Form No: HCJD/C-121

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

F.A.O No.139 of 2020

Muhammad Kader Choudhry

Versus

Multi Professionals Cooperatives Housing Society (MPCHS), etc.

Appellant by	:	M/s Muhammad Naseem Khan and Muhammad Imran, Advocates.
Respondents by	:	Ms. Kalsoom Rafique, Advocate for respondent No.1. Mr. Saad Ahmed Rajpoot, Advocate for respondent No.3.
Date of Hearing	:	08-02-2021.

BABAR SATTAR, J.- The appellant is aggrieved by the order of the learned Civil Judge, Islamabad dated 16.12.2020 through which his application under Order XXXIX Rules 1 and 2 for grant of temporary injunction has been dismissed.

2. The facts, in brief, are that the appellant purchased a property (i.e. Plot No. 960, Block-F in Multi Gardens Sector B-17, Islamabad) (hereinafter referred to as the ***"Plot"***) in 2014, which forms the subject matter of the instant appeal. He also owns certain other properties in Pakistan. The said plot in Sector B-17 was transferred to respondent No.3 pursuant to registered general power of attorney dated 24.06.2019. The stamp paper was issued on 21.06.2019. It is the appellant's case that the general power of attorney in the name of respondent No.2, who is the wife of the appellant, is a forged document and consequently the transfer of the Plot through transfer letter issued by respondent No.1 on

26.07.2019 after the sale of the same by respondent No.2 to respondent No.3 on the basis of general power of attorney is a fraudulent transaction. The appellant filed the instant appeal against order of the learned Civil Judge dated 16.12.2020 through which the appellant's application under Order XXXIX Rules 1 and 2 was dismissed.

3. Learned counsel for the appellant submits that the appellant was not in Pakistan on 21.06.2019 when the stamp paper for general power of attorney was issued or on 24.06.2019 when the power of attorney was registered by respondent No.4; that the appellant submitted a complete copy of his US Passport to the learned trial court which reflects that he has no history of travel to Pakistan since 26.03.2018 when his US Passport was issued; that the learned trial court erred when it concluded in the presence of copies of his passport reflecting no travel history to Pakistan that his complete travel history would need to be considered at the stage of trial; that the appellant had an altercation with his wife (i.e. respondent No.2) in the year 2017 who also illegally took into custody the appellant's passport, CNIC, original title documents of the Plot and other original documents in relation to immovable assets located in Pakistan; that transfer of the Plot is a fraudulent transaction for purposes of section 51 of the Transfer of Property Act, 1882 and section 215 of the Contract Act, 1872 does not protect the action of an agent to deal with the property of the principal on her own account, without the knowledge of the principal; that the learned trial court ought to have struck the right balance between the rights of the appellant, who seeks cancellation of general power of attorney, and respondent No.3 as a bonafide purchaser for value,

by passing an injunctive order to preserve the subject property and prevent multiplicity of the proceedings.

4. Learned counsel for respondent No.3 states that he purchased the said plot from respondent No.2 who is wife of the appellant in the presence of their son and that the son is a witness and signatory of the agreement to sell between respondent No.2 and respondent No.3; that respondent No.3 undertook required diligence and verified that power of attorney pursuant to which the sale transaction was being effected, which was found to be duly registered with respondent No.4; that no question of fraudulent transaction arises in this case as respondent No.2 was the duly registered attorney of the appellant at the time when the sale transaction took place and the suit in the which the impugned order was passed was admittedly filed on 01.02.2020 which was over six months after the transfer of the Plot to respondent No.3; that it is asserted in the appellant's own pleadings that the appellant initially filed a complaint regarding the general power of attorney not being authorized with the Consulate General of Pakistan in New York on 10.12.2019 which was also a few month after the transfer of the Plot and thus the learned trial court rightly rejected application under Order XXXIX Rules 1 and 2 to protect the rights of respondent No.3 who is a bonafide purchaser for value without notice of any infirmity in the legal instrument pursuant to which transfer was made. He relies on *Amanullah v. Inamullah and 5 others* (2017 MLD 1699) and *Mst. Syeda Irshad Fatima Rizvi v. Bashir Ahmad and others* (PLD 2020 Islamabad 184).

5. Learned counsel for respondent No.1 states that in the case of female transferor, it is the society's practice to affect the

transfer/transaction in front of a male member of the family after ensuring that all sale documents are in order. This was done in the instant case and the transfer was made in the presence of the son of respondent No.2 and the appellant, and that the society acted with due care and diligence in accordance with law.

6. Respondent No.4 appeared before the Court and submitted that the power of attorney in question is a duly registered document according to the record of respondent No.4.

