

**IN THE SUPREME COURT OF PAKISTAN**  
(Appellate Jurisdiction)

**PRESENT:**

MR. JUSTICE SAJJAD ALI SHAH  
MR. JUSTICE MUHAMMAD ALI MAZHAR

**CIVIL PETITION No.1077 OF 2018**

(Against the judgment dated 21.12.2017  
passed by Islamabad High Court, Islamabad  
in Civil Revision No.290/2015)

Mst. Shahnaz Akhtar and another ...Petitioners

**VERSUS**

Syed Ehsan Ur Rehman and others ...Respondents

For the Petitioner: Mr. Tariq Mehmood, ASC  
Syed Rafaqat Hussain Shah, AOR

For Respondent No.1: Mr. Zulfiqar Ali Abbasi, ASC

For Respondent No.2: Ch. Riasat Ali Gondal, ASC  
Mr. Tariq Aziz, AOR

For Respondent No.3: Nemo.

Date of Hearing: 25.02.2022

**JUDGMENT**

**MUHAMMAD ALI MAZHAR, J.** This Civil petition for leave to appeal is directed against the judgment dated 21.12.2017 passed by learned Islamabad High Court in Civil Revision No.290 of 2015, whereby the Revision Application filed by the petitioners was dismissed.

2. Compendiously and tersely, the facts necessary for the disposal of this Civil Petition are delineated as under:-

The respondent No.1 (since deceased) filed a Civil Suit for declaration, cancellation, permanent and mandatory injunction against the petitioners and respondents No.2 & 3 with the plea that in the year 1993, he was serving as Superintending Engineer in KESC and retired from service in July 1995. As per terms and conditions of service, he was entitled for allotment of a residential plot in Sector I-16 Islamabad which was applied by him to CDA, vide application No.055187. His request was accepted by CDA vide letter dated 25.6.1993. The petitioners/defendants No.1 and 2 are real sister and brother and also maternal cousins of respondent No.1 who resided at Hyderabad (Sindh). The respondent No.1 in his suit further alleged that being an aged person he was not in a position to

travel to Islamabad in order to pursue allotment matter, therefore, he appointed the petitioner No.1 as his general attorney who fraudulently obtained NOC and transfer the plot to petitioner No.2. The petitioners No.1 & 2 filed written statement and asserted that in the year 1993, the respondent No.1 informed the petitioners with regard to his entitlement of plot but could not apply due to paucity of funds so he offered the petitioners to avail the right and benefit. After negotiations and mutual understanding, the petitioners agreed to purchase the right to apply for allotment of plot in lieu of payment of Rs.100,000/- to the respondent No.1 and the agreed amount of Rs.100,000/- was paid in presence of witnesses. After receiving the amount, the respondent No.1 also executed an irrevocable general power of attorney seventeen years back in the favour of petitioner No.1. Apart from payment of above amount to the respondent No.1, the petitioners also paid all the installments, development charges/dues of the plot directly to the CDA. The respondent No.1 also intimated the name of petitioner No.1 as his nominee in the application form of plot instead of his own sons, daughter and wife. Being duly constituted attorney, the petitioner No.1 transferred the plot in favour of the petitioner No.2 in the year 1997. The respondent No.1 and his family members were aware to said transfer but remained silent for 17 years, thereafter, the said plot was further transferred in the name of Saeed Ahmad on 22.10.2003 and to Muhammad Ahmad on 16.08.2011 and lastly to S.M. Khurram Gillani on 24.04.2013. The parties led their evidence in the Trial Court and vide judgment and decree dated 14.12.2013, the suit was dismissed, however on an Appeal filed by the respondent No.1, the suit was decreed by the court of learned Additional District Judge (West), Islamabad vide judgment and decree dated 23.02.2015 which was assailed in the Revision Application before the Islamabad High Court.

