

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.823 of 2008

Plaintiff : Abdul Karim
(In person)

Defendant No.1 : Bilal Atiq and Faraz Shahzad
None present.

Defendants No.2 : Muhammad Haroon Zakaria Co.
Through Ch. Abdur Rasheed, Advocate.

Defendants No.3 : The Honerary Secretary
Sindhi Muslim, Housing Society,
None present.

Defendant No.4 : Deputy District Officer, (Rev)
Mukhtarkar office, Civic Centre
None present.

Defendant No.5 : A Rauf Ahmed,
Through Ch. Abdur Rasheed, Advocate.

Date of Hearing : 02.01.2015

J U D G E M E N T

NAZAR AKBAR, J. Brief facts of the case are that one Mohammad Ayoob, who possessed, seized and owned a residential double storey bungalow on Plot No.55, Block-A, Sindhi Muslim, Co-operative Housing Society Karachi admeasuring 600 sq.yards (hereinafter the “suit property”) died in 1973 leaving behind Mr. Abdul Karim, Mumtaz Begum, Roshan, Ghulam Kadir, Samina wd/o Ghulam Qadir, Hayan Kadir, Tahreen Kadir as his legal heirs. The legal heirs of deceased Muhammad Ayoob in the year 2004 intended to sell the suit property and executed sale agreement with one Dr. Munawar Hassan on **20.4.2004** but due to non-availability of Govt. Extract at

the relevant time there was possibility of delay in transfer of title. Therefore, the Plaintiff requested the purchaser (Dr. Munawar) that he may pay substantial amount to enable the Plaintiff to purchase accommodation for his family. He readily accepted the request on the condition that the Plaintiff will execute sale deed in his favour and 10% of the actual sale consideration will be retained by him which will be paid on mutation of suit property in the record of S.M.C.H society after execution of sale deed. However, at the time of execution of sale deed, Dr. Munawar sought execution of sale deed in favour of Defendant No.1 and on objection by the plaintiff he stated that they are his nephews and for payment of the remaining amount of 10% he executed an undertaking on the stamp paper to the effect that the said amount has been withheld by him to be paid on mutation of the property in the record of the society. In the meanwhile the Plaintiff applied for the Government Extract. It was refused on the pretext that the Chief Minister has imposed ban on sale / purchase of properties. The plaintiff filed a Constitution Petition on **02.2.2005** which was allowed on **24.3.2005** on the statement of Advocate General, Sindh and Lawyer of the Society that there was no ban and the society has already mutated the suit property. As soon as Govt. Extract was obtained, the Plaintiff approached defendant No. 1 (Purchasers) to transfer / mutated suit property in their name on payment of balance 10% sale consideration. Defendant No.1 avoided to meet him and they never attempted to get the property mutated in their name. The Plaintiff as owner received a notice dated **12.5.2005** from the Secretary of the society (Defendant No.3) threatening

cancellation of lease of the suit property on the ground of illegal demolition of the building on the suit property. Thereafter, defendant No. 2 in 2006 approached the plaintiff to accompany them to the Office of the Society for mutation as they have purchased the suit property for sale consideration of **Rs.1,50,00000/-**. The plaintiff explained to him that 10% payment towards sale consideration has yet to be paid by defendant No. 1. In fact Defendant No.2 has demolished the building on the suit property and therefore, the Plaintiff got suspicious and moved applications, to the police and to the Chairman of the Defendant society on **11.8.2006** and **19.8.2006** respectively to ensure that no fraud should take place in the society for mutation of the suit property as by that time even 10% of the value of suit property was yet to be paid by Defendant No.1. In the year 2008 Defendant No.2 in collusion with the other Defendants started illegal constructions against the rules and regulations of the society, without following the requirement of transfer and mutation of the suit property in their name. Therefore, the plaintiff filed the instant suit claiming his "**charge**" on the suit property by 10% of its value and prayed for the following reliefs:-

- i. Decree the suit of an amount mentioned as Rs.35,00,000/- as calculated the difference of the rate of present price as the property is of Rs.3,50,00,000/- with the 20% of rate from issue of extract till the decide of suit.
- ii. Declare the construction is illegal in the presence of documentary evidence and material facts.
- iii. Grant injunction permanently and restrain Defendant's and any person(s) representation, worker, assigns, agents, relatives and laborers from carry on illegal constructions on the suit plot.

- iv. Grant of mandatory injunction that whatever the undesired persons have raised illegal construction be ordered to demolish.
- v. Cost of the suit claim be awarded.
- vi. Any other relief which court deem fit be awarded.

Defendants were served with notices/summons. But the Defendant No.1 remained absent and the Plaintiff despite service of summons through publication, after going through documents filed by Defendant No.2 & 5, made one more attempt to summon Defendant No.1 as reflected in the order dated **12.10.2010**. Defendant No.3 was debarred on **18.9.2009**. Defendant No. 2 & 5 filed their respective written statements and took the common plea that the suit is not maintainable against them under the law and it is bad in law as Dr. Munawar Hassan has not been impleaded, who was necessary party alongwith other co-owner since he had purchased the suit property jointly from the plaintiff and the other co-owners, who were also necessary party in the proceedings have not impleaded. According to them plaintiff has no cause of action against them and also that the suit is miserably time-barred.

