JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

R.F.A. No.235 of 2004
Muhammad Zafar Iqbal
Versus
Malik Aurangzeb and another

Date of Hearing: 22.05.2017
Appellant by: Mr. Shaukat Rauf Siddiqui, Advocate,
Respondent No.1 by: Mr. Samad Mahmood, Advocate.

MIANGUL HASSAN AURANGZEB, J:- Through this common judgment we propose to decide Regular First Appeals No.235 and 236/2004, since they involved common questions of law and fact, and arise from consolidated judgment and decrees dated 19.10.2004, passed by the Court of the learned Civil Judge, Islamabad.

2. Through the said consolidated judgment and decrees, the learned Civil Court (i) decreed Civil Suit No.26/A411 of 1995 for declaration, permanent injunction, specific performance and mandatory injunction instituted by respondent No.1 (Malik Aurangzeb), against the appellant (Muhammad Zafar Iqbal), and (ii) dismissed Civil Suit No.60 of 2002 for declaration, possession, recovery of *mesne* profit and permanent injunction instituted by the appellant against respondent No.1 etc.

3. Respondent No.1's case before the learned civil Court was that Plot No.359, Street No.72, Sector G-8/1, Islamabad ("the suit plot") was allotted to the appellant, who had appointed one Qurban Hussain Anwar (who was the appellant's brother) as his special attorney through a duly registered power of attorney dated 05.06.1982; that under the said power of attorney, the above named attorney was authorized to *inter-alia* sell/transfer the suit plot; that vide registered sale agreement dated 29.06.1986, the suit plot was sold to respondent No.1. Under the terms of the said sale agreement, the liabilities with respect to the suit plot including payments to House Building Finance Corporation ("H.B.F.C.") were to be made by respondent No.1; that respondent No.1 made the required payments to H.B.F.C. and took over peaceful possession of the suit plot along with the house constructed thereon. On

26.05.1993, Qurban Hussain Anwar passed away; that since the appellant was refusing to transfer the suit plot in respondent No.1's name in the records of the Capital Development Authority ("C.D.A."), respondent No.1 on 17.01.1995 instituted the said suit against the appellant.

4. The appellant's case before the learned civil Court was that the appellant had not authorized his attorney to sell the suit plot in violation of the C.D.A. byelaws; that the power of attorney in question was a defective document; that the sale agreement dated 29.06.1986 was not enforceable; that no consideration for the suit plot had been received either by the appellant or his alleged attorney; that respondent No.1 was in possession of the suit plot since 1983 as a tenant; that respondent No.1 had agreed to pay the loan to H.B.F.C. instead of paying the rent to the appellant; that respondent No.1 was in unlawful occupation of the suit property, and had rented a portion of the suit property to Saleem Akhtar and Aqeel Abbas Zaidi. The appellant, in his civil suit had asserted that the registered power of attorney dated 05.06.1982 as well as the registered sale agreement dated 29.06.1986 were forged documents; and that the power of attorney had been prepared by the appellant's brother (Qurban Hussain Anwar) in collusion with respondent No.1.

5. It appears that the above mentioned two suits were consolidated on 06.01.2003. On the same very day, the learned Civil Court framed the following consolidated issues:-

1. *Whether the plaintiff has no cause of action and locus standi to file this suit? OPD*
2. *Whether the suit is barred by time? OPD*
3. *Whether the suit is not maintainable? OPD*
4. *Whether the plaintiff is occupying the suit property as a tenant? OPD*
5. *Whether the Power of Attorney deed in favour of Qurban Hussain is illegal and defective document? OPD*
6. *Whether the agreement dated 29.06.1986 is illegal, and void? OPD*
7. *Whether the suit is bad for misjoinder and nonjoinder of necessary parties? OPD*
8. *Whether the defendant No.1 is entitled to special costs U/S 35-A CPC?OPD*
9. *Whether the suit is barred U/S 49-E of CDA Ordinance? OPD*

10. Whether the plaintiff is entitled to decree for specific performance of agreement to sell dated 29.6.1986, if so, on what terms and conditions? OPP
11. Whether the plaintiff is entitled to declaration and injunction prayed for? OPP
12. Whether the plaintiff of suit No.60/2002 Muhammad Zafar Iqbal is entitled to the decree for possession and recovery of mesne profit as prayed for? OPD (Zafar Iqbal)
12-A Whether Special Power of Attorney dated 05.6.1982 is forged and fictitious, based on fraud and misrepresentation, if so, its effect? OPD
12-B Whether the suit is barred by law, not maintainable in view of preliminary objection No.10?OPD
13. Relief.

6. As mentioned above, vide consolidated judgment and decrees dated 19.10.2004, the civil suit instituted by respondent No.1 was decreed, whereas the civil suit instituted by the appellant was dismissed. The said consolidated judgment and decrees have been impugned by the appellant in Regular First Appeals No.235 and 236 of 2004.

