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Judgment Sheet

LAHORE HIGH COURT
RAWALPINDI BENCH RAWALPINDI
JUDICIAL DEPARTMENT

….

Regular First Appeal No.71 of 2021

ABDUL GHAFOOR and another

Versus

BABAR SULTAN JADOON and 3 others

JUDGMENT

Dates of hearing:	25.03.2024 & 26.03.2024
Appellants by:	Dr. Mumtaz Ali Khan, Advocate.
Respondents No.1 to 3 by:	Mr. Muhammad Faisal Butt, Advocate.
Respondent No.4 by:	Nemo.

MIRZA VIQAS RAUF, J. This regular first appeal under Section 96 of the Code of Civil Procedure (V of 1908) (hereinafter referred to as "C.P.C.") stems from the judgment and decree dated 06th March, 2021, whereby the learned Civil Judge Class-I, Rawalpindi proceeded to dismiss the suit instituted by appellant No.1 namely Abdul Ghafoor (hereinafter referred to as "appellant").

2. Facts forming background of this appeal are that "appellant" executed general attorney in favour of respondent No.1 namely Babar Sultan Jadoon (hereinafter referred to as "respondent") on 12th December, 2005 alongwith an agreement to sell of same date. In furtherance of the general attorney "respondent" executed registered sale deeds No.5041 & 5042 dated 15th July, 2006 in favour of respondents No.2 & 3, who are his real brothers. Being offended with the execution of sale deeds, the "appellant" instituted a suit

seeking cancellation of sale deeds and revocation of general power of attorney alongwith recovery of an amount of rupees four crore coupled with damages amounting to rupees two crore and possession of plot. Suit was resisted by respondents No.1 to 3, who submitted their written statement wherein they asserted that in pursuance to the general attorney executed in favour of "respondent" by the "appellant" coupled with agreement to sell dated 12th December, 2005, he was left with no right to suit property and as such "respondent" rightly executed the registered sale deeds in favour of his brothers. On the other hand, appellant No.2 and respondent No.4 being defendants were proceeded against ex-parte *vide* order dated 02nd December, 2010. In the light of divergent pleadings of the contesting parties following multiple issues were framed :-

ISSUES

1. Whether the registered sale deeds Nos.5041 & 5042 dated 15.07.2006 are result of fraud and misrepresentation and are liable to be cancelled, if so its effect? OPP

2. Whether registered general power of attorney No.2936 dated 12.12.2005 is liable to be cancelled, if so its effect? OPP

3. Whether plaintiff is entitled for an amount of Rs.2 Crore as damages from the defendants No.1 to 3, if so its effect? OPP

4. Whether plaintiff is entitled for a decree of mesne profit at the rate of 14% per annum, if so its effect? OPP

5. Whether plaintiff is entitled to receive Rs.04 crore from defendants No.1 to 3 as an alternative relief? OPP

6. Whether plaintiff is entitled for a decree of declaration, recovery of physical possession alongwith consequential relief as prayed for? OPP

7. Whether defendant No.1 executed disputed registered sale deed in favour of defendant No.2 and 3 being lawful attorney with consideration, if so its effect? OPD 1 to 3

8. Whether plaintiff alongwith proforma defendants entered into an agreement to sell with defendant No.1 on 12.12.2005 against consideration of Rs.07 million which were paid, if so its effect? OPD 1 to 3

9. Whether the suit is hopelessly time barred by limitation? OPD 1 to 3

10. Whether plaintiff has got no cause of action to file the instant suit? OPD 1 to 3

11. Whether plaint is liable to be rejected under Order VII rule 11 CPC? OPD

12. Whether plaintiff has filed false, frivolous and vexatious suit against defendants, hence defendants are entitled for special costs under section 35-A CPC? OPD

13. Relief.

After framing of issues both the sides produced their respective evidence on completion whereof, suit was dismissed through impugned judgment and decree.

3. Learned counsel for the appellants contended that in pursuance to the general power of attorney "respondent" got executed agreement to sell in his favour while practicing fraud and misrepresentation. He added that on the basis thereof, "respondent" though claimed protection of Section 202 of the Contract Act, 1882 that the attorney has become irrevocable but it is not so. Learned counsel argued with vehemence that the "appellant" has been non-suited on extraneous reasons. It is contended that execution of sale deeds in favour of his own brothers without seeking independent advice from the "appellant" being principal rendering the sale deeds invalid. Learned counsel submitted that though suit was well within time but it has been adjudged otherwise without adverting to the material pieces of evidence. It is emphatically contended that in the circumstances the limitation would be governed under Article 120 of the Limitation Act, 1908 and as such suit was well within time. In order to supplement his contentions, learned counsel placed reliance on *Mst. IZZAT versus ALLAH DITTA* **(PLD 1981 Supreme Court 165)**, *FIDA MUHAMMAD versus Pir MUHAMMAD KHAN (DECEASED) THROUGH LEGAL HEIRS AND OTHERS* **(PLD 1985 Supreme Court 341)**, *MUHAMMAD AJAIB versus MUGHAL HUSSAIN and 2 others* **(2004 YLR 690)** and *MEDIA MAX (PVT) LTD. through Chief Executive versus ARMY COMMUNICATION PVT. LTD. through Chief Executive and another* **(PLD 2013 Sindh 555).**

