IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

R.A No. 131 of 2005
[Azad Khan & another v. Haji @ Ghulam Raza & others]

R.A No. 132 of 2005
[Azad Khan & another v. Ali Mohammad & others]

R.A No. 133 of 2005
[Azad Khan & another v. Kamal Khan & others]

R.A No. 134 of 2005
[Azad Khan & another v. Ghulam Qadir & others]

R.A No. 135 of 2005
[Azad Khan & another v. Saindad through L.Rs & others]

R.A No. 136 of 2005
[Azad Khan & another v. Taj Muhammad & others]
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Applicants	:	Through Mr. Sundardas, Advocate
Respondent No.1	:	Through Mr. Talib Khan, Advocate
Respondent No.2 to 4:		Through Mr. Rafiq Ahmed Dahri, Asstt: A.G.
Dates of hearing	:	26.08.2024

JUDGMENT

ARSHAD HUSSAIN KHAN, J. These Civil Revision Applications arising out of the same dispute are being disposed of through this consolidated judgment as common question of facts and law are involved therein.

The applicants in these Civil Revision Applications have challenged the judgment dated 30.04.2005, passed by 3rd Additional District Judge, Nawabshah, whereby learned Judge while dismissing Civil Appeals maintained the Judgment dated 01.03.2003, passed by IInd Senior Civil Judge, Nawabshah, decreeing First Class Suits filed by the Respondents / Plaintiffs.

2. Briefly stated facts of the case as narrated in these Revision Applications are that the Plaintiff(s) / Respondent No.1 filed First Class Suits for Declaration, Cancellation of Sale Deed, Injunction and Mesne Profits, stating therein that the agricultural land bearing S. Nos. 1396/1, 5 and 1409/1,2 total area 15-16 acres (half share) was granted to **Haji @**

Ghulam Raza [*subject matter of R.A. No. 131 of 2005 (F.C. Suit No. 137 of 1999)*], land bearing S.Nos. 1407/4 and 1407/3 total area 2-26 was granted to **Ghulam Qadir** [*R. A .No. 134 of 2005 (F.C. Suit No. 30 of 1998)*], land bearing S. Nos. 1391/2,3,6 total area 15-00 acres was granted to **Saindad** [*R.A. No.135 of 2005 (F.C. Suit No. 32 of 1998)*], land S. Nos. 1406/2,5 and 1399/4 total Area 9-30 Acres was granted to **Ali Muhammad** [*R.A. No. 132 of 2005 (F.C. Suit No. 28 of 1998)*], land bearing S. Nos. 1408/1,2; 1407/1 and 1406/3 total area 14-20 Acres was granted to **Taj Muhammad** [*R.A. No. 136 of 2005 (F.C. Suit No. 23 of 1996)*] and agricultural land bearing S. Nos. 1409/1,2 and 1396/1,5 total area 15-16 Acres (half share) was granted to **Kamal Khan** [*R.A. No. 133 of 2005 (F.C. Suit No. 29 of 1998)*], all the above lands are situated in Deh Suhelo Chak No. 7, Taluka Nawabshah, Sindh, collectively referred to as the '**Suit Land'.** All the above grantees/Plaintiffs collectively referred to as **Respondent No.1**. Vide Ijazatnama the suit land was granted to the Plaintiff(s) / Respondent No.1 by Barrage Department on Harap condition for a restrictive period of twenty years, which was to be expired on 10.12.1998; that it was claimed to be a running grant and not fully paid and T.O was not issued by the Barrage Department; that Applicant No.1 / Defendant No.1 was looking-after the interest of Plaintiff(s) / Respondent No.1 in respect of the suit land but he deceived them and by preparing a forged power of attorney got registered sale deed in respect of suit land in favour of his near relative i.e. Defendant No.2 / Applicant No. 2; that the said sale deed was illegal as no sale consideration was received by the Plaintiff(s) / Respondent No.1; that the suit land was granted as peasant grant and its sale was specifically barred under Land Grant Policy as such the sale itself was barred, hence the Plaintiff(s) / Respondent No.1 filed the above suits.

Upon notice, the Applicants (defendants 1 & 2) filed written statement, while the official respondents did not contest the suit and remained ex-perte. The Applicants / defendants 1 & 2 in their written statement denied the assertions of Plaintiff(s) and submitted that the Grant was fully paid and Applicant No.1 (Defendant No.1) was appointed General Attorney by the Plaintiff / Respondent No.1 authorizing him to sell the suit land and as such the said sale is legal, valid and duly registered by the Sub-Registrar, Nawabshah, and prayed

that Applicant No.2 / Defendant No. 2 is in possession of suit land as owner and the suits are liable to be dismissed. The trial court after recording evidence heard learned counsel for the parties and decreed the suits of the Plaintiffs. The Applicants being aggrieved by the said judgments and decrees preferred Civil Appeals, which were dismissed. The orders passed in the said Civil Appels have been impugned in the present Civil Revision Applications.