7. Learned counsel for the appellant submitted that the power of attorney dated 05.06.1982 and the sale agreement dated 29.06.1986 were forged documents; that the appellant's admitted signatures do not tally with the ones on the power of attorney; that the execution of the said power of attorney was the result of collusion between respondent No.1 and Qurban Hussain Anwar, who was the appellant's elder brother; and that the said sale agreement was also a fictitious document. Learned counsel for the appellant submitted that the document produced by the office of the Sub-Registrar as Exh.P/2 before the learned civil Court, is different in material respects from the sale agreement which was produced by the appellant along with the suit.

8. On the other hand, learned counsel for respondent No.1 submitted that the impugned consolidated judgment and decrees are strictly in accordance with the law and fact of the case; that the appellant's assertion that the said power of attorney and sale agreement are forged documents, is an afterthought; that the appellant, in his written statement to the suit instituted by respondent No.1, did not plead that the power of attorney and sale agreement were forgeries; that the appellant had only pleaded that the power of attorney was an illegal and a defective

document; that the appellant had also pleaded that the sale agreement was not enforceable, because the appellant had not authorized his attorney to sell the suit plot in violation of the C.D.A's byelaws; that respondent No.1 had proved the execution of the registered power of attorney by producing its marginal witnesses; that respondent No.1 had also proved that the execution of the sale agreement dated 29.06.1986 by producing its marginal witness (Chaudhary Altaf Hussain) and the son of the second marginal witness; that the record of the said agreement was produced by the Moharrir (Tehsil Office Islamabad); and that respondent No.1's occupation of the suit plot and the house constructed thereon is in his capacity as an owner and not as a tenant. Learned counsel for respondent No.1 prayed for the appeals to be dismissed.

9. We have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

10. The record shows that the suit plot was allotted to the appellant by the C.D.A. vide allotment letter dated 25.04.1971. On 05.06.1982, a special power of attorney was executed by the appellant, whereby the appellant appointed his elder brother (Qurban Hussain Anwar) as his special attorney and authorized him to inter-alia sell/transfer the suit plot to anybody against consideration and complete all obligations in this respect. This special power of attorney was registered at the office of Sub-Registrar, Gujjar Khan. Apparently, loan had been taken from H.B.F.C. for constructing a house on the suit plot.

11. On 29.06.1986, a sale agreement was executed between the appellant through his special attorney Qurban Hussain Anwar, and respondent No.1, whereby the latter agreed to purchase the suit plot. By this stage, a house had been partly constructed on the suit plot. As per the terms of the said sale agreement, the sale consideration agreed between the parties was Rs.2,25,000/- out of which Rs.1,16,000/- had been paid by respondent No.1 when the said agreement was executed, whereas the balance Rs.109,000/- was to be paid by respondent No.1 to H.B.F.C. as payment of the loan. Possession of the suit plot had already been

delivered to respondent No.1 with permission to complete the construction of the house on the suit plot at his own costs. After getting a completion certificate from the C.D.A., the appellant was to get the said plot transferred in respondent No.1's name. The said sale agreement was registered with the Sub-Registrar, Islamabad.

12. The appellant's special attorney, Qurban Hussain Anwar died on 26.05.1993. Thereafter, dispute and difference arose between the appellant and respondent No.1 causing the latter to institute a suit for declaration, permanent injunction, specific performance and mandatory injunction against the appellant before the Court of the Civil Judge, Islamabad. This suit was instituted on 17.01.1995. In the said suit, respondent No.1 had specifically prayed for the relief of specific performance of the said sale agreement. The appellant contested the said suit by filing a written statement. In the said written statement, it was *inter-alia* pleaded that a sale agreement does not create any right or title of respondent No.1 over the suit property. Furthermore, it was pleaded that the said power of attorney was an illegal and defective document, and was not in accordance with C.D.A's byelaws; that Qurban Hussain Anwar had no power to sell the suit plot to respondent No.1; that the said sale agreement was not enforceable; that no consideration was received by the appellant or his attorney; and that respondent No.1's occupation of the suit plot was in his capacity as a tenant. This written statement was filed on 28.05.1995 by the appellant through his eldest son, Muhammad Amar Iqbal, who was also his attorney.

13. About six years after filing the said written statement, the appellant, on 13.01.2003, filed an application for an amendment in the written statement so as to enable him to plead that the said special power of attorney dated 05.06.1982 was a forged document, and that the sale agreement dated 29.06.1986 was also based on fraud and misrepresentation, and was without any consideration. In this application, the appellant pleaded that earlier the written statement had been filed by his eldest son in collusion with respondent No.1.

14. Apparently, prior to the filing of the application for the amendment in the written statement, the appellant had applied to take off the written statement that had been filed earlier. Vide order dated 13.11.2001, the appellant's said application had been dismissed by the learned civil Court. The appellant's civil revision petition No.38/2002 against the said order had been dismissed as not pressed. Vide order dated 21.01.2003, the learned civil Court dismissed the appellant's application for amendment in the written statement.