4. Conversely, learned counsel for respondents No.1 to 3 submitted that suit was covered under Article 91 of the Limitation Act, 1908 and it was clearly barred by time. Learned counsel argued that suit instituted by the "appellant" was in terms of Section 39 of the Specific Relief Act, 1877 and it is not to be governed under Article 120 of the Act *ibid* at all. Learned counsel contended that overwhelming evidence is available on the record with regard to the execution of agreement to sell in favour of "respondent" by "appellant". It is maintained that after the creation of interest in the suit property, power of attorney which is even otherwise is admitted became irrevocable. Learned counsel contended that possession of the suit property lies with respondents No.1 to 3 and the "appellant" has concealed material facts, while instituting the suit. Learned counsel further contended that suit was rightly dismissed by the trial court and as such impugned judgment is unexceptionable. It is also one of the arguments of learned counsel for respondents No.1 to 3 that documents were produced by the "appellant" in the statement of his counsel, which is not permissible at all. Placed reliance on *Dr. MUHAMMAD JAVAID SHAFI versus Syed RASHID ARSHAD and others* **(PLD 2015 Supreme Court 212)**, *IMAM DIN and 4 others versus BASHIR AHMED and 10 others* **(PLD 2005 Supreme Court 418),** *S.K. SHAH through LRs versus JAMALUDDIN and others* **(2017 SCMR 626)**, *MUHAMMAD ASLAM versus Mst. FEROZI and others* **(PLD 2001 Supreme Court 213)** and *MANZOOR HUSSAIN (deceased) through L.Rs. versus MISRI KHAN* **(PLD 2020 Supreme Court 749)**.

5. Heard. Record perused.

6. The property in dispute is a commercial plot measuring 26 Marla situated at near Tipu Road, revenue estate of Mareer Hassan, Qasbati, within the area of Tehsil Municipal Authority, Rawalpindi (hereinafter referred to as "suit property"), which was jointly owned by the appellants and respondent No.4. Being the owners of the "suit property", the appellants as well as respondent No.4 executed a general power of attorney bearing No.2936 dated 12th December, 2005 in favour of "respondent", who in furtherance thereof executed

registered sale deed bearing No.5041 and 5042 dated 15th July, 2006 in favour of respondents No.2 and 3, who are his brothers, which became the root cause of litigation interse parties. Being offended with the registered sale deeds, the "appellant" instituted the suit seeking cancellation of sale deeds as well as general power of attorney, recovery of amount of rupees four crore or the market value of the "suit property" alongwith possession. The validity of the sale deeds is questioned by "appellant" on two fold grounds; firstly, that the same were executed by the "respondent" in violation of the general power of attorney and agreement to sell dated 12th December, 2005 executed by him in favour of "appellant" and secondly the sale deeds are the product of fraud. Contrary to this, while submitting joint written statement it was pleaded by the respondents No.1 to 3 that general power of attorney executed in favour of "respondent" was with consideration as it was coupled with an agreement to sell of even date. From the pleadings of the parties there emerges some undisputed facts which are as follows :-

- Suit property was originally owned by the appellants and respondent No.4.
- All the owners executed general power of attorney in favour of "respondent".
- "Respondent" while acting upon general power of attorney executed sale deeds No.5041 and 5042 dated 15th July, 2006 in favour of his brothers i.e. respondents No.2 & 3.

Parties are, however, at poles apart with regard to following aspects:-

7. As per claim of the "appellant" after execution of general attorney the "respondent" executed an agreement to sell in his favour of even date whereunder he bound himself to pay the sale proceeds as per terms settled therein. on the contrary, "respondent" denied execution of any such agreement in favour of "appellant". Similarly, agreement to sell pleaded by "respondent" being executed in furtherance of general power of attorney in his favour was seriously disputed by "appellant". The factum of possession is also in dispute amongst the parties as per respective pleadings. In this backdrop, the

appellants assert that the general power of attorney was not coupled with any interest and as such the registered sale deeds executed in favour of respondents No. 2 and 3 are without any lawful authority unless the "respondent" being the attorney sought a permission from his principal i.e. "appellant". On the contrary, claim of respondents No.1 to 3 is that general power of attorney was since coupled with agreement to sell and the principal has also received the sale consideration, so it was irrevocable and there was no need to seek permission from the "appellant" being principal. In addition suit was also resisted on the ground of limitation. From the respective pleadings of the parties and contentions of their counsel, following points for determination emerge :-

i). Distinction between a suit for cancellation and suit for declaration.

ii). Applicability of Articles 91 and 120 of the Limitation Act, 1908 (hereinafter referred to as "Act 1908")

iii). Scope and import of Section 202 of the Contract Act, 1872 (hereinafter referred to as "Act, 1872").

8. Before delving into the moot points, it would not be out of context to mention here that points No.(i) & (ii) are interconnected and dependent to each other. The applicability of Articles 91 and 120 of the "Act 1908" is dependent upon the actual nature of the suit.

9. From the perusal of plaint, it is apparent that it was captioned as suit for cancellation. Though learned counsel for the appellants while making reference to *MUHAMMAD AJAIB versus MUGHAL HUSSAIN and 2 others* **(2004 YLR 690)** submitted that nature of the suit is not dependent on its caption, rather it is to be gathered from its contents. In order to address this issue, it would be advantageous to have a comparative analysis of Sections 39 and 42 of the Specific Relief Act, 1877 (hereinafter referred to as "Act 1877"). Both the provisions are reproduced below for the purpose of comparative analysis:-

> **"39. When cancellation may be ordered**. Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left

> outstanding, may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled.
>
> If the instrument has been registered under the Indian Registration Act, the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.**"**

> **"42. Discretion of Court as to declaration of status or right.** Any person entitled to any character, or any right to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:
>
> Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.
>
> (2) Notwithstanding anything contained in any other law for the time being in force, a suit filed under sub-section (1) shall be decided by the Court within six months and the appellate court shall decide the appeal not later than ninety days, as the case may be.**"**

Section 39 is part of Chapter V which deals with the cancellation of instruments whereas Chapter VI relates to declaratory decrees and Section 42 forms part of the same. In terms of former provision any person having reasonable apprehension that a written instrument being void or voidable to his extent, if left outstanding, may cause him serious injury can sue to have it adjudged void or voidable and the court may in its discretion, so adjudge it and order it to be delivered up and cancelled whereas in terms of latter any person entitled to any character, or any right to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled and such person need not in such suit to ask for any other relief.

