

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1447 of 2006

[Syed Amjad Mahboobv.....Raja Mumtaz Hussain Arif & others]

Date of Hearing : 08.12.2021
Plaintiff through : Mr. Abdullah Nizamani, Advocate.
Defendants through : Dilawar Hussain Bhatti, Defendant
No.2 in person. None present for
defendant No. 1, 3 & 4.

JUDGMENT

Zulfiqar Ahmad Khan, J:-This suit has been filed seeking specific performance of an agreement dated 16.09.2006 and permanent injunction.

2. Concisely, the facts of the case are that Plot No.9, Survey No.1/2, situated in Defence Housing Scheme No.1, Malir Cantt., Karachi (“the suit property”), was originally allotted on 30.04.2003 to defendant No.3, who sold it to defendant No.2 on 13.04.2004 through a registered General Power of Attorney. Thereafter on 09.05.2005, defendant No.2 sold the suit property to defendant No.1 through a registered General Power of Sub-Attorney. Plaintiff alleged that defendant No.1 executed an agreement to sell dated 16.09.2006, whereby he agreed to sell the suit property to the plaintiff in consideration of Rs.90,00,000/- An advance part payment of Rs.15,00,000 was made by the plaintiff to defendant No.1, out of which Rs.12,00,000 was paid through a demand draft and Rs.300,000 was paid in cash. The balance amount was to be paid by the plaintiff on or before 30.09.2006 after clearance and verification of documents, and execution of a General Power of Sub-Attorney in favour of the plaintiff. In order to perform his agreed part of the

contract, the plaintiff arranged a demand draft for the balance sale consideration of Rs.75,00,000, but defendant No.1 did not execute the requisite documents in favour of the plaintiff within the stipulated period. Plaintiff having aggrieved by the conduct of the defendant No.1, through his legal counsel issued a notice to defendant No.1 on 10.10.2006 calling upon him to complete the sale in his favour, but the efforts of the plaintiff remained in vain, whereafter, the plaintiff filed this suit with the following prayers:-

- a) for specific performance of agreement dated 16.09.2006 directing the defendant No. 1 to 3 to execute transfer documents (required/prescribed by the defendant No.4) in the office of the defendant No.4 in favour of the plaintiff in connection to the plot No.9, survey No.1/2 measuring 500 square yards or thereabout situated at Defence Officers Housing Scheme No.1, Malir Cantt, Karachi or execute a general power of attorney coupled with interest for consideration agreed in the sale agreement.
- b) in the alternative, the Nazir of this Hon'ble Court be directed to execute transfer documents (required/prescribed by the defendant No.4) in office of the defendant No.4 on behalf of the defendant No. 1 to 3 in favour of the plaintiff in connection to the plot No.9, survey No.1/2 measuring 500 square yards or thereabout situated at Defence Officers Housing Scheme No.1, Malir Cantt, Karachi.
- c) permanently restrain the defendant No.1 to 3 or any one claiming through or under them from transferring, alienating, encumbering, creating any third party interest or dealing with in any manner whatsoever with the plot No.9, survey No.1/2 measuring 500 square yards or thereabout situated at Defence Officers Housing Scheme No.1, Malir Cantt, Karachi except in favour of the plaintiff.
- d) grant cost of the suit;
- e) for the grant of such other relief(s) as this Hon'ble Court may deem just and proper in the circumstances of the case.”

3. Having filed the suit, the summons/notices were issued to the defendants to file their written defence. Per record, considerable time was given to the defendants to file their written statements and in deference of the notices, only defendant No.2 contested the matter and filed his written statement while defendant No.1 & 4 were debarred from filing written statements vide order dated 25.08.2008 despite extending considerable time.

4. The Defendant No.2 in his written statement challenged the filing of the instant suit on different counts. According to defendant No.2, the plaint does not disclose any cause of action, and the suit is barred by law. Defendant No.2 has averred that there was no privity of contract between him and the plaintiff, or between the plaintiff and defendant No.1. He has further averred that the registered General Power of Sub-Attorney dated 09.05.2005 executed by him in favour of defendant No.1 was revoked by him on 05.06.2006 through a registered Deed of Revocation, which was within the knowledge of defendant No.1. It has also been averred that an undertaking was executed by defendant No.1 on 24.09.2006 that he had terminated the agreement to sell dated 16.09.2006 in favour of the plaintiff; and that the plaintiff had witnessed the said undertaking. Defendant No.2 has alleged that in view of the said revocation on 05.06.2006, defendant No.1 had no right or authority to execute the agreement to sell on 16.09.2006 in favour of the plaintiff. He has further alleged that forged, fabricated and fictitious documents were prepared by the plaintiff and defendant No.1 in collusion with one another, and this Suit is based on such documents. It has also been alleged that defendant No.1 never acquired the ownership and title of the Suit

property, and as such the same could not be sold by him to the plaintiff.

