

Date of hearing: 22.10.2008.

Judgment

Syed Hamid Ali Shah, J.--Muhammad Akbar Khan deceased plaintiff instituted a suit for declaration, cancellation of mutations, injunction and restoration of possession, on 22.06.1994. The case of the plaintiff, as set out in the plaint was that he owned 116 kanal and 4 marlas agricultural land in village Akwal. He shifted to Okara and appointed Atta-ur-Rehman Khan (Defendant No. 1) as general attorney and executed three deeds of General Power of Attorneys on 19.12.1993, 4.1.1994 and 8.1.1994. The object of appointing the attorney was to sell the land and remit the sale proceeds to the plaintiff. The attorney, instead of selling the property as per covenant, gifted the same through impugned Mutations No. 1413, 1414, 1418 and 1420 to close relatives including his son (Defendant No. 2). Respondent No. 12 (Defendant No. 12) the nephew of the plaintiff in this illegal exercise, actively connived with Defendant No. 1. It is also asserted in the plaint that impugned gifts were made without the consent and authority of the plaintiff. The plaintiff breathed his last, during the pendency of the suit and is survived by appellants (Defendants No. 1-A to 1-C).

Respondents appeared before learned trial Court, submitted written statements, controverted the assertions of the plaint and raised various preliminary objections. Respondent No. 1 took the plea that plaintiff sold the property in dispute and had received entire sale consideration from him and in lieu thereof executed three General Powers of Attorney.

2. Learned trial Court, out of the divergent pleadings of the parties, framed ten (10) issues and recorded the evidence of parties. Learned trial Court, on conclusion of the trial, vide impugned judgment and decree dated 10.02.2000, dismissed the suit. Issues No. 6 to 8 were decided against the defendants, while Issues No. 1 to 3, were decided against the plaintiff. Issues No. 3-A, 3-B and 5 were decided in favour of the defendants. Hence this appeal.

3. Learned counsel for the appellants contended that, by a general attorney mutations of gift were sanctioned, on behalf of the appellants' predecessor. The gift is invalid as love and affection, which is the main consideration of gift, cannot be expressed through attorney. Learned counsel supported this contention by placing reliance on the cases of "Mst. Shumal Begum vs. Mst. Gulzar Begum and 3 others" (1994 SCMR 818). Learned counsel contended further that before the transfer of the property, the consent of the principal was essential, which was not obtained. Respondent No. 1 has violated the provisions of Sections 214 and 215 of the Contract Act, 1872. Learned counsel referred to the case of "Muhammad Ashraf and 2 others Vs. Muhammad Malik and 2 others" (PLD 2008 S.C. 389) and contended that without permission and consent of the principal, any gift by the authority on behalf of the principal, is void transfer. Learned counsel added that when the attorney has his own interest in a transaction, then mention of consideration is essential and mandatory requirement. Learned counsel, in his contention, found support from the dictum laid down in the case of "Rasool Bukhsh and another Vs. Muhammad Ramzan" (2007 SCMR 85). Learned counsel went on to argue that evidence of DW-5, DW-7, DW-8 and DW-9, on the point of sale agreement between the plaintiff and Defendant No. 1 was out of pleadings and had to be ignored. It was submitted that Exh. D-1 to Exh.D-3 were not mentioned in written statement, nor the plaintiff was confronted with these documents. The execution of these documents was denied and as such, by virtue of Article 140 of Qanoon-e-Shahadat Order, 1984, these documents have no evidentiary value. Learned counsel pointed out contradictions in the evidence of the respondents regarding payment of earnest money etc. He referred to Article 102 of the Qanoon-e-Shahadat Order, 1984 and contended that oral evidence cannot be adduced to prove and dislodge the express stipulation in a document. Learned counsel summed up his arguments with the contention that sale agreement of subsequent date is silent with regard to earlier document i.e power of attorney, this fact alone is sufficient to conclude that subsequently false sale transaction was created through fake document.