7. Respondent No. 2 did not appear despite issuance of notice.

8. I have heard the learned counsel for parties at length, perused the record with their able assistance and reviewed the case law cited by them in support of their contentions.

9. Learned counsel for the appellant has relied on the following judgments:

Shaukat Hussain Khan through his legal representatives v. Anwar and another (1984 MLD 799).

(i) In the said case, the power of attorney being used to transfer the property was neither registered nor those purporting to be plaintiff's attorneys had any relationship with or connection to the plaintiff and were found to be members of a gang of forgerers by the Learned Sindh High Court. The power of attorney was thus found to be a void document as was the sale executed on the basis of such forged power of attorney. The facts of the case are distinguishable as for starters we are dealing with a registered power of attorney.

John Paul vs. Irshad Ali and others (PLD 1997 Karachi 267)

(ii) Here too the general power of attorney was not registered and the plaintiff was admittedly out of country at the time of its purported execution. In the instant case the fact of the plaintiff's absence from Pakistan at the relevant time remains to be proved by the plaintiff through cogent evidence.

Lal Din and another v. Muhammad Ibrahim (1993 SCMR 710).

(iii) In this case the decree had been obtained on the basis of forged copy of death certificate and the august Supreme Court reiterated the principle that fraud vitiates the most solemn proceedings while dealing with an application under section 12(2) of CPC. The case does not help the appellant's cause.

Fida Muhammad v. Pir Muhammad Khan (Deceased) through legal heirs and others (PLD 1985 SC 341)

(iv) In this case the attorney had not been authorized to sell property in view of the content of the power of attorney issued to him but he went ahead and engaged in the sale transaction with his own son. The august Supreme Court held that where an agent deals with property on his own account without obtaining consent of the principal, the principal can repudiate the transaction under section 215 of the Contract Act. In the instant case there is no correlation between respondents No. 2 and 3, respondent No.3 has purchased the Plot for consideration and the power of attorney used to

authorize the sale transaction permitted the sale in view of its content.

Messrs Ismail Industries Limited vs. Mondelez International and 2 others (2019 MLD 1029).

(v) This was cited for the settled proposition that interim relief under Order XXXIX Rules 1 and 2 is intended to be a preventive remedy to preserve status quo or corpus of litigation pending final determination. There can be no cavil with this settled proposition.

Hameed A. Haroon through attorney and others v. Yousuf A. Haroon and others (PLD 2020Sindh 507).

(vi). This was cited for the proposition that the object of interlocutory orders was to maintain the situation subsisting when a party approaches the court and to prevent the creation of a new situation. The ratio here actually hurts the appellant's case as he is seeking an ancillary relief of encumbering the Plot, which may be considered by a court after the appellant first establishes his primary claim that the power of attorney in question is a forged document which is liable to be cancelled, after which the question of what legal rights have accrued pursuant to exercise of authority under such document and how such rights ought to be dealt with under law.

10. None of the cases cited above are thus helpful to the appellant because the settled principles of law stated therein are not applicable in the instant case. The case law relied on in relation to forged power of attorney stating that fraud vitiates the most solemn proceedings is distinguishable because in the said case the power of

attorney used to effect the sale transaction was not registered. In the instant case, the power of attorney used by respondent No.2 to transfer the suit property in question to respondent No.3 is a document duly registered with respondent No.4 for purposes of section 17 of the Registration Act. And while fraud no doubt vitiates the most solemn proceedings, the appellant is seeking an injunctive order against respondent No.3 on the basis of such principle even though he does not assert an allegation of fraud against the said respondent. The appellant's case is that it was respondent No.2 (i.e. his wife) who has registered the power of attorney in question without authorization. Respondent No.3 is a purchaser for value without any notice that the general power of attorney pursuant to which the Plot was being transferred to him was under any cloud of suspicion. The case cited to emphasize the appellant's right to repudiate the sale transaction relates to section 215 of the Contract Act which affords such right to a principal in relation to an agent who is involved in self-dealing without the principal's consent. The case is of no relevance in the present set of facts as respondent No.3 is not in any way related to respondent No.2. It is the plaintiff that is related to respondent No.2 being her spouse. The case law on injunctive relief also emphasizes that the object of interlocutory order is to preserve the status of the lis before the court and preserve existing rights as opposed to creating rights or conferring rights that have not yet been adjudicated and established.

11. In the instant case the question before the learned trial court in deciding the application under Order XXXIX Rules 1 and 2 was to strike the right balance between rights of the plaintiff/appellant who claims that he has been defrauded by

respondent No. 2, his wife, in selling the Plot to respondent No.3 through a registered power of attorney and rights of respondent No.3 who claims to be a bonafide purchaser, who has purchased the Plot for consideration from an ostensible owner duly authorized to sell the same in view of the registered power of attorney that he also verified from the record of respondent No.4 before entering into the sale transaction.