10. The notable distinction between the above two provisions of the "Act 1877" is that Section 39 presupposes that the document whose cancellation is sought through the suit is void or voidable *qua* the plaintiff whereas in terms of Section 42 a person entitled to any character or to any right to any property being offended from the denial of such character or right or title from any other person, seeks

a declaration of his status or right without asking for cancellation in furtherance of such declaration.

11. In the case of *KHALID HUSSAIN and others versus NAZIR AHMAD and others* **(2021 SCMR 1986),** the Supreme Court of Pakistan outlined the distinctive features of Sections 39 & 42 of the "Act 1877" in the following words:-

> **"**4. There is a marked yet subtle distinction between a suit for cancellation of a document under section 39 of the Act of 1877, and a suit for declaration of a document under section 42 of the Act of 1877. The crucial feature determining which remedy the aggrieved person is to adopt, is: whether the document is void or voidable. In case of a voidable document, for instance, where the document is admitted to have been executed by the executant, but is challenged for his consent having been obtained by coercion, fraud, misrepresentation or undue influence, then the person aggrieved only has the remedy of instituting a suit for cancellation of that document under section 39 of the Act of 1877, and a suit for declaration regarding the said document under section 42 is not maintainable. On the other hand, in respect of a void document, for instance, when the execution of the document is denied as being forged or procured through deceit about the very nature of the document, then the person aggrieved has the option to institute a suit, either for cancellation of that instrument under section 39 of the Act of 1877, or for declaration of his right not to be affected by that document under section 42 of the Act of 1877; it is not necessary for him to file a suit for cancellation of the void document.**"**

12. To the above effect, reference can also be made to *Mst. HALIMAN BIBI versus MUHAMMAD BASHIR and 2 others* **(1989 CLC 1588).** The relevant extract from the same is reproduced below:-

> **"**5. Both the contentions of the learned counsel are well founded. As regards the first contention, from the perusal of the plaint it is apparent that the petitioner had sought a declaration that the gift deed in question was illegal, unlawful, void and not binding on her. The plaint did not contain any prayer that she be declared as owner of the suit land and no declaration was asked for with regard to her title. On a bare reading of the plaint it appears that the suit was governed by section 39 of the Specific Relief Act and not by section 42 thereof. The distinction between a suit under section 39 of the Act and a suit under section 42 is quite obvious. In the former case the plaintiff does not seek a declaration regarding his title but only about invalidity of a deed while in the latter case relief asked for is regarding the title of the plaintiff or right in any property or status. In Bahadurmull Chawdhury and others v. Nagarmull Madangopal and others AIR 1941 Calcutta 534 it was observed

that though the Court's power to make declaratory decrees are limited by section 42 which apply only to cases in which the plaintiff, being entitled to any legal character or to any right to any property, brings a suit against a person denying his title to such character or right; but a suit to adjudge and declare that a contract is void and order it to be delivered up and cancelled is competent by reason of section 39. Similarly in Maneshier Gir v. Rehmatullah and others AIR 1936 Allahabad 710 it was held that where the plaintiff sought to have two deeds in question adjudged void, section 39 and not section 42 of the Specific Relief Act, 1877 applied.

6. In order to determine whether a suit falls under section 39 or section 42 of the Act, it is the plaint as a whole which is to be considered. Even if, like the present case, the petitioner only prays for a declaration that the deed is void or invalid without asking for further relief of cancellation of the document, still the suit falls within section 39 of the Specific Relief Act, for, it is well settled that the prayer for cancellation need not be specifically made but is inherent and flows from the relief regarding the prayer for adjudging the document void. A Division Bench of Allahabad High Court in Akhlaq Ahmad and others v. Mst. Karam Elahi AIR 1935 Allahabad 207 was of the view that a suit under section 39, Specific Relief Act, for avoiding an instrument, even if there be no prayer for cancellation carries with it by implication a prayer that the Court may further use the discretion given to it by section 39 so as to order the said instrument to be delivered up and cancelled. Similarly in Bulakram and another v. Ganga Bishum Chaudhury AIR 1940 Patna 133 it was observed that it is open to the Court though there is no prayer for it to order the document to be delivered up and cancelled in a suit brought by the plaintiff for a declaration that the document is void. It thus becomes clear that even in the absence of prayer for cancellation, the suit of the petitioner was governed by section 39 of the Specific Relief Act and not section 42 thereof.

