

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Civil Revision No. S – 151 of 2020

(Abdul Hakeem Lakho v. Fida Hussain Lakho & others)

Date of hearing : 28.10.2024

Date of decision : 28.10.2024

Mr. Ashok Kumar K. Jamba, Advocate for applicant.
Mr. Noor Hassan Malik, Advocate for respondent No.2.
Mr. Ahmed Ali Shahani, Assistant Advocate General Sindh.

J U D G M E N T

Zulfiqar Ahmad Khan, J. – The applicant has preferred this Civil Revision, challenging the judgment and decree dated 24.08.2020, passed by the learned Additional District Judge (MCAC), Kandiaro, in Civil Appeal No.180 of 2019. The appeal was allowed setting aside the judgment and decree dated 14.05.2019 and 15.05.2019, respectively, passed by the learned Senior Civil Judge, Mehrabpur in F.C. Suit Old No.64 of 2017 (New No.38 of 2018), whereby the suit of the applicant was decreed.

2. The applicant (plaintiff) filed a suit for specific performance of contract and permanent injunction (F.C. Suit No.03 of 2012), asserting that respondent (defendant) No.2, a Doctor residing in the United States of America, being owner of agricultural land in Deh Khakhri, Taluka Mehrabpur, consisting of several survey numbers mentioned in the plaint, totaling 96-34 acres, had appointed respondent (defendant) No.1 as his general attorney under a registered power-of-attorney. Respondent No.1, acting on behalf of respondent No.2, sold out 32-11¼ acres of the land out of aforesaid total measurement to the applicant for a consideration of Rs.4,25,000/-. An agreement in this regard was signed on 11.11.2010, and it was duly registered in the office of Sub-Registrar, Kandiaro. The applicant paid Rs.4,00,000/- at the time of signing the agreement, with the remaining Rs.25,000/- to be paid upon registration of the sale deed. The possession of the land was not handed over at that time, as it was agreed that possession would be transferred once the sale deed was registered.

3. The applicant alleged that the revenue records of certain Dehs in Taluka Mehrabpur, including Deh Khakhri, were destroyed in a fire on 27.12.2007, following the assassination of former Prime Minister Benazir Bhutto. This destruction of record prevented the official respondents (defendants) from issuing the *Fardi Intikhab* (Sale Certificate), which in turn caused delay in the execution of the sale deed. Nevertheless, the applicant claimed to have taken possession of the land a year before filing the suit. He stated that he was in possession of the land, cultivating it and paying the land revenue to the Government. Furthermore, the applicant invested significant amounts of money in improving the land to make it cultivable.

4. The applicant made several attempts to have the sale deed executed, but respondent No.1, the attorney, failed to do so. When respondent No.2 returned to Pakistan, the applicant approached him and respondent No.1, but was met with false promises and assurances. Eventually, both respondents refused to execute the sale deed and threatened the applicant with dispossession. The applicant later discovered that respondent No.2 had canceled the power-of-attorney granted to respondent No.1 without prior notice or publication, and was negotiating to sell the land to other potential buyers. This led the applicant to file the suit, seeking specific performance of the contract and permanent injunction.

5. Although the applicant has raised several claims against respondent No.1, including the denial to execute the sale deed, it is notable that respondent No.1 has, in his written statement before the trial Court, surprisingly supported the applicant's claims. He has admitted to the contents of the suit, including the cancellation of the registered power-of-attorney by respondent No.2 without prior notice. Moreover, respondent No.1 has alleged that respondent No.2 had become dishonest, which led him to cancel the power-of-attorney.

6. Respondent No.2 filed his written statement before the trial Court, denying the applicant's claims. While acknowledging his U.S. citizenship and profession as a Doctor, he asserted that the applicant had managed

the land affairs in his absence. However, he asserted that the applicant had become greedy and that the agreement was fraudulent and invalid. Upon discovering the misuse of the power-of-attorney, he moved an application before Sub-Registrar, Naushahro Feroze, to cancel it, with notices published in Daily Kawish newspaper on 30.12.2011.