5. Record reflects that on 06.04.2009, issues were framed and parties were directed to file list of witnesses and documents. A cursory glance over the file transpires that on 29.02.2016 the matter was referred to the learned commissioner to record evidence. The issues settled by this court are as under:-

“1. Whether the plaintiff has no locus standi to file the instant Suit ?

2. Whether the documents, on the basis of which Suit for specific performance is filed, is forged and/or fabricated as to what consequences ?

3. Whether the Sub-Power of Attorney purportedly executed by the defendant No.2 in favour of defendant No.1 was already revoked on 5/6/2006 within the knowledge of defendant No.1 ? If so, to what effect ?

4. Whether the sale agreement dated 16/9/2006 is capable of specific performance ? If so, to what effect ?

5. Whether the purported sale agreement was terminated through undertaking dated 24/9/2006 ? If so, its effect ?

6. What should the judgment and decree be ?”

6. At the outset, the main stance of learned counsel for the plaintiff is that plaintiff before purchasing suit property invited objections through public notice in newspapers, but defendant No.2 did not come forward to object to the sale of the suit property. He vociferously contended that the agreement for sale of the suit property between defendant Nos. 1 and 2 was never cancelled and, this fact alone is sufficient to show that the sale in favour of

defendant No.1 by defendant No.2 was never repudiated. His next stance is that as the registered General Power of Sub-Attorney was admittedly executed in favour of defendant No.1 by defendant No.2 for consideration, the same could not be revoked unilaterally by defendant No.2 and due to this reason, the purported Deed of Revocation is of no legal effect. He next contended that there is another aspect to consider, which is the defence of the plaintiff taken pursuant to section 41 of the Transfer of Property Act, with regard to the transfer by ostensible owners for consideration and on no discoverable principle can bona fide purchasers be penalized for any fraud or misrepresentation by the defendant No.1 unless plaintiff is *pari delicto*. While summing up his submissions, learned counsel for the plaintiff requested for the decree of the suit as prayed.

7. Defendant No.2 in person submitted that he agreed to sell the suit property to defendant No.1, and defendant No.1 delivered him a cheque for Rs.30,00,000/- towards the agreed sale consideration which was dishonoured upon presentation and due to this reason, he rescinded the sale, and through a registered Deed of Revocation dated 05.06.2006, he revoked the registered General Power of Sub-Attorney dated 09.05.2005 executed by him in favour of defendant No.1. According to him, the original documents of the suit property and the original registered General Power of Sub-Attorney are in his possession. He submitted that no vested right in the suit property was ever created in favour of defendant No.1, and as such he had no *locus standi* to sell the suit property to the plaintiff

8. Heard the arguments. Issue No.1 germane to *locus standi* of the plaintiff to file the instant suit. The expression "*locus standi*" and

“*aggrieved person*” are interlinked and complementary. Per Black’s Law Dictionary, the term *locus standi* is a Latin word which means place of standing. The Black’s Law Dictionary further elaborates the term *locus standi* as *the right to bring an action or to be heard in a given forum*. While the apex court in plethora of precedents defined the term an aggrieved person as “a person whose interest is adversely affected”.

9. Apart from above, the plaintiff has filed this lis for the performance of a contract/agreement. According to the plaintiff, the defendant No.1 agreed to sell the suit property while the plaintiff agreed to purchase the same and for performing certain acts, the plaintiff and defendant No.1 entered into a sale agreement on 16.09.2006. Having scanned the record, it came on the surface that the defendant No.2 amid his examination-in-chief introduced on record an undertaking (urdu version and exhibited as Exh D-2/7A, page 155 of the evidence file) which appears to have been signed by the plaintiff as well as defendant No.1 explicates that defendant No.1 upon happening of certain things rescinded the sale transaction allegedly entered into between the plaintiff and defendant No.1. Record shows that in fact the defendant No.1 was neither owner of the suit property nor competent to enter into any sale transaction with respect to the suit property with the plaintiff for the reasons that on the basis of alleged General Power of Sub-Attorney, the defendant No.1 entered into a Sale Agreement had already been revoked/rescinded by the defendant No.2, therefore, the defendant No.1 through an undertaking (Exh.D-2/1, page No. 155 of the evidence file) revoked/over turned the sale agreement dated

24.09.2006 based upon which the suit in hand was filed by the plaintiff. It is gleaned from the appraisal of the foregoing that an instrument which the plaintiff wants specific performance is neither in existence nor in vogue and the same has been mutually rescinded by the plaintiff and defendant No.1, therefore, in view of the above facts and circumstances, the issue No.1 is answered in negation.

