

IN THE HIGH COURT OF SINDH AT KARACHI

HCA No.382 of 2006

Present:

Mr. Justice Irfan Saadat Khan

Justice Mrs. Kausar Sultana Hussain

J U D G M E N T

Date of hearing: 01.04.2019.

Appellants: Mst. Shahla Begum and Sadruddin Hashwani through Mr. Muhammad Arif Khan, Advocate.

Respondent: Brig. (Retd.) Muhammad Akbar Khan (now deceased) through his L.Rs. through Mr. Anwar Muhammad Siddiqi Advocate alongwith Malik Muhammad Ejaz, Advocate.

IRFAN SAADAT KHAN, J. This High Court Appeal has been filed against the judgment dated 27.03.2006 passed by the learned Single Judge of this Court. The learned Single Judge while passing the impugned judgment on the basis of the pleadings framed the following issues:-

- "1. *Whether the irrevocable Power-of-Attorney executed by the plaintiff No.1 in favour of the defendant, was pursuance of an agreement executed in May, 1980 between the plaintiff No.1 and the defendant and not in pursuance of the agreement dated 22.5.1980 between the plaintiff No.1 and the Plaintiff No.2?*
2. *Whether the defendant has received a sum of Rs.56,17,983/- as sale proceeds of the lands belonging to plaintiff No.1, and sold by him by virtue of the Power-of-Attorney?*
3. *Whether this Court has no jurisdiction in the matter?*
4. *Whether the suit as filed is not maintainable?*
5. *Whether the agreement between the plaintiff No.1 and the plaintiff No.2 is fabricated, false and baseless?*
6. *Whether the defendant invested with the plaintiff No.2 an amount of Rs.850,000/- on profit at 2% per month?*

7. *Whether in May 1980 the plaintiff No.2 agreed to sell her lands in district Dera Ghazi Khan to the defendant?*
8. *Whether Rs.9 lacs were paid by the plaintiff No.2 to the plaintiff No.1 out of the money belonging to the defendant?*
9. *What should the decree be?"*

2. Parties have led their evidence and thereafter the Issue Nos.1, 2 and 5 to 8 were decided in affirmative, while Issue No.3 was not pressed. Keeping in view the findings recorded on Issue No.2, the learned Single Judge gave no finding with regard to Issue No.4 and in the end, in view of the observations made on the above referred issues, the suit was dismissed vide Issue No.9, with no order as to costs.

3. Briefly stated, the facts of the case are that the Appellants No.1 and 2 filed a suit for recovery of Rs.57,70,383.00 against the respondent being the amount claimed to have been received by him on their behalf. The appellants simultaneously claimed a sum of Rs.1,52,400.00 against the respondent being the interest/compensation/profit/mark-up of such claimed amount at the rate of 18% per annum from 1.4.1990 till the date of recovery of the said amount. It is claimed that the Appellant No.1 was the owner of agricultural land admeasuring 7 squares, 8 acres and 4 kanals (1468 kanal), situated in Mouza Kotla Ghulam, Tehsil and District Dera Ghazi Khan (hereinafter referred as the subject land). The Appellant No.1 entered into sale with Appellant No.2 vide agreement of sale dated 22.5.1980. Thereafter, to fulfill the contents of the sale it was the claim of Appellant No.1 that she appointed the respondent through a registered power of attorney dated 14.3.1982 to look after the affairs of the subject land including its sale/transfer and all other acts concerning the mutation of the subject land as a whole or any part thereof to the prospective buyer i.e. the Appellant No.2. However, in 1991 the appellants came to know that the respondent had sold and transferred the subject land to

various purchasers for a sale consideration of Rs.56,17,983.00 and has also not furnished accounts of such sale proceeds in respect of the subject land handed over to the respondent. Thereafter, a suit bearing No.1274 of 1991 was filed against the respondent for recovery of the above referred sale consideration amount with interest/profit/markup accrued thereon from 1.4.1990 till the recovery of the suit amount at the rate of 18% per annum. The matter proceeded before the learned Single Judge, who framed as many as nine issues, which are reproduced supra and thereafter decided the matter in the manner as explained above vide judgment dated 27.3.2006. Being aggrieved and dissatisfied with the said judgment the present High Court Appeal has been filed, which was admitted for regular hearing on 08.11.2006.