7. The trial Court framed the following issues based on the pleadings:

1. *Whether the suit of the plaintiff is not maintainable and is barred by any provision of law?*
2. *Whether the defendant No.1 illegally sold out suit land through power of attorney and got executed sale agreement dated 11-11-2010?*
3. *Whether the defendant No.1 misuses power of attorney of defendant No.1?*
4. *Whether agreement of sale dated 11-11-2010 is false, fabricated document?*
5. *Whether the plaintiff is entitle for any relief claimed?*
6. *What should the decree be?*

8. Meanwhile, the suit was renumbered as F.C. Suit No.64 of 2017. The trial Court examined the applicant, who produced the original registered power-of-attorney and sale agreement. The applicant also presented witnesses Muhammad Ramzan and Muhammad Umar in his support. The evidence of Sub-Registrar, Parvez Ahmed Rajpar, was recorded, during which he produced attested copies of the daily book, T.P. register and the registered sale agreement. Tapedar Haseeb Malah was also examined, and he produced Form VII-A of Entry No.50. From the respondents' side, Mazhar Hussain and Fida Hussain were examined. Ultimately, learned Senior Civil Judge, Mehrabpur, vide judgment and decree dated 31.03.2017 and 03.04.2017, respectively, decreed the suit of the applicant as prayed, subject to payment of balance amount of Rs.25,000/-.

9. Being aggrieved, respondent No.2 filed Civil Appeal No.67 of 2017 before the learned District Judge, Naushahro Feroze. The case was subsequently transferred to the learned Additional District Judge,

Kandiaro, who, through his judgment and decree dated 29.08.2018 and 30.08.2018, respectively, remanded the case to the learned 2nd Senior Civil Judge, Kandiaro. The appellate Court set aside the impugned judgment and decree, directing the trial Court to re-decide the matter after examining the author and attesting officer / Notary Public, as well as conducting the cross-examination of respondent No.1 (respondent No.2 in the appeal).

10. The decision of the appellate Court was challenged by the applicant before this Court through Civil Revision No. S-184 of 2018. However, in the meantime, the trial Court, after recording evidence of Ashfaque Ahmed Vistro (Stamp Vendor) and Wazir Ali Behen (Mukhtiarkar Revenue, Naushahro Feroze) and cross-examining Fida Hussain (defendant No.1) through its judgment and decree dated 14.05.2019 and 15.05.2019, respectively, passed in F.C. Suit Old No.64 of 2017 (New No.38 of 2018), decreed the suit in favour of the applicant as previously decided. Consequently, the applicant withdrew Civil Revision No. S-184 of 2018. Subsequently, respondent No.2 filed Civil Appeal No.180 of 2019, which was allowed by the appellate Court through its judgment and decree dated 24.08.2020, setting aside the trial Court's judgment and decree and dismissing the applicant's suit. Therefore, the applicant, challenging that dismissal, has filed the instant civil revision.

11. After a thorough review of the findings of the trial Court and the appellate Court, it reflects that the trial Court had failed to properly address the issue of maintainability and the legality of the power-of-attorney in question. The trial Court erroneously shifted the burden of proving the suit's maintainability solely on the defendant, even though the Court had an obligation to first consider and establish whether the suit was competent under the law. Additionally, the appellate Court found that the trial Court had misinterpreted the evidence provided by both parties, particularly in relation to the execution of the power-of-attorney and the agreement to sell.

12. A review of the plaintiff's evidence reveals significant discrepancies that cast doubt on his claim. Although the plaintiff did not mention his relationship with defendants No.1 and 2 in the plaint, he admitted at the start of his deposition that defendant No.1 is his real brother and defendant No.2 is his cousin. Furthermore, he acknowledged that defendant No.2 is the original owner of the land. Regarding the sale, while the agreed consideration was Rs.4,25,000/-, the plaintiff testified "*At the time of execution of sale agreement, I paid Rs.5,00,000/- to defendant No.1, while it was settled between plaintiff and defendant No.1 that remaining sale consideration will be paid at the time of execution of registered sale deed of suit land.*"

13. During cross-examination, the plaintiff confirmed that defendant No.2, his younger brother, usually resided in America. He stated "*In his absence, we used to look after the suit land. We also used to pay the land revenue on behalf of defendant No.2.*" The plaintiff also mentioned a pending litigation regarding a gift deed before the Revenue Authorities, in which he was a party. Although he claimed to be in possession of the land, it is unclear whether this possession occurred after the sale agreement or was simply the prior possession that he had already acknowledged. He also admitted that no land revenue receipt was produced before the trial Court. Even if the same were produced, there is doubt as to whether the payment was made by him or on behalf of his brother, as he had earlier stated.

14. The plaintiff was unable to recall the name of the individual who attested the sale agreement dated 11.11.2010, executed by Riaz Ahmed Memon in the office of stamp vendor Ishafaque Ahmed Memon. Additionally, he admitted that no CNIC copies were attached to the sale agreement, neither for the parties nor for the witnesses. While the plaintiff initially stated that Rs.5,00,000/- was paid, during cross-examination, he revised the figure to Rs.4,00,000/-.