4. Learned counsel for the Respondents No. 1, 2 and 7, stood behind the impugned judgment. He supported it with full vehemence and contended that suit is incompetent, as it is admitted by PW-1 that plaintiff was out of possession. In the absence of specific prayer for possession, the suit under Section 42 of the Specific Relief Act, is not competent. He added that Exh.D-1 to Exh.D-3 are unchallenged and without seeking

Qanoon-e-Shahadat Order, 1984, have not been complied with and the alleged agreement of sale does not carry any evidentiary value.

7. The marginal witnesses produced by the respondents did not confirm the signatures on the agreement of sale Ex.D-1 as well. The document was not placed before them. Ex.D-2 as well as Ex.D-3 had not been proved, in accordance with Article 17 read with Article 79 of the Qanoon-e-Shahadat Order, 1984.

8. The plaintiff admitted execution of three powers of attorney in favour of Respondent No. 1. However, it is evident from relevant record that Respondent No. 1 transferred the property in dispute in favour of Respondent No. 2 (his real son) and Respondents No. 3 to 5 his close relatives. It was imperative for him to have obtained consent of the principal before transferring the land to his near relatives. Transfer of property on the basis of power of attorney to closely related person by the attorney and impact of failure to seek consent and approval, remained under consideration in various cases. It was held in the case of "Muhammad Ashraf and 2 others vs. Muhammad Malik and 2 others" (PLD 2008 S.C 389) as under :--

"It is a settled law by now that if an attorney intends to exercise right of sale/gifts in his favour or in favour of next of his kin, he/she had to consult the principal before exercising that right. The consistent view of this Court is that if an attorney on the basis of power of attorney, even if "general" purchases the property for himself or for his own benefit, he should firstly obtain the consent and approval of principal after acquainting him with all the material circumstances."

The Honorable Apex Court in the case of "Rasool Bukhsh and another Vs. Muhammad Ramzan" (2007 SCMR 85), held further that :--

"It is also a well established legal preposition that a person, who has been validly authorized to alienate the property of another, he has to satisfy the Court that at the time of entering into a transaction of sale of a property, the principal was not available and if there is no such evidence then the transaction does not hold good unless it is established on record that the transaction has been made with knowledge and with consent of the principal while entering into general power of attorney."

It has been held in the case of "Dur Muhammad and 12 others vs. Abdul Sattar" (1996 CLC 1596) that in the event of a Hiba by the attorney, prior permission of the principal is necessary.

The Honorable Apex Court, in the case of "Fida Muhammad Vs. Pir Muhammad Khan (Deceased) through legal heirs and others" (PLD 1985 S.C 341) held that:--

"It is wrong to assume that every "general " Power-of-attorney on account of the said description means and includes the power to alienate/dispose of property of the principal. In order to achieve that object it must contain a clear separate clause devoted to the said object. The draftsman must pay particular attention to such a clause if intended to be included in the power of attorney with a view to avoid any uncertainty or vagueness. Implied authority to alienate property, would not be readily deduceable from words spoken or written which do not clearly convey the principal's knowledge, intention and consent about the same. The Courts have to be vigilant particularly when the allegation by the principal is of fraud and/or misrepresentation. The second aspect which needs caution on question of validity of acts under a power of attorney is that notwithstanding an authority to alienate principal's property, the attorney is not absolved from his two essential obligations, amongst others, firstly in cases of difficulty (and it will be a case of difficulty if the power of attorney is susceptible to doubt about it's interpretation) to use all reasonable diligence in communicating with the principal and seeking to obtain his instructions; and secondly, if the agent deals on his own account with the property under agency, e.g, if he purchases it himself or for his own benefit, he in his own interest should obtain the consent of the principal in that behalf after acquainting him with all material circumstances on the subject, failing which the principal is at liberty to repudiate the transaction."