3. The learned counsel for the petitioners argued that the learned Courts below, without considering the evidence, came to the wrong conclusion that the petitioner No.1 was not granted permission to sell the suit property by the respondent No. 1. The learned High Court has arbitrarily dismissed the Civil Revision without examining the oral as well as documentary evidence. It was further contended that the learned Trial Court rightly appreciated the evidence, pleadings and applicable law on the subject, whereas the learned Appellate Courts ignored the evidence and on misconceived notions, passed the impugned judgment. The learned High Court and Appellate Court both failed to consider that the respondent No.1 sold out the plot to the petitioner No.1 seventeen years back and also executed an irrevocable general power of attorney. It was further averred that the indenture of the irrevocable general power of attorney was not properly considered by the learned Islamabad High Court despite the admission of respondent No.1 that the General Power of Attorney was signed by him. He further argued that the learned High Court misinterpreted the law that, before

selling the plot, permission was not obtained which scenario is not applicable because the petitioner No.1 had borne all expenses and paid the dues and was also nominee of respondent No.1 in the application form which amounts to surrender of rights.

4. The learned counsel for the legal heirs of deceased Syed Ehsan-ur-Rahman (respondent No.1) admitted that during the service deceased had applied for allotment of residential plot. It was further averred the deceased was a permanent resident of Karachi and being an aged person, he was not in a position to travel to Islamabad and pursue the case of allotment of the plot, therefore for the said purpose the plaintiff executed a general power of attorney to manage and look after the affairs of the plot but from time to time he (deceased) paid the installments and other dues of the plot to petitioner No.1 who took the benefit of the power of attorney and obtained NOC through fraud and got the plot transferred in the name of her real brother (petitioner/defendant No.2) who further transferred the suit plot. When the deceased came to Islamabad and visited the office of Capital Development Authority (CDA), then it was revealed that the suit plot has been transferred on the basis of the general power of attorney, therefore, he filed suit for declaration, cancellation of the allotment letter and permanent injunction for restraining further transfer of the plot which was rightly decreed by the Appellate Court and appellate judgment was affirmed by the High Court.

5. Heard the arguments. The celebrated phrase "to sift the grain from the chaff" accentuates the burdensome duty upon the Court to thrash out the evidence. According to Article 117 of the Qanun-e-Shahadat Order, 1984, if any person desires a court to give a judgment as to any legal right or liability, depending on the existence of facts which he asserts, he must prove that those facts exist and the burden of proof lies on him. The lawsuits bring to an end on preponderance of evidence in which Court has to see which party has discharged the onus of proof. The evidence led in the Trial Court brings to light that the deceased (plaintiff) had appeared as PW-1 with one more witness as PW-2. He testified in his examination-in-chief that the petitioner No.1 congratulated him for the allotment of the plot. Whereas the petitioner/defendants No.1 and 2 appeared in the evidence and also produced several

documents as Ex.D-1 to Ex. D-4 together with some more documents marked as D-1 to D-7. According to the minutiae of exhibited documents, it is clear that CDA accepted the general power of attorney on record produced as Ex. D-2 with the acknowledgment of deposited amount of Rs.12,200/- as Ex. D-3 along with Ex. D-4 which was the booklet/catalogue featuring the terms and conditions of the allotment along with copy of the irrevocable general power of attorney, copy of transfer letter and receipt of deposited amount of Rs.5,560/-. Though the execution of the power of attorney was admitted but the deceased plaintiff during his evidence deposed that at the time of execution of the irrevocable general power of attorney it did not contain any provision of sale of the suit plot and said power to sell was fraudulently included. On the contrary, on our evaluation, the conditions in the indenture of power of attorney were numbered sequentially as Clause No.1 to Clause No.18. On Page No.2 of this document, Clause 12, encompassed the specific power to sell the plot. The plot was transferred in the name of petitioner No.2 on 09.11.1997, whereas the civil suit was filed on 24.08.2009 after an inordinate delay without any plausible justification or explanation. No commonsensical reason was put forward as to why and how the plaintiff was prevented from making the necessary inquiry from CDA with regard to the status of the plot. Nothing was placed on record to address whether any payment was made by the plaintiff in consideration of the allotment of the plot, nor any action was taken by him for revocation of irrevocable general power of attorney, nor any evidence was led that the plaintiff refunded any amount to the petitioner No.1 which was paid to CDA on behalf of the plaintiff pursuant to the power of attorney. The Trial Court judgment was based on the evidence with right appreciation, but the Appellate Court, on extraneous considerations, ignored the evidence and upset the judgment without any cogent justification and held that in the irrevocable general power of attorney, one stamp paper had a different date of issue. The stamp papers at page Nos.1 and 3 were issued on 08.05.1995, whereas the stamp paper at page No.2 was issued on 02.05.1995. It was further observed by the Appellate Court that the DW-1 admitted some obliteration or overwriting with regard to the year and address on the said power of attorney. It was further held in a perfunctionary