4. Mr. Muhammad Arif Khan Advocate has appeared on behalf of the appellants and stated that the learned Single Judge was not justified in dismissing the suit without considering the various aspects going to the roots of the case and the evidence produced before him. While elaborating his view-points he submitted that vide power of attorney dated 14.3.1982 the respondent was only authorized to execute and register the sale deed between the Appellant No.1 and Appellant No.2 since the Appellant No.1 resided in Karachi whereas the subject land was situated in Dera Ghazi Khan. He stated that the respondent with malafide intention by claiming himself to be the owner of the subject land disposed of the same and received Rs.56,17,983.00 from different purchasers. According to him, firstly, the respondent was not authorized to sell and transfer the subject land of the Appellant No.1 and, secondly, if he had sold the subject land by illegally claiming himself to be the owner of the subject land then he was under the legal obligation to surrender the sale consideration received by him from different purchasers. As per the learned counsel, a perusal of power of attorney would reveal that the

Appellant No.1 only authorized the respondent to execute and register sale deed on behalf of Appellant No.1 in favour of Appellant No.2 and no authority was given by the Appellant No.1 to the respondent to sell out her land, hence the respondent is liable to return the amount of Rs.56,17,983.00 alongwith the profit/mark accrued thereon to the Appellant No.1. He stated that the learned Single Judge has also not considered the fact that an agreement to sell the subject land was duly executed between the Appellant No.1 and Appellant No.2. According to him when the Appellant No.1 had already entered into a sale agreement with the Appellant No.2 with regard to sell the subject land hence there was no occasion to sell out the same to the respondent who was only her attorney to transfer/mutate the subject land in respect of the sale entered between the appellants. He stated that various documents were produced before the learned Single Judge with regard to receiving of the sale amount from the Appellant No.2 by the Appellant No.1 but the learned Single Judge did not consider the same and had dismissed the suit. He stated that the respondent was never appointed for selling out the subject land and the respondent had misused the power of attorney given to him by the Appellant No.1 and, thus, is liable to return the amount received by him in respect of the sale of the subject land. In support of his contention the learned counsel has placed reliance on the decision given in the case of JAMIL AKHTAR AND OTHERS VS. LAS BABA AND OTHERS (PLD 2003 SC 494).

5. Mr. Anwar Muhammad Siddiqi Advocate has appeared on behalf of the respondent and supported the judgment of the learned Single Judge. He submitted that the sale agreement allegedly executed by the appellant No.1 with appellant No.2 was a forged and fabricated document as there is no attestation on the said agreement. He stated that the respondent was duly authorized by the Appellant No.1 to sell out the subject land to

the prospective buyers as the respondent had purchased the subject land from the Appellant No.1 and the entire sale consideration was also given to her, which according to him is an admitted position. He stated that the Appellant No.1 and Appellant No.2 are in hands and gloves with each other and have supported each other by bringing a false case against the respondent. The learned counsel submitted that the Appellant No.1 in order to save various government charges including stamp duty, etc. sold out the subject land by way of power of attorney and when the respondent sold out the subject land to the different buyers the Appellant No.1 in connivance with the Appellant No.2 filed the suit by producing fake sale agreement executed between them to show that the Appellant No.1 had sold out the subject land to the Appellant No.2 whereas, in fact, the subject land has already been given to the respondent through power of attorney after receiving sale consideration. He stated that entire facts, evidence, etc. were examined by the learned Single Judge in detail and thereafter had come to the conclusion that the claim of the appellants with regard to the selling of the subject land by the Appellant No.1 to the Appellant No.2 has not been proved, hence the suit was found to be not maintainable and was accordingly dismissed. He stated that if the Appellant No.1 has sold the subject land to the Appellant No.2 what precluded the Appellant No.1 to execute a sale deed in this regard in favour of the Appellant No.2? which was never done. He argued that this question had remained unanswered on the part of the appellants that is why the learned Single Judge was quite justified in observing that the appellants had miserably failed to prove that the sale consideration received by the respondent in respect of the subject land, in fact pertains to the Appellant No.1 and not to the respondent. He further stated that all the issues were decided by the learned Single Judge after taking into consideration various affidavits, evidence, documents, cross-examination