Defendants No.2 & 5 also averred that the plaintiff and other co-owners had also sworn/executed indemnity bonds, affidavits, undertakings and other documents for completion of the requirements of the society (Defendant No.3) for transfer of the suit property in favour of defendant No. 1. The said purchasers/defendant No. 1 had sold the suit property and executed General Power of

Attorney registered at No. 458 dated **13.8.2005** in favour of Fayyaz Ahmed. Soon after, the said Fayyaz Ahmed being, owner and attorney of defendant No. 1, sold out suit property to M/s. Abdur Rahim Lakhani and Muhammad Ibrahim, through Sale Agreement dated **24.10.2005**. But instead of executing registered Sale Deed in their favour, Fayyaz Ahmed executed Sub-General Power of Attorney in favour of Muhammad Haroon (Defendant No.2 herein) registered at No. 591 dated **24.10.2005**. The demolition permission and approval of building plan was acquired by defendant No.2 on **7.4.2006** and **18.3.2008** from Karachi Building Control Authority. However, on the instructions of Abdur Rahim Lakhani and Muhammad Ibrahim (the purchasers of the suit property from Fayyaz Ahmed) the sub-attorney Muhammad Haroon (Defendant No.2) had already sold the suit property to M/s. Abdur Rauf, Muhammad Yousuf and two others through registered Sale Deed dated **27.7.2007**. It is averred by Defendants No.2 & 5 that after coming to know about these transactions the plaintiff has started harassment to the answering defendants by moving false and frivolous applications to the society (Defendant No.3) and he also lodged a false FIR.

Defendant No. 4 in their written statement has denied all the allegations and further stated that no cause of action arose to the plaintiff against defendant No.4, hence this suit merits dismissal against defendant No.4 as in this matter, no government interest is involved.

From the pleadings of the parties following issues were framed on 15.02.2012.

1. Whether the suit is maintainable in its present form?
2. Whether plaintiff is entitled to for the damages as claimed in the suit, if yes, to what extent?
3. What should the decree be?

The evidence was recorded through commissioner. The plaintiff examined himself and produced documents as Exh. P/1 to P/33 and relevant exhibits are as follows.

1. Photocopy of Sale Agreement dated **12.3.2004** as Exh.P/1.
2. Photocopy of Sale Deed dated **12.10.2004** as Exh. P/2.
3. Photocopy of Undertaking dated **11.10.2004** as Exh.P/3 (Original seen & returned).
4. Photocopy of the Order dated 24.4.2005 in CP No.D-92/2005 as Exh.P/4 (Original seen & returned).
5. Photocopy of Extract issued on 19.6.2005 as Exh.P/5. (Original seen & returned).
6. Photocopy of Application dated **11.8.2006** addressed to SHO by the plaintiff as Exh.P/6.
7. Photocopy of the letter dated 8.12.2007 sent by me to the defendant No.2 as Exh.P/7.
8. Photocopy of the letter dated **19.8.2006** sent by me to the Chairman Sindhi Muslim Co-operative Society as Exh.P/8.
9. Photocopy of the application to the SHO Ferozabad duly received on 1.4.2008 as Exh.P/9. (Original seen & returned).
10. Photocopy of the letter dated 1.4.2008 addressed to Sindhi Muslim Co-operative Society as Exh.P/10.

11. Photocopy of News Item dated 29.4.2008 published in "JANG" as Exh.P/11 & dated **24.8.2006** as Exh.P/12.
12. Photocopy of the letter dated **12.5.2005** sent by Sindhi Muslim Co-operative Society to me as Exh.P/13. (Original seen & returned).
13. Photocopy of the letter dated 16.9.2002. (Copy endorsed to me) as Exh.P/14.
14. Photocopy of the letter dated **22.8.2006** sent to DDO (Revenue) as Exh.P/15.
15. Photocopy of the letter dated **7.4.2006** Demolition letter as Exh.P/16 and approval letter dated **18.3.2008** as Exh.P/17 issued by KBCA regarding the suit property, alongwith photocopy of approved Building plan.
16. Photocopy of the letter dated Nil sent by me to Sindhi Muslim Co-operative Society as Exh.P/18.
17. Photocopy of our Indemnity Bond dated 12.10.2004 as Exh.P/19,
18. My affidavit and undertaking as Exh.P/20 & P/21.
19. Photocopy of order sheet dated 16.9.2002 and 24.4.2007 as Exh.P/22.
20. Photocopy of registered Power of Attorney having regd. No. 458 dated **13.8.2005** as Exh.P/23 and Sub-Power of Attorney having regd. No. 591 dated **24.10.2005** as Exh. P/23 & P/24.
21. Photocopy of legal notice dated **5.7.2006** from Defendant No.1 to District Officer, Cooperative Housing Society, Karachi as Exh. P/26.
22. Photocopy of letter dated **25.4.2007** from Defendant No.3 (Society) to Defendant No.4 as Exh.P/32.