15. Witness Muhammad Ramzan supported the plaintiff's claims in his evidence. However, in cross-examination, witness Muhammad Umar

stated that he was in possession of his CNIC at the time of signing the agreement. He claimed that copies of his CNIC, another witness's CNIC, and the CNICs of the parties were attached to the agreement. In reality, no CNIC copies were found with the agreement, a fact that the plaintiff admitted during his testimony. Furthermore, the evidence presented by Tapedar Haseeb revealed a significant issue: he confirmed that there were multiple instances of overwriting in the records, and these changes were made without the signatures of Mukhtiarkar or any other authorized officer, which he acknowledged while presenting the records before the trial Court.

16. Defendant No.2 acknowledged his relationship with defendant No.1 as cousins and further testified that he is also the brother-in-law of the plaintiff. He explained that while he was in America, his brother Abdul Hakeem and cousin Fida Hussain managed his share of the land. He stated that in January 2006, he reached a private understanding with the parties, entrusting the management of his land to Zaheer Hussain and Fida Hussain, and executing a general power-of-attorney in favour of defendant No.1 to manage the suit land.

17. Defendant No.2 further testified that he was informed by defendant No.1 via telephone about selling out the suit land to the plaintiff. However, upon his arrival in Pakistan, he learnt about the sale agreement. He claimed that the plaintiff and defendant No.1 had conspired to commit fraud. Following this, he immediately approached the Sub-Registrar to cancel the power-of-attorney, and a public notice was subsequently issued. He also conveyed this decision to both the plaintiff and defendant No.1 verbally, as they resided in the same compound.

18. Defendant No.1's deposition strengthened his connection with the plaintiff, as he admitted that his son had married the plaintiff's daughter. Regarding the payment, he testified, *"It is a fact that I have not deposed in my evidence that I have paid Rs.400000/- to Dr. Mazhar Hussain (Defendant No:2). I do not remember whether the fact of payment of*

Rs.400000/- at the time of execution or before is mentioned in agreement to sell or not.”

19. It is a fundamental principle that the burden of proof for an issue lies with the party raising it. However, the trial Court failed to properly decide the issue of maintainability. Instead of evaluating whether the suit was competent and maintainable from a legal standpoint, the Court overlooked this crucial question, and failed in its duty to first ascertain whether the suit was maintainable before proceeding with the trial. The trial Court also failed to properly consider the evidence presented by both parties. The plaintiff could not identify the attesting witness to the agreement and did not provide the necessary documentation, such as copies of CNICs of the parties involved, to substantiate the claim. These gaps in the applicant's case were significant, yet the trial Court did not address them properly.

20. The main point of dispute in this case revolved around the power-of-attorney. Defendant No.1 (Fida Hussain) claimed to have acted on the basis of a general power-of-attorney executed by defendant No.2 (the original owner). However, defendant No.2 denied executing such a power-of-attorney for the purpose of selling the land, asserting that the power-of-attorney was limited to managing the property and not for sale purposes. Furthermore, the power-of-attorney itself had inconsistencies, such as overwriting on the document regarding the land's area, which lacked any initials to authenticate the changes. This further undermined the credibility of the power-of-attorney as a valid legal instrument. In addition, the testimony of Fida Hussain Lakho, who was supposed to corroborate the execution of the power-of-attorney, failed to provide any clarity on the matter. He did not testify to the place where the power-of-attorney was executed, nor did he confirm that defendant No.2 had authorized him to act as his attorney for the sale of the land.

21. The trial Court also neglected the significance of inconsistencies in the evidence, especially regarding the power-of-attorney document, which was crucial to the entire case. The overwriting and irregularities in the

document, as highlighted, were not sufficiently addressed or considered by the trial Court. Furthermore, the absence of CNIC copies with the agreement to sell, as well as the failure to properly identify the attesting witness, added to the doubts surrounding the authenticity of the sale transaction.

22. In light of the trial Court's failure to properly consider the maintainability of the suit, its inadequate evaluation of the evidence, and its misinterpretation of crucial aspects of the power-of-attorney, the appellate Court was justified in setting aside the trial Court's judgment. The trial Court's failure to address the central issues of the case, particularly the validity of the power-of-attorney and the agreement to sell, resulted in a flawed decision. Therefore, the civil revision is **dismissed**, and the appellate Court's decision dismissing the suit of the applicant (plaintiff) is upheld.

Above are the reasons of my short order dated 28.10.2024.

J U D G E

Abdul Basit