Under the law it is not necessary that in a suit governed by section 39 of the Specific Relief Act the plaintiff should in addition to a prayer for having the document adjudged void claim any further relief available to him. Section 39 of the Act does not contain provision similar to the proviso to section 42 of the Act which bars the Court from granting a declaration if the plaintiff being entitled to further relief, omits to do so. This question was examined by a Division Bench of this Court in Nur Muhammad v. Mst. Karim Bibi PLD 1959 Lah. 932 wherein it was observed that a suit under section 39 of the Specific Relief Act cannot be held to be non-maintainable on account of the omission of the plaintiff to sue for further relief even if such a relief is available to him. The learned District Judge did not advert to this aspect of the case.**"**

13. On the above laid analogy when the suit at hand is examined, it is quite obvious therefrom that the appellants did not deny the

execution of general power of attorney and while admitting its execution are seeking cancellation. The registered sale deeds are clearly offshoot of general power of attorney. Moreover, the appellants are not seeking a declaration regarding their title but their concern is with regard to the validity of the deeds in question. In this background, suit was in the nature of cancellation and that's why it was also captioned so, falling within the domain of Section 39 of the "Act 1877".

14. After having an answer with regard to the nature of the suit, it became very easy to hold that the suit would be governed under Article 91 of the "Act 1908". Needless to observe that had it been a suit under Section 42 of the "Act 1877" it would certainly be governed by Article 120 of the "Act 1908". Article 91 provides limitation of three years from the date when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him. It is asserted by "appellant" in the plaint that cause of action, firstly accrued to him on 12th December, 2005 on the execution of general power of attorney and it remained operative till the execution of sale deeds by the "respondent" in favour of respondents No. 2 and 3 on 15th July, 2006, which stance is even evident from his statement, when he appeared as PW.1. The relevant extract is reproduced below:-

"۔۔۔۔بابر جدون نے 2006 میں رجسٹری کروادی ہوگی مجھے علم نہ ہے۔ہمیں بعد میں پتہ چلا میں نے بابر جدون پر اعتماد کیوجہ سے 2006 سے لیکر 2010 تک دعویٰ دائر نہ کیا۔۔۔۔"

Suit was admittedly instituted on 31st May, 2010, which was thus clearly barred by time. Reliance in this respect can be placed on *Mst. HAMIDA BEGUM versus Mst. MURAD BEGUM AND OTHERS* **(PLD 1975 Supreme Court 624)**. The relevant extract from the same is reproduced below:-

> **"**Learned counsel for the appellant is right in contending that Article 91 does not apply to a suit where the cancellation of the instrument is merely incidental or ancillary to the substantial relief claimed by the plaintiff, for example, recovery of possession, or a declaration that the instrument is ineffective as

against the plaintiff's rights. This proposition finds support from a number of precedent cases, namely, *Bachchan Singh v. Kamta Prasad* (I L R 32 All. 392), *Mt. Bageshra v. Shoo Nath* (A I R 1916 All. 339), *Chhaju Mal v. Multan Singh* (A I R 1936 Lah. 996), *Unni v. Kunchi Amma* (I L R 14 Mad. 26) and *Rampal Singh v. Balbhaddar Singh* (I L R 25 All. 1). In all these cases the principle enunciated is that if the plaintiff is not bound by the document, or if he is not claiming under the same, and the substantial relief prayed for by him is not the cancellation or setting aside of the instrument, then the suit is not governed by Article 91. Applying this principle to the case before us, we find that the plaintiff, claiming, as she does, through the executor of the impugned instruments cannot succeed in recovering her share in the inheritance unless she prays for the cancellation or setting aside of these documents. As a successor-in-interest of Sh. Mehar Din she is bound by these instruments as long as they remain operative, with the result that the property in dispute would not be available for her to inherit.

It follows from what we have said in the preceding paragraphs that the appellant's suit was indeed governed by Article 91 of the Limitation Act. The question, however, is regarding the starting point of limitation. The learned Judge in the High Court has taken the view that the right to sue had accrued to the plaintiff during the lifetime of her father, Sh. Mehar Din; that time started to run against her from the date of the execution of the deeds; and that in any case she had come to know about these instruments on or about the 14th of November 1945, on which date her Mukhtar, Taj Din, had applied for copies of the mutations attested in this behalf on the 4th of August 1945. On these facts, the learned Judge has concluded that the suit filed on the 2nd of October 1950 was clearly barred by limitation, as the period allowed under the law was only three years.**"**

15. In the case of *MUHAMMAD SHARIF and 13 others versus INAYAT ULLAH and 24 others* **(1996 SCMR 145)** the Supreme Court of Pakistan reiterated the above principles in the following words:-

"12. Article 95 of the Limitation Act provides a limitation period of three years for a suit "To set aside a decree obtained by fraud, or for other relief on the ground of fraud" and the terminus a quo is the date "When the fraud becomes known to the party wronged". Now the suit of the plaintiffs in the present case is a suit for declaration and recovery of possession of the land in dispute and not for setting aside any decree or document based on fraud. It is manifest from the body of the plaint and the prayer made therein that the plaintiffs sought it to be declared that the power of attorney purporting to have been executed by them on the basis whereof, defendant No.l having obtained the allotment of the suit land further sold it to other defendants was a forged and fictitious document. Case of the plaintiffs is that they never executed any power of attorney in favour of defendant No.l and consequently they sought a further declaration that the sales made by defendant No.l in pursuance of the impugned power of attorney were not binding on them and were inoperative qua their rights. Prayer was also made for a decree for possession with a direction to be issued to the Registrar for canceling all the registered-deeds in favour