manner without comprehending or clutching the bone of contention vis-à-vis the nature of transaction but callously held that the attorney could not sell the plot without permission from the principal. A comprehensive analysis of the evidence led by the parties in the Trial Court acutely unveils that the plaintiff in the Trial Court failed to prove his case and suit was rightly dismissed.

6. The power of attorney is a legal authorization that gives a designated person a written sanction and endorsement to stand in for or act on another's behalf in different events, businesses or legal matters having fiduciary relationship with the principal, being responsible to manage the affairs in terms of powers vested in the indenture and execute all necessary legal or other business related and/or personal documents in line with this authority. The principal may allow an agent to handle a variety of activities including the execution of contracts, dealing with property affairs, overseeing and governing financial affairs and managing and supervising diverse or multiple accomplishments. The principal may revoke or cancel the power of attorney at any time unless it is with consideration. In order to decipher the actual nature of transaction and import of the indenture of power of attorney and in order to resolve the bone of contention between the parties, it would be quite expedient and helpful to reproduce some substantial clauses jotted down in the power of attorney as under:-

"3. To get the house constructed in accordance with the schedule and plan of the Housing Scheme/CDA at her own costs.

7. To pay & to receive all kinds of payments, rents, dues & consideration & to obtain or issue receipts thereof in connection with the said plot, to deposit securities or to get the same refunded in respect of said plot, to pay all kinds of expenses and costs from her own pocket for the completion/construction of a House on the said plot, to obtain connection of the various services such as Electricity Gas, Water, Sewerage and Telephones etc.; in my name and on my behalf.

8. To reside herself in the house to be constructed over the said plot or to let it out on rent, to appoint or eject tenants to execute agreement with them, to receive rents & advance money on account of rent, advance or security & to get or deliver the possession of the house, to be constructed over the said plot, in my name and on my behalf.

11.To get the said plot transferred in the name of anyone else after obtaining permission from the authorities concerned.

12.To sell, mortgage, convey, gift, exchange, release or to transfer the said plot and building to be built thereon in any way to anyone else and receive consideration thereof and issue receipt under her own signature in my name and on my behalf.

14. To complete/sign requisition slip on my behalf and submit in the Office of C.D.A for obtaining transfer application form. After obtaining application form, to complete/sign it on my behalf and submit the same in the office of the C.D.A for the transfer of said plot and/or house thereon in favour of anyone else in my name and on my behalf". [Emphasis supplied]