3. Learned counsel for the applicants while reiterating the contents of the revision applications has contended that the impugned judgments passed by both the courts below are contrary to law and fact and the impugned judgments are based on erroneous findings of the facts, as such, the same are liable to be set aside, being not sustainable. It is also contended that both the courts below while passing the impugned the judgments failed to consider the material fact that suit land was granted to Plaintiff No.1 / Respondent No. 1 by Barrage Department on Harap condition in the year 1977; that the last i.e. 20th installment was payable on 10.12.1998 whereas entire payment was made on 10.05.1995 and T.O was issued on 10.06.1996, as such the condition of payment of last installment till 1998-1999 had become redundant and the sale of suit land after full payment was legal and valid as after payment of entire malkano the grantee acquired the proprietary right over the suit land. It is argued that under Section 15 of Colonization Act read with condition No.8 of grant of the sale deed after full payment of grant is valid and binding upon respondent No.1. It is also contended that the courts below have failed to consider the fact that after full payment the record of right was mutated in the names of grantees and on the said basis the suit land was sold to applicant No.2 through a valid sale deed. It is also urged that for the sake of arguments, if, as per trial court, the sale deed could not be executed before expiry of the restrictive period that is 10.12.1998, even then it is valid and binding upon respondent No.1 as all the four ingredients required under Section 41 of Transfer of Property Act 1882, are established, as such, the right of applicant No.2 is protected under the said provision of the law. Moreover, the facts of handing over all the title documents and possession of the suit land with applicant No.2 was also ignored as such the decisions impugned herein are result of misreading and non-reading the evidence produced by the applicants. Lastly, it is

prayed that judgments and decrees of both the courts below may be set aside and the suits filed by respondent No.1 may be dismissed. In support of his arguments learned counsel has relied upon the cases of *Mst. Zohra and others v. Nabi Bux and other* [2002 MLD 1049], *Pakistan Industrial Credit and Investment Corporation v. Karachi Port Trust* [PLD 2005 Kar. 288], *Saifullah Khan Bangash v. Jaseem Khan and 6 others* [2017 CLC 84] and *Nazir Ahmed and another v. Muhammad Yousuf and others* [PLD 2013 Lah. 517].

4. Learned counsel for respondent No.1 contended that judgments and decrees passed by both the courts below are well reasoned and are in accordance with settled principles of law, hence these Revision Applications against the concurrent findings of the courts below are not sustainable, as such, the same may be dismissed. Learned counsel in support of his stance has relied upon the cases of *Dhani Bux v. Ali Sher & others* [SBLR 2007 Sindh 888], *Muhammad Aslam and another v. Province of Sindh and 3 others* [2020 MLD 809], *Muhmmad Asif Rana v. Abdul Majeed Ali M. Sabadia and 2 others* [2010 CLC 214] and *Amir Abdullah v. Zafar Khan* [2011 CLC 499].

5. I have heard learned counsel for the parties and perused the material available on the record.

Precisely the case of the Applicants is that Respondent /Plaintiffs (Taj Muhammad, Kamal Khan, Saindad, Ghulam Qadir and Ali Muhammad), in respect of suit land had jointly executed a registered General Power of Attorney in the year 1987 [the **'GPA'**], in favour of Applicant No.1, inter alia, authorizing him to sell the suit land. The applicant by virtue of the said power of attorney paid the entire installment towards payment of transfer price *(malkano*) along with other dues as well as interest thereon to the government and subsequently with the consent of the above Principals/Respondent No.1 sold the suit land to applicant No. 2. Further, the applicant No.2 claimed benefit of bonafide purchaser in terms of Section 41 of the Transfer of Property Act. Whereas the plea of Respondent No.1 is that although applicant No.1 was looking-after their interest in respect of the suit land yet they neither executed any power of attorney in favour of applicant No.1 nor the entire installments of malkano (transfer price) were paid nor T.O was issued, besides no sale consideration was paid, as such, the sale deed

executed in favour of applicant No.2. by applicant No.1, is illegal and void, hence liable to be cancelled.