The Exh.P/6, P/7, P/8, P/10, P/15 and P/16 were taken on record under objection from counsel of Defendants No.2 & 5 which were to be decided at the final hearing but such objections have not

been pressed as the learned counsel has not even mentioned about his objections to the production of the said exhibits during his arguments.

Defendants No.2 & 5 appeared as their own witnesses as DW-1 and DW-6, Defendant No.2 & 5 both admitted and confirmed contents of Exh.P/1, P/2, P/16 to P/21 and Ex.P/23 and P/24 and produced **Exh.D/2** sale deed of **open** plot by Defendant No.2 in favour of Defendant No.5.

I have heard arguments of learned counsel and perused the record. My issue wise findings are as follows:-

Issue No.1. The Plaintiff has claimed that he alongwith other co-owners has entered into an agreement of sale of their ancestral property as it came to their hand by way of inheritance with one Dr. Munawar Hussain. The said Dr.Munwar taking advantage of our financial circumstances without payment of entire sale consideration got the sale deed executed in favour of Defendant No.1 i.e Bilal Atiq and Faraz Shahid jointly and retained 10% of the sale consideration on the ground that said amount shall be paid at the time of mutation of the property in the record of Defendant No.3 i.e the society. The Plaintiff was not expecting any fraud and executed the sale deed. This is not disputed that the sale deed executed on **12.10.2004** and an undertaking was executed on **11.10.2004** by Dr. Munawar with whom the sale agreement was entered into by the Plaintiff on **12.3.2004**. Since there is no agreement between the Plaintiff and Defendant No.1 and it was also mentioned in the sale agreement that

the sale-deed shall be executed in favour of the buyer or his nominee, therefore, unless beneficiary of sale deed deny that they were not the nominees of Dr. Munawar it cannot be presumed that Defendant No.1 i.e Bilal Atiq and Faraz Shahid have not acquired the said property from the Plaintiff through the said Munawar on the basis of the agreement of sale dated **12.3.2004**. Defendant No.2 & 5 themselves have conceded in para 3 of their respective written statements that Dr. Munawar had sold the suit property to defendant No. 1 and the plaintiff executed sale deed in favour of defendant No. 1 at the instance of the said Dr. Munawar. The allegations of the Plaintiff that the entire sale proceeding have not been paid by the said Dr. Munawar or even the Defendant No.1 has gone unchallenged and of course it does find support from the “undertaking” (**Exh.P/3**) which is on record. The willful absence of Defendants No.1 from proceeding and the very fact that the Defendants No.2 has agreed to deposit security in the sum of Rs.35,00,000/- in Court in favour of plaintiff to avoid the restraining orders further confirms that the Defendant No.1 i.e. Mr. Atiq and Faraz are and were in contact with Defendant No. 2, their sub-attorney. The fact that Defendant No.2 is also sub-attorney of Defendant No.1 leads us to believe that Defendant No.1 were duly served and represented through Defendant No.2 as para-5 of both the power of attorney and sub-power of attorney reads as follows:-

“To prosecute or defend any suit, Complaint, Application, Petition or any proceeding whatsoever before any Court or Authority, as may be necessary or expedient relating to my Property and for such purpose to appoint an Advocate, Pleader, Sub-Attorney or Agent on my behalf to

verify and sign such Plaints, Applications, Petitions, Memorandum of Appeal and Swear such Affidavits as may be necessary therefore, and to Compromise, Compound, Withdraw and or refer to arbitration, legal proceedings in or before any Court or Authority and for such purpose the Said Attorney may accept the Service/Summons or Notices, Writs, Etc, issued against me by the Court of Authority.”

Therefore, I hold that the absence of defendant No. 1 in presence of defendant No. 2 is not material. The learned counsel for defendant No. 2 and 5 neither orally nor in his synopsis of written argument has raised any contention about issue No. 1. The burden of issue No. 1 was on defendants' to show that how this suit is not maintainable in the present form. Therefore, both an account of my above observations based on the record and evidence and failures of counsel for defendants to show my legal infirmity in the plaint, I hold that the suit is maintainable in the present form. The issue No. 1 is answered in affirmative.

Issue No.2 The correct language of issue No.2 should have been whether the Plaintiff is entitled to the difference of the rate of property and not “for the damages” as used in the proposed issue No.2 which was adopted on **15.2.2012**. Therefore, this issue is redrafted to be read as under:-

Whether the Plaintiff is entitled for the sum of Rs.35,00,000/- as calculated by him equivalent to 10% of the present value of the property which remained unpaid?