7. According to Section 32 of the Registration Act 1908 ("**Registration Act**"), every document, whether registrable either compulsorily or optional, shall be presented by some person executing or claiming under the same, or claiming under the decree or order of the Court or by the representative or assign of such person, or by the agent of such person, representative or assign duly authorized by power of attorney executed and authenticated, whereas Section 33 is correlated to the power of attorney recognizable for the purposes of Section 32, which provides, *inter alia*, that if the principal at the time of executing power of attorney resides in any part of Pakistan in which this Act is for the time being in force, a power of attorney executed before and authenticated by the Registrar or Sub-Registrar within whose district or sub-district the principal resides shall be recognized. Under Sub-Section 4 of Section 33 of the Registration Act, it is clearly provided that any power of attorney mentioned in this Section may be proved by the production of it without further proof when it purports on the face of it to have been executed and authenticated by the person or Court. At this juncture, we cannot lose sight of Article 95 of the Qanun-e-Shahadat Order 1984 (Section 85 of Evidence Act) which relates to the presumption as to power of attorney whereby the Court has to presume that every document purporting to be a power of attorney and purported to have been executed before and authenticated by a Notary Public or any Court, Judge, Magistrate, Pakistan Council or Voice-Council or representative of Federal Government was so executed and authenticated. The documentary evidence, particularly for a registered document, enfolds a presumption of truth and genuineness and such presumption of truth is attached to the registered power of attorney which is admissible unless its genuineness is suspected and proved to be counterfeited or deceptive; its admissibility cannot be doubted to impede the agent from acting on behalf of principal unless the indenture of power of attorney is controverted and repudiated with satisfactory evidence.

All the more so, the provisions contained under Article 79 of the Qanun-e-Shahadat Order 1984 interpret and deduce that it is not necessary to call attesting witnesses in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Registration Act unless the person by whom it is purported to have been executed specifically denies its execution which is missing in this case where execution of power of attorney is admitted.

8. The Court may presume the existence of any facts under Article 129 of the Qanun-e-Shahadat Order, 1984 which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case which enables the Court to infer one fact from the existence of another proven fact. A presumption is a rule of law that ascribes a straightforward probative denomination to accurate statistics and fosters a high degree of probability unless upset and annulled by evocative proof to the satisfaction of the Court and in the event of two equal presumptions, the Court may prefer that which best accords to the facts and circumstances of the case.

9. The Appellate Court in its Judgment made weird observation that some obliteration or interpolation was found in the power of attorney with regard to the date month or year. We have cautiously vetted the indenture of the power of attorney and found that it was registered on 28.03.1996 and only the date and month were inserted through handwriting to fill in the blanks and signature of the Principal (Syed Ehsan-ur-Rehman) is available on all pages of the power of attorney. It is totally an erroneous conclusion arrived at by the Appellate Court that since the date of issuance on one stamp paper is different therefore the power of attorney was dubious. On the contrary, the Appellate Court failed to consider that the power of attorney was properly registered with the seal and signature of the Registrar. We have not discovered any manipulation or forgery in the document in which all clauses are mentioned *in seriatim*. If the plaintiff had any doubt regarding it, then at best he could have summoned the record from the Registrar office during evidence for verification of the power of attorney, which he failed to do.

10. In the case of Muhammad Taj. Vs. Arshad Mehmood and 3 others (2009 S C M R 114), it was held by this Court that whenever a general attorney transfers the property of his principal in his own name or in the name of his close fiduciary relations, he has to take special permission from the principal. Whereas in the case of Fida Muhammad. Vs. Pir Muhammad Khan (deceased) through legal heirs and others (PLD 1985 SC 341), this Court observed 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. Implied authority to alienate property, would not be readily deducible from words spoken or written which do not clearly convey the principal's knowledge, intention and consent about the same. It was held that 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 its 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. This Court in the case of Mst. Naila Kausar and another. Vs. Sardar Muhammad Bakhsh and others (2016 SCMR 1781), held that the power of attorney does not disclose any intention or direction of the principal to the attorney to gift the property to Appellant No.1. Furthermore, in absence of any relationship or other reasons, there was no occasion for Mst. Fatima Jan to gift her property to a stranger i.e. Appellant No.1. There is also no specific written permission by Mst. Fatima Jan to Appellant No.2, Sardar Muhammad Aslam to gift the property to Appellant No.1 his daughter. In the facts and circumstances of the case, rather heavy onus upon the plaintiffs to prove the direction and/or permission