6. Insofar as the execution of GPA by respondents-Haji @ Ghulam Raza, Taj Muhammad, Kamal Khan, Saindad, Ghulam Qadir and Ali Muhammad is concerned, although neither the original of the said GPA was produced in the evidence nor any effort was made to get the same produced through concerned sub-register nor any application is on the record to show that the respondent sought permission to produce secondary evidence, yet the same was adjudged by the trial court to have been executed by respondent No.1, except Haji @ Ghulam Raza, on the bases of certified copy produced by the applicant in his evidence. It is well settled that evidentiary value of the certified copy of the GPA without seeking prior permission from the court loses its importance and such a copy would not suffice to prove the same. The trail court failed to realize that the document produced on the record was merely a certified copy and had been tendered in evidence by the applicant without seeking prior permission from the court. No presumption of correctness could be attached to the certified copy of the GPA and the said copy produced on the record was not admissible in evidence because the condition precedent to the admission of the secondary evidence had not been fulfilled[1]. In fact, the appellant was to first produce evidence to account for non-production of the original GPA and to establish that the original had in fact been lost, as required under Article 76(c) of the Qanun-e-Shahadat which in the present case is lacking. It may be observed that once the execution of a registered document is disputed, it does not remain a 'public document' and becomes a 'private document'; therefore, any form of its secondary evidence, including its certified copy, cannot be produced in evidence to prove its existence, condition or contents without complying with the requirements of Article 76 of the Qanun-e-Shahadat[2]. This being the position, the very admissibility of the

[1] Imam Din and 4 others v. Bashir Ahmed and 10 others [PLD 2005 SC 418]

[2] Mst. Akhtar Sultana v. Major Retd. Muzaffar Khan Malik through his legal heirs and others [PLD 2021 SC 715]

certified copy of the disputed Power of Attorney remains unjustified in the eyes of law.

7. In the instant case in order to prove the execution of the GPA, the appellant although examined the purported attesting witnesses namely; Behram and Mehar Ali, yet neither the signatures of the said witnesses are appearing in the certified copy of GPA nor the evidence of the said witnesses suggest that they were shown the exhibited document (certified copy of the GPA), as such, their evidence is not worth considerable. It may also be observed that the provision of Article 79 of Qanun-e-Shahadat being mandatory; its compliance has to be made and mere production of attesting witnesses with their specific acknowledgement that the exhibited document was signed by the parties in their presence and without specifically acknowledging their own signature on the exhibited document will not be a compliance of the provision of this Article. For complying with Article 79 r/w Article 117 of the Qanun-e-Shahadat attesting witnesses in their evidence must be shown such document and their categorical statement must be obtained regarding their own attestation and its execution in their presence by parties thereto. In absence of such evidence a party on whom burden to prove such document is lying would fail and same cannot be used in evidence[3].

8. Besides above, for the sake of arguments, if we assume that the GPA was executed by the respondents with the power to sell that property, even then same cannot be said to have been executed validly as the subject Grant was a peasant grant for a restrictive period of twenty years for self-cultivating purposes and they cannot authorize any one to act on their behalf in respect of the said land during the restrictive period. In this regard Condition No.12 of the Statement of Conditions 1972[4] is also very clear which states that '*A Hari who has been granted land under the these condition shall cultivate the land: (a) by his own exertion*

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[3] Abdul Jabbar v. Muhammad Ajmal [2010 CLC 1950 Karachi]

[4] Notification No. KB-I/1/30/72/7179/7784 dated 20th November, 1972

or(b) by the exertion of any member of his family referred in clause 2(g). Further, at the time of execution GPA the executants were neither the owner nor authorized or competent to alienate/sell the property/ suit land, as such, since the executants who themselves do not possess the authority to sell the property, they cannot authorize someone to exercise such authority on their. Besides above, a perusal of the GPA, shows that it is completely silent about subject Grant and payment of malkano to government as well as after payment of entire malkano obtaining the T.O.

For what has been discussed above, I am of the considerate view that GPA produced by the appellant with his evidence is not liable to be considered, as such, the finding of the trial court in respect of GPA to the extent of respondents-Muhammad, Kamal Khan, Saindad, Ghulam Qadir and Ali Muhammad, being against the law, is reversed.

9. Insofar as the legality of execution of registered sale deed executed by applicant No.1 in favour of applicant No.2, is concerned, from the record it appears that the subject Grant was a peasant grant on Harap condition for a restrictive period of twenty years and Condition 16 (2) of Statement of Conditions of 1972[5] states that '*The grant of hari /peasant khatedars, shall be non-transferable for a period of twenty years i.e. the grant shall be deemed to be held on the restricted tenure and the right title and interest of the hari shall not be transferred or changed by any sale, gift , mortgage, lease or otherwise; provided that in the event of his death the grant shall be continued in favour of one of the grantee's adult/able bodied self-cultivating family member with the prior sanction of the revenue officer/Colonization officer concerned.*'

In this regard clause 8 of the Grant is also relevant to be referred which states as under:

> '8. The Grantee or heirs his executors and assigns may not, without permission in writing of the Colonization officer/ collector lease, mortgage, sell or otherwise however encumber the land granted or any portion thereof before all the amount due on such land on account of the occupancy price and interest thereon shall have been paid.'