I have gone through the entire evidence and found that the premises on which the Plaintiff has claimed this amount was the very fact that before payment of entire sale consideration, the Defendants No.1

within hardly 10 months has sold the suit property for a sum of Rs.1,50,00,000/- to defendant No. 2 and to conceal the actual sale consideration Defendants No.1 executed a General Power of Attorney in favour of one Mr. Fayyaz Ahmed who sold it further and he, too, instead of registered sale deed, executed a sub-power of attorney in favour of Defendant No.2. The case of Plaintiff is that the balance sale consideration equivalent to 10% of the agreed value of the suit property was payable by Defendant No.1 at the time of mutation in the record of Defendant No.3 which the Defendant No.1 has willfully skipped and sold the suit property prior to getting the mutation done. The Plaintiff has categorically stated in his cross that:-

“It is incorrect to suggest that sale consideration had been paid to us by Dr. Munawar Hassan”.

The Plaintiff has produced original “undertaking” as **Exh.P/3** but no question was suggested in cross to challenge its authenticity. The statement of Plaintiff regarding non-payment of 10% sale consideration in para-5 and 12 of the plaint and evidence adduced by him were complimenting to each other. In his cross the Plaintiff re-affirmed on oath that:-

“It is correct to suggest that the Defendant No.2 is not the registered owner of the suit property. It is correct to suggest that my entire claim through the present suit is against Dr. Munawar Hussain, Bilal Atiq and Faraz Shahid. Voluntarily says that due to fraud committed by above named three persons against us and without having any lawful title, they had sold the suit property to third person and did not clear about the remaining amount, mentioned above which have to payable before the finalization of sale which was to be payable at the time of transfer/mutation.”

Thus it can safely be said that the suit property has not been absolutely transferred to Defendants No.1 as long 10% balance sale consideration is not paid by defendant No. 1. **Section 54** of the Transfer of Property Act, 1882 defines “Sale” as “**Transfer of ownership in exchange for a price paid or promised or part-paid part-promised**”. The issue of sale consideration was in respect of the suit property and it was liable to be paid by the beneficiary of the sale deed or at least it should have been denied by the beneficiary of the sale deed executed on **12.10.2004**. The defendant No. 2 who happened to be Sub-Attorney of the Attorney of defendant No.1 in para 3 of his written statement has conceded that the Sale Agreement between the plaintiff and Dr.Munawar dated **02.3.2004** is the same, which culminated in sale deed in favour of Defendant No.1, then how he can deny “undertaking”, **Exh.P/3** which is in respect of payment of sale consideration. Admittedly sale consideration on the sale deed (**Exh.P/2**) is different than the one mentioned on the sale agreement (**Exh.P/1**) and Defendant No.2 & 5 both have admitted and confirmed contents of Exh.P/1 & P/2, in their evidence thus it was a case of sale in which price was “part paid” and “part-promised” to be paid. The execution of sale deed is not proof of “Sale” as defined in **section 54** of Transfer Act, 1882. The “sale” has to be proved independently by payment of full and final sale consideration. Thus, despite the registered sale deed, which is not even denied or disputed by the plaintiff, the sale was incomplete until and unless a full and final sale consideration is paid and receipt thereof is issued separately by the seller. Therefore, the suit property continued to be

under charge by its original owners (the plaintiff and co-owners) to the extent of 10% of its market value. In coming to this conclusion, I find support from the following case law:-

i. PLJ 1985 Tr. C. (Custodian) 76 (Sarfraz Ahmed and 36 others ..Vs.. Mst. Sakina Ahmed and 36 others).

In this case while relying on a judgment of the Hon'ble Supreme Court of Pakistan (**1971 SCMR 414**) the following observation at page 83 is relevant:-

The question as to whether the non-payment of consideration would render the transaction of sale void, came up for consideration before the Supreme Court in Muhamamd Hayat's case cited by learned counsel for the petitioners. Their Lordships observed:--

“The onus in this respect, therefore, lay very heavily indeed on the Plaintiff-respondent to prove that the consideration had not been paid. This onus, in our opinion, has not been discharged. Furthermore, on the analogy of the decision reported in I.L.R. 42 Mad. 20, when the matter has passed from the stage of contract to that of an executed conveyance and possession of the property has been given thereunder, even non-payment of consideration will not render the transaction void. **The price if not paid, is a charge on the property sold and it can be recovered under the law.** Title to the property nevertheless passed on the registration of the sale deed.”

It is, therefore, clear that in the instant case even if it is conceded that full consideration of the transaction had not passed the title to the property did pass on the registration of the sale deed. **The unpaid portion of the price remained only a charge on the property.** (Emphasis is provided).

ii. 1990 CLC 1591 (Mst. Hussain and 5 others ..Vs.. Mst. Channo Bi). The Hon'ble Lahore High Court refused to interfere with the annulment of sale deed on finding that the petitioner had failed to establish that sale price was duly paid. The relevant observations from page 1595-96 are reproduced below:-

In number of decided cases, it has been held that the **acknowledgement of receipt of the whole or part of the sale**

consideration in a deed of sale is not a term of the deed of sale and oral evidence may be given to show that the amount acknowledged or any part of it was not paid.