of Mst. Fatima Jan to gift the property has not been discharged as has been correctly held both by the learned Trial Court and the learned Revisional Court. Whilst in the case of Muhammad Ashraf & 2 others. Vs. Muhammad Malik & 2 others (PLJ 2008 SC 368), this Court held that even if it be taken that power of attorney was validly executed, Petitioner No.1 had no authority and he was not competent in law to gift or sell the suit land to his son-in-law namely, Muhammad Amin. There is no evidence on record to show that the attorney before making the gift in favour of his son-in-law ever obtained the consent and permission of the plaintiffs and sought any approval from the real owners of the property, who even according to the stance of the petitioners are his principals. It is a settled law by now that if an attorney intends to exercise right of sale/gift in his favour or in favour of next of his kin, he/she had to consult the principal before exercising that right. The Court further held that 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 and also referred to the dictums laid down in the case of Fida Muhammad v. Pir Muhammad Khan (deceased) through legal heirs and others (PLD 1985 SC 341), Mst. Shumal Begum v. Mst. Gulzar Begum and three others (1994 SCMR 818) and Nisar Ahmad and others v. Naveed-ud-din and others (2004 SCMR 619).

11. The learned Appellate Court and High Court both have failed to properly consider the doctrine of pith and substance which means the litmus test of powers vested in the power of attorney which could have been deciphered once the contents of the document could be looked into, rather both the Courts in fact drew the conclusion based on some of the aforesaid judgments of this Court that the attorney cannot gift or sell the property without the consent of the principal. Of course, in normal circumstances, there is no cavil to the well settled exposition of law laid down by this Court and obviously an agent can act only on behalf of the principal according to the mandate given in the power of attorney and all acts of agent may be ratified by the principal under the

normal and common relationship of principal and agent and even in case of selling out the property as well, the agent receives the amount on behalf of principal with the moral and legal obligation to pass on the sale proceeds to its principal unless the power of attorney is executed with consideration. It is also well-defined under the letter of law that the principal may at any time cancel or revoke the power of attorney if not executed with consideration. However, in the case in hand neither the principal ever cancelled or revoked the power of attorney, nor denied to have executed the wide-ranging power of attorney which indenture in its pith and substance was tantamount to a sort of a surrender of rights and release in favour of the attorney.

12. The document of power of attorney put on display various unqualified and exceptional/extraordinary powers to the attorney such as to get the house constructed in accordance with the schedule and plan of the Housing Scheme/CDA at her own costs, (ref: clause-3). To pay and to receive all kinds of payments, rents, dues and consideration and to obtain or issue receipts thereof in connection with the said plot, to deposit securities or to get the same refunded in respect of said plot, to pay all kinds or expenses and costs from her own pocket for the completion/construction of a House on the said plot (ref: clause-7). To reside herself in the house to be constructed over the said plot or to let it out on rent, to appoint or eject tenants to execute agreement with them, to receive rents and advance money on account of rent, advance or security and to get or deliver the possession of the house to be constructed over the said plot. (ref: clause-8). To get the said plot transferred in the name of anyone else after obtaining permission from the authorities concerned (ref: clause-11). To sell, mortgage, convey, gift, exchange, release or to transfer the said plot and building to be built thereon in any way to anyone else and receive consideration thereof and issue receipt under her own signature on behalf of the principal. (ref: clause-12). To complete/sign requisition slip for obtaining transfer application form and complete/sign it on behalf of principal for the transfer of said plot in favour of anyone else on behalf of principal. (ref: clause-14).