of the parties, power of attorney, sale agreements, counter-foils of the cheques and the deposition of the various witnesses, who have attended the suit. He, therefore, finally submitted that the learned counsel for the appellants has miserably failed to point out any misreading or non-reading of the evidence by the learned Single Judge and stated that this High Court Appeal being without any merit may therefore be dismissed with cost.

6. We have heard both the learned counsel at considerable length and have perused the record, paper-book and the decisions relied upon by the learned counsel for the appellants.

7. From the deposition of Rajab Ali Panjwani (PW-1, Ex-1) (the attorney of the Appellant No.1) it reveals that admittedly the signature of the Appellant No.1 on the general power of attorney (Ex-P/5) is different from her signature on irrevocable general power of attorney dated 02.06.84 (Ex-P/1) and even the photocopy of stamp paper of the sale agreement filed with the plaint was different from the stamp paper of the original sale agreement (Ex-P/2). It was also admitted by him that the sale agreement executed between the appellants No.1 and No.2 was not attested by the Oath Commissioner. The PW-1 further admitted in his cross-examination that the signatures on sale agreement and the power of attorney signed by the appellant No.1 are different however in his voluntary statement he clarified that the sell agreement was executed in 1980 whereas the power of attorney was executed in 1984 and by that time the appellant No.1 was married to one Khalid Ali therefore there is difference in her signature, this assertion of the attorney was found to be incorrect in the agreement to sell dated 22.05.1980 it has clearly been mentioned that at that time also she was the wife of Khalid Ali. The record also reveals that the irrevocable power of attorney (Ex-P/5) was given by

the appellant No.1 to the respondent by assigning him full authority to execute sale deed in favour of the purchasers and it has been proved from the documents furnished that the respondent not only acted as an attorney of the appellant No.1 but also as an owner of the subject land.

8. From the record it also revealed that it was only when the respondent had received Rs.5617983/- in 1991 from the different purchasers that the appellant No.1 alongwith appellant No.2 filed the suit for recovery of the above amount against the respondent. If it is presumed that the appellant No.1 had entered into an agreement of sale with the appellant No.2 in 1980 then why up-till 1991, when the subject land was stated to be transferred by the respondent to different buyers, the appellants remained silent and after that became aggrieved and filed this suit, which had also remained unexplained on the part of both the appellants.

9. From the deposition of the respondent it may be noted that he produced irrevocable power of attorney (Ex-8/2) duly executed on 22.05.1980 in his favour beside other powers of attorney. He also produced sale agreement (Ex.8/6) executed between him and the appellant No.1, receipts (Ex.8/10), counterfoils of the cheques etc. (Ex. 8/11 & 8/12). It is noted that his cross-examination had remained unshattered when he duly submitted that the sale consideration of the subject land was paid on his behalf by the appellant No.2 to the appellant No.1. However, subsequently it is noted that the appellant No.1 in connivance with the appellant No.2 made out a case of selling the subject land by the appellant No.1 to the appellant No.2 and asking from the respondent to pay an amount of Rs.56,17,983/- being the amount received by him from different purchasers, whereas according to record, as duly noted by the learned Single Judge, both the appellants have