Decisions reported in Pradyaman Prasad Singh v. Mahadeo Singh and others A I R 1950 Patna 85, Official Receiver of Salem v. Chinna Goundan and another A I R 1957 Madras 630 are in point. When the record is examined from this perspective, it is clear that sufficient evidence was adduced by the plaintiff to prove that the acknowledgement of the sale price and consequent endorsement on the sale-deed were incorrect and that the vendee had not paid the price to her. Therefore, finding on receipt of price is neither infirm nor faulty. Having decided that consideration was not paid, I shall now advert to the second limb of the point which relates to the effect of non-payment of price on passing of title to the vendee. **In terms of section 54 of the Transfer of Property Act, 1882,** principles whereof are applicable to the territory in Punjab, **price is an essential ingredient in all the sales. Ordinarily, payment of consideration is simultaneous with and at the time when the conveyance is executed but in a particular case, parties may deviate from the above Rule.** If the parties intend that title shall be transferred upon the price settled between them on the execution and registration of the sale-deed, non-payment of purchase money shall neither arrest nor prevent the transfer of ownership rights. All depends on what is intended by the parties in a particular case. If the intention is that in absence of payment of consideration, ownership should not pass, title will not pass until the consideration is paid. **Non-payment of consideration is a strong piece of evidence though not conclusive to show that parties did not intend the document to be operated upon.** In the case in hand, though the conveyance was executed and registered on 13-11-1976 yet as admitted by the original vendee to the Revenue Officer and supported by evidence led at the trial, consideration was not paid. Furthermore, though the sale-deed was registered on 13-11-1976, yet report to the Patwari for entry of mutation in accordance with it was made on 26-7-1984. Non-payment of consideration coupled with the delayed report for the incorporation of the sale-deed in revenue records seen in the light of evidence led in the suit is sufficient to convince that the plaintiff was tripped up and duped by her cousin who vainly attempted to deprive her of the land without paying consideration for it.

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Therefore, both equity and law will not assist the petitioners to take the property without paying the price for it. In this view, I am satisfied that findings on questions of fact recorded by the Courts below are correct and no interference should be caused with them. Revision petition is dismissed in limine.

The Plaintiff, in the case in hand, has discharged his burden of proof about non-payment of 10% of the value of the suit property till date. The delay of almost three years by Defendant No.1 in obtaining mutation in the record of Defendant No.3 further strengthens the case of the Plaintiff. In my humble view, since it is possible that in some cases the parties may agree to execute registered sale deed by deferring the payment of full price or part thereof, therefore, it was incumbent upon Respondent No.3 (SMCH Society) to direct the new member (buyer) to furnish a "NO OBJECTION CERTIFICATE" from the outgoing member (sellers) of the society, or produce him before the society before seeking mutation in the record of society in place of outgoing member even on acquiring the property by a "registered instrument" in terms of **Section 54** of the Transfer of Property Act, 1882. Defendant No.3, in the instant case, despite objection from the recorded owner (Plaintiff) and his written intimation to the society that 10% payment of sale consideration was yet to be paid by Defendant No.1, waived the basic requirement of producing the recorded owner or his NOC and mutated the suit property in favour of Defendant No.1 after three years of sale deed dated **12.4.2004** through Resolution dated **20.4.2007**. Defendant No.3 by unlawfully mutating the property in the name of Defendant No.1 played the role of a facilitator for Defendant No.1 to usurp the "**10% of price promised**" by Defendant No.1 which was to be paid at the time of mutation of suit property in the record of Defendant No.3.

The SMCH Society (Defendant No.3) has chosen to remain absent despite service. However, some of the documents which

relates to the society have come on the record in evidence and have gone un-rebutted. These admitted documents confirm that the mutation of suit property in favour of Defendant No.1 took place on **20.4.2007**. A letter of Defendant No.3 dated **25.4.2007** (Exh.P/32) to Defendant No.4 namely the Deputy District Officer (Revenue) shows that Defendant No.3 has mutated / transferred the suit property at the request of recorded owners i.e Plaintiff and co-owners. However, no details of the documents showing request from the Plaintiff and other co-owners were disclosed, even the date of such request has not been disclosed in the said **Exh.P/32**. The resolution dated **20.4.2007** has been passed by ignoring the following documents:-

- i. **Exh.P/6** dated **11.6.2006** copy whereof was also received in the office of Defendant No.3.
- ii. **Exh.P/8** dated **19.8.2006** is letter from Plaintiff addressed to the Chairman of Defendant No.3.
- iii. **Exh.P/12** a public notice published by the Plaintiff in newspaper dated **24.8.2006** and;
- iv. **Exh.P/15** dated **22.8.2006**.

All these documents available in the office of Defendant No.3 were definitely pointing towards the factual dispute between Plaintiff and Defendant No.1, that Defendant No.1 have not cleared the sale consideration equivalent to 10% of the value agreed as sale consideration in the agreement of sale. These documents coupled with the letter of society dated **12.5.2005 Exh.P.13** shows that on **12.5.2005** the building structure has unlawfully been demolished on

the suit plot without obtaining NOC from the society (Defendant No.3). It was violation of the terms and condition of the sublease and penalty for such violation according to **Ex.P/13** was cancellation of lease / allotment. However, no action has been taken by Defendant No.3 on such violation prior to passing a resolution on **20.4.2007** for mutation of suit property in favour of Defendant No.1 despite objection from the Plaintiff.