> of the defendants. It is an established proposition of law that when the plaintiff is not a party to a decree or fraudulent transaction, Article 95 will have no application. Refer Mst. Sheedi v. Muhammad Siddique and 2 others (PLD 1980 Lahore 477) wherein it was observed that for so long as a person is not actually a party to a document or to a decree, he will not be bound by it and for this reason, it would not be necessary for him to get it cancelled. His purpose will be served by merely getting it declared as void. Reliance in the aforenoted case was also placed on a judgment of this Court reported as Mst. Hamida Begum v. Mst. Murad Begum and others (PLD 1975 SC 624) wherein while interpreting Article 91 of the Limitation Act which, too, provides a period of three years for a suit to cancel or set aside an instrument not otherwise provided for, it was held that this Article will not apply when the cancellation of the instrument is not an essential part of the plaintiffs relief. That is to say where the deed or instrument is ab initio null and void in which case it can be treated as a nullity without having to be cancelled or set aside. For instance, if a person who executes a document had no authority in law to do so or he is suffering under a legal disability, at the time of its execution, say by reason of minority, unsoundess of mind etc., the document will be null and void. It was further observed in the said judgment that "Article 91 does not apply to a suit where the cancellation of the instrument is merely incidental or ancillary to the substantial relief claimed by the plaintiff, for example, recovery of possession, or a declaration that the instrument is ineffective as against the plaintiff's rights". In an earlier case Shamshad Ali Shah v. Hassan Shah (PLD 1964 SC 143) also, this Court examined the question as to whether it is always necessary to seek the setting aside and/or cancellation of instruments obtained by fraud and it was observed that "A person who claims that a deed which purports to be executed by him is a forgery is not asking that the deed be set aside and is not bound to sue within three years". In the present case, as seen above, the plaintiffs have not sought the setting aside/cancellation of the impugned power of attorney. They only sought it to be declared as void and the sales made in pursuance thereof as not binding on them. In fact, on the allegations made in the plaint, which were not controverted by the defendants by filing any written statement as on their request, the plaint itself was rejected, it was not necessary for the plaintiff's to seek setting aside/cancellation of the power of attorney.**”**

16. So far facts of the case ***Mst. Izzat*** *supra* heavily relied upon by learned counsel for the appellants is concerned, the same runs on entirely different premises. The said suit was mainly for declaration whereas cancellation was claimed as an ancillary relief and the plaintiff in that suit was in possession of the suit property, which is not in the case of the “appellant” whereas in the case of ***Muhammad Ajaib*** *supra*, the matter was related to inheritance and one of the legal heirs being aggrieved of the gift deeds and mutations,

sanctioned while excluding him from the estate left by his predecessor, instituted the suit challenging the gift on the ground that donor was suffering with *"Marz-ul-Maut"* at the time of alleged gift deeds. To the above effect, case of *Dr. MUHAMMAD JAVAID SHAFI versus Syed RASHID ARSHAD and others* **(PLD 2015 Supreme Court 212)** is very relevant wherein the Supreme Court of Pakistan held as under :-

> **"**In our candid view if an instrument is alleged to have been obtained by fraud, undue influence, coercion or misrepresentation, it is not a document which can be held to be void *ab initio* or on the face of it void, but it requires to be determined and adjudged by the court of law as voidable or void as the case may be and in such an eventuality, the matter shall squarely be covered by section 39 of the Specific Relief Act, which mandates:--
>
> *"39. When cancellation may be ordered.-- Any person against whom a written instrument is void or voidable, who has reasonable apprehension that such instrument, if left outstanding, may cause him serious injury, may sue to have it adjudged void or viodable; and the Court, may, in its discretion, so adjudge it and order it to be delivered up and cancelled.*
>
> *If the instrument has been registered under the Registration Act, the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation.*
>
> *Illustrations*
>
> *(a) .....*
>
> *(b) A conveys land to B, who bequeaths it to C and dies. Thereupon D gets possession of the land and produces a forged instrument stating that the conveyance was made to B in trust for him. C may obtain the cancellation of the forged instrument.*
>
> *(c) .....*
>
> *(d) .....*
>
> And where the case is basically and primarily covered by section 39 *ibid*, Article 91 of the Limitation Act shall be attracted, which ordains and reads as under:--

Description of suit	Period of limitation	Time from which period begins to run
91. To cancel or set aside an instrument not otherwise provided for.	Three years	When the facts entitling the plaintiff to have the instrument cancelled or set aside became known to him.

In the instant case, the contents of the plaint, especially prayer part thereof which has been reproduced in one of the preceding paragraphs of this opinion clearly and undoubtedly envisages that the respondent is challenging the documents as being invalid against him on the ground of fraud, forgery, misrepresentation etc., and as a consequential relief per prayer clause *(d)* he unambiguously is seeking a decree for possession

of the plot in dispute by further asking for the demolition of the superstructure existing thereupon. This part of the relief upon proper construction of the plaint and the frame of the suit is merely ancillary, incidental, consequential and dependent upon the primary relief of cancellation of the documents which is the basic and the foundational relief being sought *(emphasis supplied)*. If the main relief is time barred and the bar is not surmounted by the respondent, the incidental and consequential relief has to go away along with it and the suit is liable to be dismissed on account of being time barred.