13. We are sanguine that according to Section 2 of the Power of Attorney Act 1882, the donee of power of attorney may if he thinks

fit, execute or do any assurance, instrument or thing in and with his own name and signature, and his own seal, where sealing is required, by the authority of the donor of the power of, and every assurance, instrument and thing so executed and done, shall be as effectual in law as if it had been executed or done by the donee of the power in the name, and with the signature and seal, of the donor thereof. The dialect and phraseology of power of attorney should be construed strictly and sternly. A bare look at the aforesaid powers bestowed in the power of attorney do show that this was not *simpliciter* a power of attorney in routine or an ordinary nature to act on behalf of principal in some traits and mannerisms but it was also protected under Section 202 of Contract Act which was neither cancelled or revoked by the principal nor any prayer was made for its cancellation in the civil suit and as a matter of fact, during its currency certain third party interests were also created. The document had conferred unbridled and unreserved powers to the attorney *inter alia* to build the house on the plot at her own expense and also bear all other expenses required to be consumed on transfer of plot including the price and other expenses. The intention of author of the document unequivocally shows that he surrendered his right in favour of petitioner No.1 and in order to materialize the allotment and fulfillment of all requisite formalities with CDA to secure the plot against payment of consideration by the petitioner No.1, an irrevocable power of attorney was also executed and since at very intimal stage nothing was corporal, therefore the execution of precise deed of surrender or release was not possible. So for all intents and purposes it can be safely concluded that the author allowed the attorney to apply and secure the plot on her own funds and also raise construction at her own expense with further power to sell unconditionally and unqualifiedly which amounts to a surrender of rights even before the stage of allotment of plot in a tangible form and this is the reason the petitioner/defendant No.1 in the suit took the specific plea that she bought this right on payment of certain amount to the plaintiff and also produced the receipts of amount paid to CDA for effectuating the allotment of plot. In the same semblance, the respondent No.1 (since deceased) also intimated the name of petitioner No.1 as his nominee in the application form of plot instead of his own sons, daughter and wife.

The word surrender presupposes the possession or ownership of the thing that is to be given up which may be expressed or implied such as give up, discharge, or abandon a right of action, whereas a release is the giving or discharging of a right of action which a man has or may claim against another or that which is his. An express release is one which is distinctly made in the deed or a release by operation of law which, though not expressly made but the law presumes in consequence of some act of the releaser. The word and expression "surrender" has been defined in law lexicons in the following manner:

**1. Black's Law Dictionary (Ninth Edition)**

Surrender-1. The act of yielding to another's power or control. 2. The giving up of a right or claim. 3. The return of an estate to the person who has a reversion or remainder, so as to merge the estate into a larger estate.

**2. Words and Phrases, Volume 40A (Permanent Edition)**

The word "surrender" means yield, render, or deliver up. *Nolander v. Burns*, 50 N.W. 1016, 1018, 48 Minn. 13. A surrender of a term by agreement, whether express or implied, is the act, not of the law, but of the parties. *Felker v. Richardson*, 32 A. 830, 831, 67 N.H.509.

**3. Stroud's Judicial Dictionary, Volume V (Fifth Edition)**

Surrender ' *sursum redditio*, properly is a yielding up an estate for life or years to him that has an immediate estate in reversion or remainder, wherein the estate for life or years may down by mutual agreement between them. (Co. Litt. 337 b; see thereon Butler's note, 294, where it is said "a surrender differs from a release in this respect, that the release operates by the greater estate's descending upon the less – a surrender is the falling of a less estate into a greater"). See hereon Co. Litt. 338 a, *et seq.*; Touch. Ch. 17; *Burton v. Barclay* 9 L.J.O.S.C.P.238; cp.

14. In the wake of above discussion, this Civil Petition is converted into appeal and allowed, the impugned judgments of the learned Appellate Court dated 23.2.2015 and learned High Court dated 21.12.2017 are set aside. Consequently, the judgment and decree passed by the Trial Court dated 14.12.2013, whereby the civil suit was dismissed are restored and maintained.

Judge

Judge

Announce in open Court

On 10.6.2022 at Islamabad  
Approved for reporting

Judge