[5] Notification No. KB-I/1/30/72/7179/7784 dated 20th November, 1972

10. In the instant matter, the stance of applicant No.1 is that he had paid entire amount of transfer price (malkano) prior to the expiry of the twenty (20) years and he was issued "Form A" and since the entire malkano has been paid, as such, he was not required to obtain any permission in writing, in terms of above clause No.8 of the Grant from the concerned authority, for the sale of property. The stance of the applicant appears to be misconceived as firstly from the perusal of the "Form A" (a certified copy produced by the applicant in the evidence) reflects that the restrictive tenure of 20 years grant was to expire on 10.12.1998 whereas, as per the applicant, he paid the entire amount on 02.05.1995. In this regard, although the applicant produced in his evidence certain payments receipts showing the amount deposited with Mukhtiarkar Nawabsha as well as "Form A" (certified copy), however, it is interesting to note that the applicant did not produce any receipt dated 02.05.1995 which could show that the amount was actually deposited with the concerned authority on 02.05.1995. Nonetheless, the marginal note of the same date that is 02.05.1995 appearing in "Form A", which reads as under " *The grant being of harp conditions will remain under restriction till expiry of 20 years i.e., up to 10.12.1998. T.O form will be issued after 10.12.1998 the last due date of the installment*.", clearly reflets that restriction will remain till expiry of the grant, whereas the applicant sold out the property in the year 1995 prior to the expiry of the restrictive period. Record also shows that T.O form was issued subsequently after execution of sale deed in favour of Applicant No.2. The applicant did not produce any document that after payment of alleged entire malkano the suit land was transferred in the name of the grantee/respondent which could entitle the grantee and/or his alleged attorney to sell the suit land. Record also reflects that the sale deed executed by applicant No.1 in favour of applicant No.2, who admittedly is the relative of applicant No.1, for which no special permission was sought from the respondent. It is a settled law by now that if an attorney intends to exercise right of sale/gift in his favour or in the name of his close fiduciary relations, he/she had to consult and take special permission from the principal before exercising that right[6].

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[6] Muhammad Taj v. Arshad Mehmood and 3others [2009 SCMR 114], Jamil Akhtar and others v. Las Baba and others [PLD 2003 SC 494] and Mst. Shahnaz Akhtar and another v. Syed Ehsan ur Rehman and others [2022 SCMR 1398]

11. Insofar as the stance of applicant No.2 that his right is protected under Section 41 of Transfer of Property Act is concerned, Section 41 of the Transfer of Property Act is a provision that addresses the rights and protections of innocent third-party buyers who acquire property from ostensible owners. It introduces the concept of estoppel, which restricts the real owner from challenging the validity of a transfer if certain conditions are met. The provision emphasizes the importance of good faith and reasonable precautions taken by the transferee to ensure the transferor's authority. For the ease of reference, section 41 is reproduced as under:

> "41. Transfer by ostensible owner:-
>
> Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorized to make it:
>
> Provided that the transferee, after taking reasonable care to ascertain the transferor had power to make the transfer, has acted in good faith."

Mere reading the aforesaid provision of law clearly shows that as per mandate of provisions of law if the transferee after taking reasonable care to ascertain that the transferor has acted in good faith, then his rights are protected. In the instant case, applicant No.2 did not mention a single word qua making any enquiry with regard to the status of the suit property from the concerned authority before purchasing the same from applicant No.1 the alleged attorney of respondent No.1. It is a settled principle of law that a bona fide transferee while seeking protection of Section 41 of the Act is required to prove on record that he entered into a transaction of sale in good faith having believed that the transferor is the ostensible owner of the property in question. In other words Section 41 of the Transfer of Property Act protects a transferee provided he acted in good faith and took reasonable care to ascertain that the transferor had power to make the transfer. In this exercise inquiry into valid title is involved. In the present case there is nothing available on record to show that applicant No.2 made any inquiry regarding status of the suit land from the authority concerned prior to entering into the sale transaction

with applicant No.1. As such the rights of the applicant No.2 cannot be held to have been protected under the aforesaid provision of law.[7] In the facts and the law discussed above, I am of the opinion that the sale deeds executed by applicant No.1 in favour of applicant No.2 are not valid and legal, hence the same were rightly declared as null and void by both the courts below.

The case law cited by learned counsel for the applicants have been perused and considered with due care and caution but the same are found distinguishable from the facts of instant case and hence are not applicable in the present case.

The upshot of the above discussion is that I do not find any merit in the present Revision Applications, which are accordingly dismissed.

JUDGE

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[7] Abdul Rashid v. Muhammad Yaseen another [PLJ 2010 SC 1059]