6. In context of the above, let us examine when did a cause of action arise in favour of the respondent entitling him to seek the relief of cancellation of document(s); and in this regard it may be pertinent to mention here, that in his examination-in-chief, the plaintiff in unequivocal terms has stated

"سال 1974میں علم ہوا کہ پلاٹ متنازعہ فروخت ہو چکا ہے"

In the cross-examination, he in similar words have stated

"سال 1971میں میرے علم میں آگیا تھا کہ مختار نامہ بن گیا تھا۔"

Though in the cross-examination, he mentioned that

"سال 1978 میں علم ہوا تھا کہ فضل عظیم نے پلاٹ آگے منتقل کر دیا ہے"

In the examination-in-chief he states to have moved an application with martial authorities on the basis of which a case was registered against Chaudhry Muhammad Sharif, who is close relative of Fazal-e-Azeem and in the cross-examination he admitted that the application was moved in February/March, 1971; he further admits

"Exemptionسے متعلق مارشل لا کو درخواست دینے سے قبل علم ہوا تھا کہ استسنا ہو کر پلاٹ فروخت ہو چکا ہے"۔

He also admitted that he saw the said plot about 6/7 years before the date of his statement *(which was recorded on 30-1-1989)* and at that time the bungalow had been constructed thereupon. Moreover unimpeachable evidence was adduced by the appellant in the form of the site plan for the construction of bungalow, which was approved by the competent authority on 8-12-1973; the construction whereof was completed within two years; all the amenity connections such as electricity connection, water connection and gas connection were installed during that period and had been existing since then despite which the respondent never approached the court of law. All these factors put together leave no room for doubt, that the respondent had the knowledge of the GPA since 1971. He also had the knowledge about all the transaction(s) of sale in favour of Manzoor and the appellant made through the attorney Fazal-e-Azeem on the basis of GPA since 1974, but did not bring any legal action under Section 39 *ibid* within the prescribed period of limitation per Article 91. Therefore, we are of the candid view that the suit filed by the respondent was barred by time.**"**

17. Adverting to the last point for determination relating to scope and import of Section 202 of the "Act, 1872", it is observed that power of attorney is a written instrument in the shape of

authorization by virtue of which the principal assigns to and confers upon a person, as his agent, the authority to perform specified acts on his behalf. In other words, the primary purpose of instrument of attorney is to assign or delegate the authority of principal to another person as his agent. The main object behind it is that the agent has to act in the name of principal and the principal also purports to rectify all the acts and deeds of his agent done by him under the authority conferred through the instrument. Power of attorney can either be general or special but in all circumstances, it must be strictly construed in the light of its recitals to ascertain the manner of exercise of the authority in relation to the terms and conditions specified in the instrument. A principal can revoke the deed of attorney at any time whereas Section 201 of the "Act, 1872" lays down the principles as to termination of agency in the following modes:-

i). by the principal revoking his authority; or
ii). by agent renouncing the business of the agency, or
iii). by business of the agency being completed; or
iv). by either the principal or agent-dying or becoming of unsound mind; or
v). by either the principal or agent being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors;
vi). by expiry of the period of agency, if any;
vii). by the destruction of a material part of the subject-matter of the agency;
viii). the happening of any event which renders the agency unlawful or upon the happening of which, it is agreed between the principal and the agent that the authority shall determine; or
ix). by dissolution of the principal, where the principal is a firm or a company or other corporation.

18. Before moving further, it would not be out of context to mention here that in ordinary course whenever an attorney intends to alienate or transfer the property subject matter of the deed of attorney in favour of his near relation or kith and kin, he has to seek specific permission from the principal to that effect before entering into such transaction. The above are the general rules regulating the power of attorney. Section 202 of the "Act, 1872" is, however, an exception and depart from the general rules. Section 202 of the "Act, 1872" is reproduced below:-

> **"202.** ***Termination of agency where agent has an interest in subject matter***.—Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.**"**

From the bare perusal of the above referred provision of law, it becomes abundantly clear that when the agent has himself interest in the property, which forms the subject matter of the agency, the agency cannot in absence of an express contract, be terminated to the prejudice of such interest. Now the question arises as to *"whether the deed of attorney executed in favour of "respondent" was coupled with interest and irrevocable?*

19. As already observed that execution of deed of attorney is not denied by the principals including the "appellant". The "appellant" however claimed that the deed of attorney was not coupled with any interest and no agreement to sell whatsoever was executed in favour of "respondent" in furtherance thereof, rather it is the "respondent" who executed an agreement to sell in favour of "appellant" for securing his rights in the suit property. Though agreement to sell purportedly executed in favour of "appellant" was pleaded and brought on record as Exihibit-P6 but it was denied by respondents No.1 to 3. In that eventuality the "appellant" was obliged to prove the agreement to sell (Exhibit-P6) but to this effect only anecdotal evidence was brought on record and even marginal witnesses except Omer Hayat (PW.2) were not examined to ensure compliance of Articles 17 & 79 of the Qanun-e-Shahadat Order, 1984. On the contrary, agreement to sell pleaded by respondents No.1 to 3 statedly executed in furtherance of the deed of attorney (Exhibit-D1) was though denied by "appellant" in the plaint but while appearing in the witness box as PW1 he took a somersault in the following words:-

"۔۔۔درست ہے کہ اقرار نامہ مورخہ 12-12-05 کا اقرار نامہ عبدالغفور عمر حیات تاج نے مشترکہ کیا تھا۔ درست ہے کہ مختار نامہ بھی ان تینوں نے مشترکہ طور پر دیا تھا۔۔۔"

It is trite law that admitted facts need not be proved. When once it is established on the record that deed of attorney was coupled with

agreement to sell whereunder the "appellant" also received whole consideration, there remains no cavil that deed of attorney was irrevocable. There was thus no need for the attorney ("respondent") to obtain the consent of the principals (appellants) before executing the sale deeds in favour of respondents No.2 and 3.

