Defendant No.1 had obtained said loan facility availed financial facility by mortgaging the suit properties and they were facing the litigation of the and thereafter they have sold out the said properties to the Defendant No.2 but the Plaintiff and Defendant No.1 by concealing the true facts have started the litigation through this suit with Intention to play fraud with Defendant No.2 and when the Defendant No.2 came to know about the pendency of this suit illegal and fraudulent act of Plaintiff and Defendant No.1 she immediately filed application Order 1 Rule 10 the same was allowed and thereafter she was impleaded as Defendant No.2 in this suit and she filed her written statement, denied the contention and averments of the plaint of the suit and also mentioned the detail of purchase of suit properties. The Honourable court has framed the issue and matter was fixed for recording the evidence of the parties. The Plaintiff has filed his affidavit in evidence before the learned Commissioner but failed to appear before the learned Commissioner for his evidence since 2014. This Honourable Court also give the power to the learned commissioner to close the side of the Plaintiff if the Plaintiff failed to appear, for his evidence. The Plaintiff has failed to appear to record his evidence and the learned commissioner has closed the side of Plaintiff. The Plaintiff has filed application for re-opening the side and recalling order

dated 16-1-2019 and after hearing the said application was also dismissed by this Honourable court on 3-10-2019.

7. That the Plaintiff has not come with clean hands before this Honourable court suit of the Plaintiff is also not maintainable under the eyes of law and the same is also liable to be dismissed special compensatory cost.
8. That whatever stated above is true and correct to the best of my knowledge and belief.

8. In her written statement, the defendant No.1 has not stated that the suit property was purchased by her from her own funds. In fact she has never stated that she was ever engaged in any gainful employment. Following paragraphs from the written statement are worth reproduction:-

- (i) The defendant agreed to marry the plaintiff and to proceed to Nigeria and not to use her academic qualifications in gainful employment on the condition that all savings made by the plaintiff from his earnings from employment will be shared equally by the plaintiff and the defendant.
- (ii) The salary of the plaintiff was partly paid in the Nigerian currency Naira and partly paid in US dollars. Pursuant to the agreement, the savings made in the foreign currency were deposited in the account with Chase Manhattan Bank, New York, USA, in the joint names of the plaintiff and the defendant.
- (iii) That a Plot No.63, 25th Street, Phase V, Defence Housing Authority, Karachi, measuring 2000 sq. yds. was acquired in the name of the defendant at the price of Rs.550,000/-. The purchase price was paid from the joint savings of the plaintiff and the defendant.
- (iv) That construction was put up on the said plot which is presently a matrimonial house, where the plaintiff, defendant and their two sons are residing. The funding for the construction between the period 20/07/84 to 22/5/85 was made from the accounts being Chase Manhattan Bank and Habib Bank Ltd from the joint savings of the plaintiff and the defendant.
- (v) That on retirement from the service, the plaintiff started to have the feelings of insecurity and became hypersensitive and suspicious. He started claiming that the matrimonial house constructed on plot No.63, 25th Street, Phase-V, Defence Housing Authority, although acquired in the name of the defendant, was the exclusive property of the plaintiff and that the joint business carried out in the name of Kimblze Chateau De Glace (Private) Limited was his exclusive business. That in pursuance thereof the plaintiff has filed this suit.
- (vi) The only dispute between the plaintiff and the defendant was whether the plaintiff is the exclusive owner of the business.

9. It is interesting to note that while a number of documents were exhibited by Mr. Adnan Asad acting as an attorney of the defendant No.2, (his wife) however the Power of Attorney on the strength of which he sold the suit property to his wife is not produced during evidence.

10. Learned counsel for the said defendant No.2 relying on the evidence of the said defendant has stated that *in fact* the subject property was rented out to Mr. and Mrs. Adnan Asad and they were resident thereof, having a tenancy of 25 years, and upon coming to know that there were certain claims on the said property by Lever Brothers as well as few banks, offered his services to the defendant No.1 to have those claims settled and to enable him doing so, a power of attorney was granted to him to settle the dispute with the creditors including the Bank. It is interesting to see that amongst the entire evidence adduced by the said witness, no document has been attached that he was tenant in the said property.

11. Having transferred the suit property in favour of his wife, counsel contended that proper mutation of the said property in the name of defendant's (Adnan Asad) wife was affected in DHA records. When posed with the question that when the power of attorney empowering the said witness Adnan Ahmed to effect the sale of the property from defendant No.2 has not been produced in the Court, how subsequent transactions made on the strength of the said power of attorney, could be considered legitimate? Counsel had no answer. It is interesting to note that a copy of the said Power of Attorney was attached alongwith the written statement filed. While having no evidentiary value still one does not fail to observe that the said Power of Attorney was granted by defendant No.1 having shown herself resident of a house in Lahore to Mr. Adnan Asad to "*lookafter, deal and manage*" the suit property. Nowhere in the said instrument power to sell the said property has been entrusted upon the Attorney. In fact the word "sale" or "sell" does not appear anywhere in the said document except in clause 12, where the word "sale" is used in the following context that:-

"That the Power of Attorney will be effective and operative only in case its sale is declared null and void by any order or ordinance etc. of the Government."

12. No meaning can be attributed to the word "sale" as used in the above mentioned clause as it appears to be a typographic error as the said clause does not render any meaning. Combined effect of above mentioned paragraph 7 to 12 results me concluding that Issue Nos.2 and 3 have to be answered in **Affirmative**. Hence answered as such.

13. With regards to Issue No.4, whether the defendant No.1 has committed any contempt of this Court's order dated 21.09.1998, as mentioned in the foregoing, this Court had earlier passed consolidated

orders in both the suits directing parties to maintain *status quo* with regards to the properties subject matter of the suits, hence sale/transfer of the suit property by defendant No.1 in favour of defendant No.2 through the power of attorney granted to the husband of the defendant No.2, which this Court has not seen, is a clear violation of this Court's order, for which contempt proceedings could be initiated against the defendant No.1. This issue is accordingly answered in affirmative.

14. With regards Issue Nos.5, 6 and 7, which deal with the issuance of the said power of attorney and the transactions completed thereafter, they are answered in negative, because no such power of attorney was produced in the evidence.

15. Suit is accordingly decreed as prayed.

Judge

Barkat Ali, PA