Another aspect of the case is that Defendant No.1 has sold the suit property by suppressing the fact that it was “charged” property by 10% of its market value and also facilitated the so-called subsequent buyer, Fayyaz Hussain, to evade stamp duty, he executed registered general power of attorney dated **13.8.2005** on a stamp paper hardly of **Rs.2500/-** in his favour. Subsequently Defendant No.2 claimed to have acquired ownership rights in the suit property from the said Fayyaz Ahmed on the basis of Sub-power of Attorney on stamp paper of hardly **Rs.2600/-**. This sub-power of attorney is said to be coupled with admitted agreement of sale dated **24.4.2005** with M/s. A. R. Lakhany and Muhammad Ibrahim. In his cross Defendant No.2 sub-attorney of Defendant No.1 admitted that:-

It is correct to suggest that the suit property was not mutated / transferred in the name of the Defendant No.1 from 2004 till 2007. Voluntarily says that he had applied to the Sindh Muslim Co-operative Society and the same was pending. It is correct that the suit was sold out by the Defendant No.1 to Fayyaz Ahmed by executing General Power of Attorney (Exh.P/23) on 13.8.2005. It is correct to suggest that thereafter, Fayyaz Ahmed sold out the property to M/s. Abdul Rahim Lakhani and Muhammad Ibrahim in 2005. I have not purchased the suit property either from Fayyaz Ahmed or from Abdul Rahim Lakhani and Muhammad Ibrahim. The possession of suit property came to me through such Power of Attorney executed by Fayyaz Ahmed on 24.10.2005.

It goes without saying that for proper transfer of title of immoveable property mere sale agreement is not enough. The transfer of the title of immoveable property must be through “registered instrument” and not merely by registered power of attorney to act on behalf of the owner. In case of “sale” through power of attorney, the requirement of law is that to confer power to “sell” on the attorney with whom the seller has also entered into an agreement of sale is that such power of attorney is liable to be “duly stamped” with the stamp duty in terms of **Section 3** of the Stamp Act, 1899 read **with Section 17(b)** of the Registration Act, 1908. The amount of stamp duty on such power of attorney shall be equal to the stamp duty required for registration of “conveyance deed”. To appreciate the difference between “conveyance” and “power of attorney” and how and why power of attorney authorizing “sell” is to be equated with “conveyance” and it is required to be stamped with the amount of stamp duty payable on conveyance, we need to go through the provisions of **Section 2(10), 2(21)** of Stamp Act, 1899 and **Article 16** and **27(e) and (ee)** of the Sindh Schedule of Stamp Duty on Instruments in terms of Sindh Ordinance, XVIII of 2002. These provisions are as follows:-

2(10) “Conveyance”. “Conveyance” includes a conveyance on sale and every instrument by which property, whether moveable or immoveable, is transferred inter vivos and which is not otherwise specifically provided for by schedule I:

2(21) “Power-of-attorney”. “Power-of-attorney” includes any instrument (not chargeable with a fee under the law relating to court-fees for the time being in force) empowering a specified person to act for and in the name of the person executing it:

SINDH SCHEDULE
STAMP-DUTY ON INSTRUMENTS
(See Section 3)

Article Number	Description of Instrument	Proper Stamp Duty
16	Conveyance as defined by section 2(10) not being a Transfer charged or exempted under No. 31, and includes Transfer of Lease by way of assignment and not by way of under-lease.	5 percent of the value of the property.
27	Power of Attorney as defined by section 2(21). (a)..... (b)..... (c)..... (d)..... (e)Whe given for consideration and authorizing Attorney to sell any immoveable property. (ee) when given not for consideration and authorizing the Attorney to sell any immoveable property.	5 percent of the value of the property. Two thousand five hundred rupees.

Both the power of attorneys (**Exh.P/23** and **P/24**) have the following recital in clause-8:-

To sell, transfer, convey, gift, assign and/ or dispose off the SAID PROPERTY and to enter into agreement such as sale, transfer, convey and assignment and / or disposal and to demand and receive from purchaser thereof the purchasing amount / money and to give proper and valid receipt thereof and for the purpose of Gift sign and execute Declaration of Gift, Gift Deed as the case may be in favour of Donee.

Both the documents were not “duly stamped” to transfer the title in favour of respective attorneys in view of the provisions of law quoted above. In their evidence, the Defendants No.2 & 5 both have categorically relied on these two documents. The Defendant No.5 is

beneficiary of sale deed and on the face of it even his sale deed **Exh.D/2** is also not duly stamped as required by **Section 2(11)** of the Stamp Act, 1899 which reads:-

2(11) “Duly stamped.” “Duly stamped”, as applied to an instrument, means that the instrument bears an adhesive or impressed stamp of **not less than the proper amount** and that such stamp has been affixed or used in accordance with the law for the time being in force in ¹³[Pakistan]:

The Defendant No.5 has acquired “open plot” through sale-deed (**Exh.D/2**) whereas Defendant No.2 claimed to have sold or he was authorized by Defendant No.1 as his sub-attorney to sell a residential double story bungalow bearing House No.A-55 measuring 600 sq.yds or thereabout situated in SMCH Society Ltd., Karachi under survey No.149. all these documents namely P/23 & P/24 and D/2 ought to have been impounded at the time of presenting the same in evidence in terms of **section 33** of the Stamp Act, 1899; which reads as under:-

“33. Examination and impounding of instruments. (1) Every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except, an officer of police, before whom any instrument, chargeable in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same.”