20. To the above effect learned counsel for the appellants has though made reference to the case of ***Media Max (Pvt) Ltd.*** *supra* and contended that Section 202 of the "Act, 1872" would only come into play when an interest in the property is created prior to the execution of attorney, which is not so in the present case, but such contention seems to be the outcome of improper analysis of the facts involved therein. Guidance to this effect can be sought from *MUHAMMAD YOUSAF versus Mst. AZRA PARVEEN* **(2012 SCMR 380)** wherein the Supreme Court of Pakistan held as under :-

> **"**8. The finding of the learned Judge of the High Court appears to be correct. The amount so received cannot be given a colour of loan when preponderance of the evidence on the record does not tend to support it. Even the power of attorney and for that matter the agreement to sell, whose execution has been established through aboveboard evidence, leave no foothold for the appellant to stand upon and deny their execution with his chin up. The judgment rendered in cases of Fida Muhammad v. Pir Muhammad Khan, Jamil Akhtar v. Las Baba and others and Muhammad Ashraf and 2 others v. Muhammad Malik and 2 others (*supra*) cannot, in any way, advance the case of the appellant when the power of attorney was executed on receipt of sale consideration. It is clearly a case where the subject-matter of agency is coupled with an interest. The purpose behind creating this agency, inasmuch as it can be gleaned from the evidence on the record, was to secure and protect an interest accruing to respondent No.2 upon payment of the amount mentioned above. We, therefore, don't agree with the learned counsel for the appellant that no transfer could validly be made by the donee of the power of attorney without obtaining the consent of its donor. It is, quite obviously, a case of authority coupled with an interest falling within the purview of section 202 of the Contract Act, 1872. Though the section itself is clear yet para 868 of Halsbury's Laws of England would be quite illustrative in this behalf, which reads as under:--
>
> > "868. Authority coupled with interest.---Where the agency is created by deed, or for valuable consideration, and the authority is given to effectuate a security or to security or to secure the interest of the agent, the authority cannot be revoked. Thus, if an agreement is entered into on a sufficient consideration whereby an authority is given for the purpose of securing some benefit to the donee of the authority, the authority is irrevocable on the ground that it is coupled with an interest. So, an authority to sell in

> consideration for forbearance to sue for previous advances, an authority to apply for share to be allotted on an underwriting agreement a commission being paid for the underwriting, and an authority to receive rents until the principal and interest of a loan have been paid of or to receive money for a third party in payment of a debt, have been held to be irrevocable. On the other hand, an authority is not irrevocable merely because the agent has a special property in or a lien upon goods to which the authority relates, the authority not being given for the purpose of securing the claims of the agent."

21. There is yet another important aspect, agreement to sell (Exhibit-P1) was tendered in evidence through the statement of counsel which was never confronted to the "respondent". In the case of *Mst. AKHTAR SULTANA versus Major Retd. MUZAFFAR KHAN MALIK through his legal heirs and others* **(PLD 2021 Supreme Court 715)** the Supreme Court of Pakistan outlined the true import of the relevant provisions of the Qanun-e-Shahadat Order, 1984 dealing with the relevancy and admissibility of the documentary evidence. The relevant extract from the same is reproduced below : -

> **"(i) Relevant and admissible evidence**
> 10. The Qanun-e-Shahadat, 1984 ("Qanun-e-Shahadat") governs the law of evidence in our country. The expression "relevancy" and "admissibility" have their own distinct legal implications under the Qanun-e-Shahadat as, more often than not, facts which are relevant may not be admissible. On the one hand, a fact is "relevant" if it is logically probative or disprobative of the fact-in-issue, which requires proof. On the other hand, a fact is "admissible" if it is relevant and not excluded by any exclusionary provision, express or implied. What is to be understood is that unlike "relevance", which is factual and determined solely by reference to the logical relationship between the fact claimed to be relevant and the fact-in-issue, "admissibility" is a matter of law. Thus, a "relevant" fact would be "admissible" unless it is excluded from being admitted, or is required to be proved in a particular mode(s) before it can be admitted as evidence, by the provisions of the Qanun-e-Shahadat. As far as the latter is concerned, and that too relating to documents, admissibility is of two types: (i) admissible subject to proof, and (ii) admissible per se, that is, when the document is admitted in evidence without requiring proof.
> **(ii) Mode of proof**
> 11. Mode of proof is the procedure by which the "relevant" and "admissible" facts have to be proved, the manner whereof has been prescribed in Articles 70-89 of the Qanun-e-Shahadat. In other words, a "relevant" and "admissible" fact is admitted as a piece of evidence, only when the same has been proved by the party asserting the same. In this regard, the foundational principle governing proof of contents of documents is that the same are to be proved by producing "primary evidence" or "secondary evidence". The latter is only permissible in certain

prescribed circumstances, which have been expressly provided in the Qanun-e-Shahadat.

12. What is important to note is that, as a general principle, an objection as to inadmissibility of a document can be raised at any stage of the case, even if it had not been taken when the document was tendered in evidence. However, the objection as to the mode of proving contents of a document or its execution is to be taken, when a particular mode is adopted by the party at the evidence-recording stage during trial. The latter kind of objection cannot be allowed to be raised, for the first time, at any subsequent stage. This principle is based on the rule of fair play. As if the objection regarding the mode of proof adopted has been taken at the appropriate stage, it would have enabled the party tendering the evidence to cure the defect and resort to other mode of proof. The omission to object at the appropriate stage becomes fatal because, by his failure, the party entitled to object allows the party tendering the evidence to act on assumption that he has no objection about the mode of proof adopted.