9. The above survey of law, brings us to conclude that the attorney is under legal obligation to seek approval or consent of the principal, when the property of the principal is acquired by the attorney himself or for his own benefit or when such property is alienated to the persons closely related to the attorney.

10. Now we will advert to the question of validity of the gift through an attorney. The identical question came-up for consideration before the Honourable Apex Court in the case of "Mst. Shumal Begum Vs. Mst. Gulzar Begum and 3 others" (1994 SCMR 818), wherein it was held that:--

property to the donee and acceptance of gift by donee. In order to establish a valid gift of the property by the donor in favour of the donee, where gift is made through a person authorized by the donor, the intention of donor to make the gift must be established in clear terms. In such a case, the authority given by the donor in his favour by said Nawab cannot be upheld for two reasons. Firstly, the power of attorney executed in his favour by said Nawab cannot be upheld for two reasons. Firstly, the power of attorney executed in favour of another person to make a gift of his property besides containing the power to make the gift must also clearly specify the property and also the name of the donee. In the case before us, the gift made by Said Ghawas in favour of his wife Mst. Gulzar Begum on the basis of the power of attorney executed in his favour said Nawaz cannot be upheld for two reasons. Firstly the power of attorney executed in favour of Respondent No. 2 by the deceased Said Nawab did not contain any specific provision authorizing him to make a gift of his properties and; secondly, even if we assume that such power was given, there is no indication in the said document that the donor intended to make gift of all his properties in favour of the wife of attorney".

11. The above dictum of the Honourable Apex Court, has settled the controversy in clear and unambiguous terms. Respondent has entered into a transaction, with regard to property of the principal, without his consent and approval. A valid gift, in the case in hands, could only be made, if there had been an approval and consent of principal with regard to property sought to be gifted with a specific mention of the name of the donee. Instant transaction lacks the element of clear and specific approval of the principal regarding gift, particulars of donee and intention of donor qua the specific property. Thus it has not been established that the donor had intended to transfer the property in question to donee as a voluntary or gratuitous act.

12. There is another angle to view this controversy. The impugned transaction was gift made on the basis of General Power of Attorney. The validity of instant transactions can be ascertained, only on the basis of deed of gift and the general attorney. The stance of respondents that the suit property was sold by the deceased plaintiff to the Defendant No. 1 and the latter as the owner of the property, alienated it to Respondents No. 2 to 5, has no legal sanctity. It is settled law and needs no scholarly discussion that oral evidence can neither be led nor considered to prove that parties intended something different from the clear stipulation of the document. When the document is clear and speaks for itself, then is no question to consider oral evidence to show real nature of the transaction. Language employed in the general powers of attorney and the gift deeds, accurately define real nature of transaction between the parties. No evidence can be admitted or considered that the parties by executing general powers of attorney and the gift deed, meant to effect a sale in favour of Respondent No. 1. The rights and obligations of parties can only be determined on the basis of these documents and no other meanings can be assigned to these documents.

13. In view of the above discussion, it is clear that the plaintiff had challenged the transfer of property in dispute to Respondents No. 2 to 5 and subsequently to Respondents No. 6 to 11 on the basis of fraud and collusion and had also denied making of a gift of the property in dispute in favour of Respondents No. 2 to 5. Although the execution of three powers of attorney has been admitted by the plaintiff but these were executed for different purposes i.e sale of the land in dispute and transferring of sale proceeds to the plaintiff. Respondent No. 1 had transferred the property in dispute by way of Hibba to his son and other near relatives without obtaining prior consent of the plaintiff. Such transfer has no legal validity and is set-aside.

14. For the foregoing, the transaction of gift is illegal and unlawful and subsequent transfers on the basis of gift, are also void. The appeal is accepted and the judgment of learned trial Court is set aside and the suit of the plaintiffs is decreed as prayed for in the plaint, with no orders as to the costs.

(R.A.) Appeal accepted.