10. In my considerate view, the Issue No.2, 3 & 5 are inextricably linked based upon similar evidence of the litigating parties, therefore, it would be advantageous to discuss the same simultaneously, in same breath.

11. Perusal of record insinuates that Attorney of the plaintiff namely Syed Ghulam Raza in his examination-in-chief introduced on record certain documents which are exhibited and available in the evidence file, more particularly attorney of the plaintiff exhibited Lease Deed as Exh. P/2 which was executed in favour of defendant No.3 (original owner of the suit property). Exh. P/3 introduced on record by the attorney of the plaintiff is a General Power of attorney executed by the defendant No.3 in favour of defendant No.2. He went on to produce General Power of Sub-Attorney as Exh. P/4. Exh. P/5 is an Indemnity Bond while Exh. P/6 is an Affidavit in the name of the defendant No.2. He next produced at the time of his examination-in-chief an agreement to sell as Exh. P/2 (available at page No.55 of the evidence file) which seeks to answer the issues under discussion.

12. In contra, defendant No.2 in order to substantiate and strengthen his version introduced on record Registered Deed of

Revocation of Sub-General Power of Attorney as Exh. D-2/1, General Power of Sub-Attorney as Exh.D-2/2, an Affidavit in the name of Defendant No.2 as Exh. D-2/2a, copies of cheques as Exh. D-2/3 & D-2/4, Cheque Returned Memo as Exh. D-2/5 & D-2/6, an application addressed to the Nazir of this court by the Military Estates Officer as annexure 2 (available at page No. 145 of the evidence file), an undertaking executed by defendant No.1 as Exh. D-2/7A and such other ancillary documents.

13. From perusal of the record, it reveals that the defendant No.1 claims to be owner of the suit property on the basis of General Power of Sub-Attorney upon which he entered into sale transaction with the plaintiff which had already been revoked/rescinded by the defendant No.2 on 05.06.2006. Defendant No.2 introduced on record that defendant No.1 paid consideration in shape of cheques towards purchasing of the suit property but unfortunately the said cheques were dishonoured on their presentation owing to which the defendant No.2 rescinded the sale transaction with the defendant No.1. Exhibit D-2/1 unequivocally connotes that defendant No.2 by way of registered instrument, revoked the Sub-General Power of Attorney executed in favour of the defendant No.1 and the said document is also registered with the Sub-Registrar, Shah Faisal Town, Karachi vide M.F. Roll No. U49261 - 3512.

14. It is obvious from the appraisal of the evidence that defendant No.2 in his examination-in-chief also introduced on record an undertaking (urdu version and exhibited as Exh D-2/7A, page 155 of the evidence file) which explicates that defendant No.1 rescinded

the sale transaction allegedly entered into between the plaintiff and defendant No.1. It also a matter of record that the defendant No.1 was neither owner of the suit property nor competent to enter into any sale transaction with respect to the suit property with the plaintiff for the reasons that on the basis of alleged General Power of Sub-Attorney, the defendant No.1 entered into a Sale Agreement had already been revoked/rescinded by the defendant No.2, therefore, the defendant No.1 through Exh.D-2/1/undertaking revoked and overturned the sale agreement dated 24.09.2006 upon which the suit in hand was filed by the plaintiff. In view of the reasoning and rationale encapsulated hereinabove, the Issue Nos. 2, 3 & 5 are answered in affirmation.

15. The nucleus and distillation of Issue No. 4 germane to performance of the sale agreement dated 16.09.2006. The general principle for the enforcement of specific performance is that every contract creates not only a right but also corresponding obligation in another. Every contract entails an obligation on each of the contracting parties to perform such terms of the contract as covenanted, failing which the other party has right to insist on the actual performance of the contract or to obtain satisfaction for the non-performance. So as to invoke specific performance, the following ingredients are necessary:-

- (i). there should be a contract enforcement of which is not barred in the Act;
- (ii). the act to be done is in respect of trust;
- (iii). there is no standard for ascertaining the actual damages caused;
- (iv). pecuniary compensation is not adequate relief;

(v). the Court deems it fit to exercise its discretion in favour of the plaintiff.

16. Reverting to the merits of the issue under discussion, since the sale agreement dated 16.09.2006 for which specific performance is sought is not in field but has been revoked which alleged to have been entered into between the plaintiff and defendant No.1, through an undertaking dated 24.09.2006, therefore, the issue No.4 is answered in negation.

17. Issue No.6, the whys and wherefores lead this court to a finale that the sale agreement dated 16.09.2006 for which specific performance is sought is not in field but has already been revoked by the plaintiff and defendant No.1 through an undertaking dated 24.09.2006, therefore, in sequel of the foregoing reasons and rationale, the suit of the plaintiff is dismissed.

Karachi
Dated:17.01.2022

JUDGE

Aadil Arab