15. On 24.06.2002, the appellant had instituted a suit for declaration, possession, recovery of *mesne* profit and permanent injunction against respondent No.1 etc. before the learned Civil Court. In this suit, it was specifically pleaded that the power of attorney dated 05.06.1982 and the sale agreement dated 29.06.1986 were forged documents. Since this suit was consolidated with the civil suit that had been instituted by respondent No.1, the learned Civil Court framed an issue on whether the power of attorney dated 05.06.1982 was a forged document.

16. The appellant has not just hurled accusations of fraud and collusion against his deceased brother, Qurban Hussain Anwar but also against his elder son, Muhammad Amar Iqbal. The onus of proving fraud and collusion in the execution of the said power of attorney and the said sale agreement was on the appellant. It is an admitted position that in the written statement to respondent No.1's suit, the appellant had not pleaded the factum of fraud and collusion in the execution of the said documents. The appellant made the allegation of fraud and collusion as a belated afterthought. At no material stage did the appellant file an application for the comparison of his admitted signatures with those on the power of attorney dated 05.06.1982. When the said power of attorney was produced in evidence as Exh.P/1 and Exh.DW.1/1, no objection was raised by the appellant as regards the fictitious nature of the said document. Perusal of Exh.P/1 shows that the attorney (Qurban Hussain Anwar) had been authorized to sell the suit plot by the appellant. Mohsin Munir, who was one of the marginal witnesses of the said power of attorney

entered the witness box as DW-3 and deposed that the said power of attorney had been registered. Mohsin Munir was also the concerned registration clerk. The second marginal witness, namely, Zafar-ul-Haq Qureshi entered the witness box as PW-4 and supported respondent No.1's case. The allegation regarding the said power of attorney being a forgery was specifically denied by respondent No.1 who gave evidence as PW-5. We would intend to agree with the finding of the learned trial Court that the execution of the said power of attorney had been proved in accordance with Articles 17 and 79 of the *Qanun-e-Shahadat* Order, 1984.

17. As regards the sale agreement dated 29.06.1986, the same was executed between the appellant's special attorney (who also happened to be his brother) and respondent No.1. As mentioned above, the appellant's special attorney had been authorized to sell the suit plot. The said sale agreement was tendered in evidence as Exh.P/2 by Amjad Hussain, Registry Moharrir, Tehsil Office Islamabad, who entered the witness box as PW-3. PW-6 was the son of the one of the marginal witnesses, and deposed that he recognized his father's signatures on Exh.P/2. The second marginal witness of Exh.P/2 was Chaudhary Altaf Hussain who gave evidence as PW-7, and testified as to his signatures on Exh.P/2. There is no evidence from the appellant's side that the said sale agreement was a fictitious document. Although an agreement to sell was not required to be registered, respondent No.1 had proved the execution of the sale agreement dated 29.06.1986 by having the original agreement tendered in evidence and its marginal witnesses deposing as to its authenticity.

18. It is also pertinent to appreciate that the appellant did not have himself examined as a witness. However, the appellant's son gave evidence as DW-8. In his evidence, DW-8 deposed that his paternal uncle had prepared the forged registered power of attorney, and that his father's signatures on the said power of attorney were also forged. DW-8 did his matriculation in the year 1998 and was of a tender age when the forgery was alleged to have been committed.

19. It is well settled that fraud and forgery must be proved by producing unimpeachable, impartial and confidence inspiring evidence. Mere allegations of fraud and forgery cannot partake prove require under the law. In the case at hand, the evidence produced by the appellant was not sufficient for holding that the said power of attorney or the sale agreement were forgeries. Furthermore, the appellant, in his suit did not give full particulars of fraud in his pleadings. If, in the plaint, a document is alleged to be fake or fraudulent or obtained through fraud, the plaintiff duty was to state clearly the material facts showing how the alleged fraud was committed. Vague, ambiguous and generalized pleas do not fulfill the requirements of Order V, Rules 2 and 10 of the Code of Civil Procedure, 1908.

20. In parapargh-4 of the suit, the appellant pleaded that he had executed a special power of attorney in his brother's favour to deal with the C.D.A., H.B.F.C. and the tenant. However, a copy of such a power of attorney (not authorizing the attorney to sell the suit plot) was not produced by any of the appellant's witnesses.

21. In view of the above, we do not find any infirmity in the consolidated judgment and decrees passed by the learned civil Court, who correctly directed the appellant to execute a sale deed on the basis of the sale agreement dated 29.06.1986. Accordingly, these appeals are dismissed with no order as to costs.

(AAMER FAROOQ)
JUDGE

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2017

(JUDGE) **(JUDGE)**

Sultan*

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