13. It is also important to note that the objection as to "mode of proof" should not be confused with the objection of "absence of proof". Absence of proof goes to the very root of admissibility of the document as a piece of evidence; therefore, this objection can be raised at any stage, as the first proviso to Article 161 of the Qanun-e-Shahadat commands that "the judgment must be based upon facts declared by this Order to be relevant, and duly proved". In other words, when the Qanun-e-Shahadat provides several modes of proving a relevant fact and a party adopts a particular mode that is permissible only in certain circumstances, the failure to take objection when that mode is adopted, estops the opposing party to raise, at a subsequent stage, the objection to the mode of proof adopted. However, when the Qanun-e-Shahadat provides only one mode of proving a relevant fact and that mode is not adopted, or when it provides several modes of proving a relevant fact and none of them is adopted, such a case falls within the purview of "absence of proof", and not "mode of proof"; therefore, the objection thereto can be taken at any stage, even if it has not earlier been taken.

(iii) <u>Evidentiary value</u>

14. Once a fact crosses the threshold of "relevancy", "admissibility" and "proof", as mandated under the provisions of the Qanun-e-Shahadat, would it be said to be admitted, for its evidentiary value to be adjudged by the trial court. The evidentiary value or in other words, weight of evidence, is actually a qualitative assessment made by the trial judge of the probative value of the proved fact. Unlike "admissibility", the evidentiary value of a piece of evidence cannot be determined by fixed rules, since it depends mainly on common sense, logic and experience and is determined by the trial judge, keeping in view the peculiarities of each case."

To be above effect guidance can be sought from *<u>MANZOOR HUSSAIN (deceased) through L.Rs. versus MISRI KHAN</u>* **(PLD 2020 Supreme Court 749)** wherein the Supreme Court of Pakistan held as under :-

"4. Before parting with this case we would like to comment on a related matter. Copies of the acknowledgement receipt (exhibit P4), aks shajarah kishtwar

> (exhibit P2), registered post receipt (exhibit P3), mutation (exhibit P5) and jamabandi for the year 2000-2001 (exhibit P6) were produced and exhibited by the pre-emptor's counsel, but without him testifying. We have noted that copies of documents, having no concern with counsel, are often tendered in evidence through a simple statement of counsel but without administering an oath to him and without him testifying, especially in the province of Punjab. Ordinarily, documents are produced through a witness who testifies on oath and who may be cross-examined by the other side. However, there are exceptions with regard to facts which need not be proved; these are those which the Court will take judicial notice of under Article 111 of the Qanun-e-Shahadat Order, 1984 and are mentioned in Article 112, and facts which are admitted (Article 113, Qanun-e-Shahadat Order, 1984).
>
> 5. The acknowledgement receipt was stated to have been signed when the envelope said to contain the Talb-i-Ishhad notice was purportedly received by the respondent. However, the respondent had not admitted receipt of the said notice, therefore, the acknowledgement receipt (exhibit P4) could not be stated to be an admitted document and did not constitute an admitted fact. Therefore, delivery to and/or receipt by the respondent of the notice had to be established. We also note that in this case the said counsel had furnished copies of all five documents (exhibits P2 to P6), which were produced by him. The Qanun-e-Shahadat Order, 1984 explicitly sets out the documents which must be produced in original, which in the present case would be the registered post receipt (exhibit P3) and acknowledgment receipt (exhibit P4), and photo copies, that is secondary evidence, could only be produced as permitted; and as regards extracts of official records, that is, the aks shajarah kishtwar (exhibit P2), mutation (exhibit P5) and jamabandi (exhibit P6), certified copies thereof had to be tendered in evidence. In not observing the rules of evidence unnecessary complications for litigants are created, which may result in avoidable adverse orders or in the case being remanded on such score, which would be avoided by abiding by the Qanun-e-Shahadat Order, 1984.**"**

The above principles were even reiterated by this Court in the case of *NATIONAL COMMAND AUTHORITY through D.G. SPD, Rawalpindi and others versus ZAHOOR AZAM and others* **(2024 CLC 1).**

22. After having an overview of the principles noted hereinabove it can be held without any hint of doubt that agreement to sell (Exhibit-P1) which was produced in the statement of learned counsel for the "appellant" is not permissible at all.

23. So far possession of "suit property" is concerned it is observed that the "appellant" in his plaint claimed that the possession of the suit property lies with him but it was only an half hearted assertion, which is even evident from the prayer clause. This was the reason

that when he appeared in the witness box made the following statement:-

"۔۔۔۔درست ہے کہ فاضل عدالت عالیہ کے حکم سے قبضہ بامر جدون کے حوالے کیا گیا تھا۔۔۔۔"

In view of above admission, it can safely be inferred that the appellants are clearly out of possession.

24. It would be also noteworthy that suit was only instituted by the "appellant" and appellant No.2 was amongst the defendants, though he appeared as DW.2. The other executants of the deed of attorney neither challenged the same till to date nor came forward to question its validity.

25. As a nutshell of thread bare discussion mentioned hereinabove, we are of the unanimous view that suit was rightly dismissed by the trial court, as a result this appeal is devoid of any merits, resultantly it is **dismissed** with no order as to costs.

(JAWAD HASSAN)
JUDGE

(MIRZA VIQAS RAUF)
JUDGE

Dictated
05.04.2024

Signed
_____

Announced in open Court on **18.04.2024.**

JUDGE **JUDGE**

APPROVED FOR REPORTING

JUDGE **JUDGE**

Shahbaz Ali*