However, since evidence was recorded through commissioner for recording evidence the same were not impounded. Earlier to evidence, the Sub-Registrar-I, Jamshed Town Karachi could have impounded the same at the time of registration of Sale-Deed (**Exh.D/2**) on **28.7.2007**, when the originals of these document were presented to him along with sale-deed for registration.

The stamp act is purely fiscal statute and violation of the provisions of Stamp Act, 1899 entail penal consequence. The offence of evading stamp duty being a white collar crime, the penalties / punishment for committing such offence are not provided in PPC/Cr.P.C to be tried by ordinary courts dealing with criminal system of justice,, the method dealing with the offenders is provided in the Stamp Act, 1899 itself in **Chapter III & IV** of the Act, starting from **Section 31** about adjudication as to proper stamp and ending on **section 48** dealing with recovery and penalties. Therefore, a defect in any instrument chargeable with duty on account of improper or insufficiently stamped is curable defect. In my humble view the power of attorney, the sub-power of attorney and the sale-deed (**Exh.P/23, P/24** and **D/2**) are defective documents and nullity in the eyes of law until and unless these defects are cured by application of the provisions of Stamp Act, 1899. The compliance of Stamp Act, 1899 is must for protection of revenue. The Hon'ble Supreme Court in **PLD 2005 SC 972** (Khawaja Muhammad Arif ..Vs.. Mrs. Tahira Asif and others) has dealt with the object of Stamp Act, 1899 which is relevant in the facts of the case in hand and relevant observation of the Hon'ble Court is reproduced below:-

It is worth-mentioning that "the Stamp Act is a purely fiscal regulation. Its sole object is to increase the revenue and all its provisions must be construed as having in view the protection of revenue. It is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The whole object is to see that the revenue of the state are realized to the utmost extent. Once the object is secured according to law, the party staking his claim on the instrument, will not be defeated on the ground of initial defect in the instrument. (Hindustan

Steel Ltd., ..Vs.. Dilip Construction Co. AIR 1969 SC 1238).

In view of the above observation of the Hon'ble Supreme court, since the trial has been concluded, therefore, instead of impounding Exh.P/23, P/24 and D/2 at this stage, I would ensure protection of revenue under the Stamp Act, 1899 in my findings on issue No.3.

Therefore, as long as these documents are not "duly stamped", Defendants No.2 & 5 shall not be deemed to be owner of the suit property. However, Defendant No.2 as sub-attorney of Defendant No.1 shall continue to be his attorney and liable to release / discharge Plaintiff and other co-owners, lien / charge equivalent to 10% to the value on the suit property. Such act of releasing encumbrance from the suit property does not amount to "sell" it, therefore he can perform the act of getting the discharge of suit property without fear of doing anything against the law, the amount of duty is sufficiently stamped on the sub-power of attorney, to do it.

On the face of it, all the transactions in respect of suit property by and on behalf of Defendant No.1 right from **12.4.2004** when Plaintiff and co-owner executed sale deed on promise of part payment of 10% to the value of suit property are dubious, malafide, illegal and contrary to law.

However, irrespective of the averments of Defendant No.2 & 5 regarding their ownership rights in the suit property subject to the observation hereinabove, the Plaintiff's lien of 10% of balance sale consideration on the market value of the suit property from

Defendant No1 continues / subsists. Whoever claims to have stepped into the shoes of Defendant No.1 by whatever instrument irrespective of its defect / legality is liable to clear the “lien” of the Plaintiff on the suit property. It is settled principle of law that the buyer cannot have a better title than the seller.

In view of the above discussion and the overwhelming evidence produced by the Plaintiff, the redrafted issue No.2 is decided in the affirmative and I hold that the Plaintiff is entitled to the claim of 10% of the market value of the suit property to be paid by the Defendants jointly and severally as it is a “charge” / lien on the suit property and the Defendants hold the suit property. This issue is answered accordingly.