12. In view of the frame of the suit, the appellant's primary grievance is that he has been defrauded by respondent No.2, his wife, who has fraudulently registered a forged general power of attorney with respondent No.4 that purportedly authorized her to sell five properties mentioned in such power of attorney. The ancillary relief in the suit that is the property already transferred to respondent No.3 pursuant to such power of attorney be restored to the appellant on the ground that the sale transaction was effected on the basis of a forged power of attorney. In order to establish, prima facie, a case for purposes of Order XXXIX Rules 1 and 2, the appellant needed to convince the learned trial court that there exists a prima facie case to assume that the said power of attorney is forged. The appellant failed to do so and was not granted interim relief. The learned trial court held in the impugned order that "in the absence of complete travel history of the petitioner, it cannot be ascertained as to whether he visited Pakistan or executed the said general power of attorney."

13. It is a settled matter that under Articles 90 and 91 of the Qanun-e-Shahadat Order, 1984 presumption of genuineness attaches to a public document registered under the Registration Act (see for example 2004 MLD 888 and 2019 CLC 1227). It was thus

for the appellant to dislodge such presumption through convincing evidence and it is a settled proposition that strong evidence is required to cast aspersions on the genuineness of a registered document (see for example 2004 YLR 709 and 2004 MLD 894) According to the memo of the plaint respondent No.2 took possession of original title documents of the properties listed in the power of attorney at some point in the first half of 2017. The power of attorney was registered on 24.06.2019 and the sale transaction between respondent No.2 and respondent No.3 took place on 26.07.2019. According to the appellant's own account it was not until 10.12.2019 that he filed a complaint with the Consulate of General of Pakistan in New York stating that his valuable documents were missing and he apprehended that the same would be used in a fraudulent manner. In other words between March 2017 and December, 2019 the appellant filed no report for loss of valuable documents and issued no public advertisement to put innocent third parties on notice that respondent No.2 might use his documents to engage in fraudulent transactions. The travel document produced by the appellant before the learned trial court is his US Passport which was issued on 20.06.2018 and has no travel history to Pakistan.

14. The learned trial court has correctly observed that determination of whether or not the appellant was in Pakistan on 21.06.2019 when E-Stamp Paper was issued for the general power of attorney and on 24.06.2019 when the said general power of attorney was registered with respondent No.4 cannot be made without taking into account the complete travel history of the appellant. This Court also asked the learned counsel for the

appellant about the whereabouts of his Pakistani Passport as being a dual national the appellant can either travel to Pakistan on a Pakistani Passport or on his US Passport subject to grant of Pakistani visa. In the absence of evidence regarding the appellant's entry and exit from Pakistan and travel history in any other travel document (i.e. Pakistani Passport) that the appellant can legally possess, the trial court rightly refrained from drawing any conclusion regarding whether or not the appellant was present in Pakistan when the general power of attorney was registered.

15. Further the learned trial court has taken into account that respondent No.3 has purchased the property in question for consideration. During hearing of this appeal, the learned counsel for the appellant, taking a fair position, conceded that for purposes of section 41 of the Transfer of Property Act the only due diligence that could be exercised by respondent No.3 was to verify the record of respondent No.4 and ensure that the power of attorney pursuant to which sale transaction was being effected was a duly registered document.

16. It is thus only after recording of evidence that the learned trial court can conclude whether the power of attorney in question is a forged document and if so whether respondent No.3 would be entitled to the protection and benefit of section 41 of the Transfer of Property Act as a bonafide purchaser for value without notice and whether or not the appellant would be estopped from asserting a claim against respondent No.3. The learned trial court cannot be said to have erred in concluding that the appellant has failed to make out a *prima facie* case at this stage.

17. In the absence of a *prima facie* case the learned trial court need not to have indulged in any analysis of where the balance of convenience lay and whether or not the appellant would suffer irreparable loss. In view of guidance provided by the august Supreme Court in Shahzada Muhammad Umar Beg's case (PLD 1970 SC 139), all those components must coexist for a case for injunction to be made out at the interim stage.

18. The impugned order has not been shown to be arbitrary, fanciful or unreasoned and the learned counsel for the appellant has not been able to point to any infirmity in the manner in which the learned trial court has exercised its discretionary jurisdiction in deciding the application under Order XXXIX Rules 1 and 2. This appeal, therefore, fails and is dismissed accordingly. The appellant is liable to pay the cost of litigation to the respondents in the instant appeal.

(BABAR SATTAR)
JUDGE

Announced in the open Court on 18.02.2021.

JUDGE

Saeed.