miserably failed to prove that the subject land did not belong to the respondent as owner acquired either by way of irrevocable power of attorney or sale agreement, as the case may be, and that respondent had received the amounts from different buyers as an attorney / agent of the appellant No.1. It has also not been transpired from the contents of irrevocable power of attorney executed by the appellant No.1 in favour of respondent that it was with regard to transfer of suit land in the name of appellant No.2 on behalf of appellant No.1. It may also be noted from the deposition of Rajab Ali Panjwani (PW1) that the word "agent" is nowhere mentioned in the agreement entered between the appellant No.1 and the appellant No.2. It is further noted that it has not been denied by the appellant No.2 that the respondent had invested the amount with him hence, the assertion of the respondent that he directed the appellant No.2 to pay the sale consideration of the suit land to the appellant No.1 had remained un-rebutted and uncontroverted. It is an undeniable position that it was not one power of attorney given to the respondent by the appellant No.1 but there were a number of powers of attorney given by the appellant No.1 to the respondent, which clearly envisages that the appellant No.1 had entrusted the subject land to the respondent and subsequently entered into a sale agreement with him. It is noted that the respondent has outrightly stated that he has no knowledge about the sale agreement dated 22.05.1980 allegedly entered into between the appellant No.1 and the appellant No.2 and has also termed the same to be a forged and fabricated document. The respondent has averred that the appellant No.1 never entered into any sale agreement with the appellant No.2 and when the respondent had sold out the suit land as an owner it was thereafter that the appellant No.1 & 2 with malafide intention and conspiracy filed the suit, which was dismissed by the learned Single Judge through impugned Judgment. On perusal of the record it has nowhere



been mentioned in the power of attorney given to the respondent by the appellant No.1 with regard to entering into any sale agreement with the appellant No.2, if it is believed that the appellant No.1 appointed the respondent to act as her attorney for her facilitation, this ground also had remained unanswered on the part of the appellants. It is further noted that the respondent has deposed that it was he who directed the appellant No.2, with whom he had invested some amount, to hand over Rs.900,000/- to the appellant No.1 being the sale consideration of the subject land, but the appellant No.2 never appeared in the witness box to contradict the said assertion of the respondent which clearly depicts that the said assertion of the respondent had remained uncontroverted and strengthens his stand that the subject land was acquired after payment of the amounts to the appellant No.1 through appellant No.2 and therefore the case of the appellant No.1 regarding the sale of subject land to the appellant No.2 through sale agreement dated 22.05.1980 appears to be an afterthought on the part of the appellants hence, in our view, could not be given much consideration. It is further noted that at no point of time either the appellant No.1 or the appellant No.2 entered into witness box about the veracity of the claim made by them in the suit and only one person, namely, Rajab Ali Punjwani, being a retired person who was appointed as attorney of the appellant No.1, whose deposition has already been discussed in detail as above, appeared as a witness. Even the attesting witnesses of the sale agreement were not produced in the witness box and under such circumstances, in our view, the learned Single Judge was quite justified in drawing adverse inference against the appellants.

10. It is also quite strange on the part of the appellants that when they entered into an agreement of sale with each other dated 22.05.1980 then why no sale deed was executed by them and as to why when they came

to know about selling of the suit land by the respondent they woke up from the slumber and thereafter filed the suit. This aspect of the matter also goes against the appellants as when the alleged sale agreement was entered between the parties and as per the appellants the respondent was appointed as attorney to facilitate the appellant No.1 in respect of transfer of land to the purchaser, then why the sale deed was not executed between appellant No.1 and the appellant No.2 and why respective entries were not made in the revenue record and before different Government authorities in respect of the ownership of the subject land. These aspects of the matter, as noted above, had remained unexplained. It is also an undeniable position that the power of attorney given by the appellant No.1 to the respondent was irrevocable and was binding upon the parties. The decision relied upon by the learned counsel of the appellants is quite distinguishable on the facts and grounds obtaining in the instant matter.

11. In view of what has been stated above, we are of the view that the learned Single Judge quite rightly dismissed the suit filed by the appellants and we see no reason to interfere in the judgment and decree passed by the learned Single Judge. Accordingly, this High Court Appeal being devoid of any merit stands dismissed.

JUDGE

JUDGE

Karachi:

Dated: .04.2019.