Issue No.3 In view of my findings on issues No.1 & 2 and the analysis of the record produced in evidence by both the parties, it is clear that ownership rights of Defendant No.1 even today is not free of encumbrance on the suit property to the extent of 10% of its market value. This encumbrance/charge is always on the property, that is why, a purchaser of personal property is always provided with a warranty of title against the unknown encumbrances. In the case in hand, such covenant of warranty was in the first sale deed (Exh.P/2) and also in the sale deed in favour of defendant No.5 (Exh.D/2). From Exh.D/2 such warranty covenant is reproduced below:-

“That the Vendors hereby further covenants with the Vendees that the **Vendors, their Attorney, Sub-Attorney** shall always keep the Vendees secured, harmless and indemnified against

and from all losses and detriments that may be occasioned or suffered by the Vendees or their successors-in-interest owing to any claim, suit, demand dues, penalty, dispute(s) preferred by SMCHS, any person or persons with respect to the Said Property and if any defect in the title of the Vendors in the Said Property is detected, comes to light or knowledge of the Vendees hereafter, the Vendors shall make good the same by every manner. That the Vendors shall from time to time and at all reasonable times hereafter, whenever and wherever required or called upon by the Vendees or their successor-in-interest, to do or procure or caused to be done, shall do, all the lawful and reasonable acts, deeds, things or matters for better assuring the mutation and transfer of the Said Property in favour of the Vendees in records of Sindhi Muslim C.H. Society Ltd., CDGK and with all relevant authorities and departments of Government of Pakistan.”

In the description of parties in sale-deed (**Exh.D/2**), the Vendors are Bilal Atiq and Faraz Shahid (Defendant No.1) and Sub-Attorney is Muhammad Haroon (Defendant No.2). The purpose of reproduction of warranty covenant is to show that how the charge/lien/encumbrance on the property travels with the property. The reading of above covenant also shows that defendant No.2 and 5 at the back of their mind had an issue of “mutation” in the record of the Society (defendant No.3). Defendant No.2, may be on account of the above warranty covenant, has already furnished security of Rs.35,00,000/- against the claim of the plaintiff in this suit. In view of the above facts, evidence and law, the suit of the plaintiff is decreed in the following terms:-

1. The plaintiff claim of decree to the tune of Rs.35,00,000/- as equivalent to 10% to the market value on the date of filing of the suit i.e., 29.05.2008 is accepted. Defendants No.1, 2 and 5 are jointly and severally directed to deposit within one month a sum of Rs.35,00,000/- with 10% simple interest from

13.12.2010, when security was furnished by Defendant No.1, till such deposit in the office of Nazir of this court.

2. In case of failure of defendants to comply with above orders, the Nazir should forthwith take steps for en-cashing the surety furnished by Defendant No.2 on 13.12.2010 by depositing sublease of office No.4 Bhaijan Gee Area, Karachi, with surety bond No.51615 dated 13.12.2010 and he may proceed to sell the aforementioned surety property for compliance with the above orders.
3. The Nazir is directed that once he collects the amount of Rs.35,00,000/- alongwith 10% simple interest from November 2010 till the date of realization, he shall call the Plaintiff and all the other co-owners (executants of Exh.P/2) in his office and distribute the said amount amongst them according to their respective share in suit property as per sharia.
4. The Defendant No.3 has definitely acted in a manner prejudicial to the lawful interest of the Plaintiff who happened to be a bonafide member of the S.M.C.H.Society (Defendant No.3) therefore, Defendant No.3 ought to have protected the interest of the Plaintiff which they have failed. Be that as it may, Defendant No.3 has passed Resolution dated 20.4.2007 for mutation of the suit property in favour of Defendant No.1 without considering the objections of the Plaintiff, the said resolution is hereby declared null and void. The Defendant No.3 is directed to ensure personal attendance of Plaintiff and other co-owners for mutating the suit property in their record

in favour of Defendant No.1 after the lawful discharge of encumbrance/lien equivalent to 10% market value with interest as ordered hereinabove by the Defendants jointly and severally. Consequently, in the meanwhile the mutation of suit property in favour of Plaintiff and other co-owners stand restored as mentioned in Exh.14.

5. Defendant No.3 is restrained from changing and / or making any entry in their record in respect of House No.A-55, SMCH Society Ltd., Karachi in favour of Mr. Fayyaz Ahmed and/or defendant No.2 and 5, unless power of attorney in favour of Mr. Fayyaz Ahmed, and sub-power of attorney in favour of defendant No.2 are both duly stamped to legalize their authority to transfer the suit property through a “registered instrument” in accordance with the provisions of Stamp Act, 1899 and the Registration Act 1908. In this regard Defendant No.3 should seek/require a certificate from the “**Collector**” / Chief Inspector of Stamp as defined by **section 2(9)** of the Stamp Act, 1899 regarding the payment of “stamp duty” from the beneficiaries of Power of Attorney namely Mr. Fayyaz Ahmed and beneficiary of Sub power of Attorney, Defendant No.2 along with a proper proof of payment of required stamp duty on the said instruments subject to prior “No Objection” from the Plaintiff and co-owners in favor of Defendant No.1. Similarly Defendant No.3 shall not transfer mutate the suit property in favour of Defendant No.5 unless and until the Defendant No.5 gets their sale deed duly stamped in

accordance with law which was applicable on the date of execution of sale deed on the immovable property bearing plot No.A-55, SMCH Society, Karachi with double story building standing thereat.

6. The decree is with **no** order as to cost.

Karachi
Dated:

JUDGE