

SUPREME COURT OF AZAD JAMMU AND KASHMIR
[Appellate Jurisdiction]

PRESENT:

Mohammad Azam Khan, C.J.
Masood A. Sheikh, J.

Civil Appeal No.167 of 2015
(PLA filed on 16.02.2015)

1. Khalid Mehmood s/o Muhammad Sarwar Khan.
2. Nasreen Akhtar w/o Khalid Mehmood, Caste Sudhan,
r/o Nakar Jhanda Bagla, Tehsil Pallandri, District
Sudhnuti.

.....APPELLANTS

VERSUS

1. Muhammad Rashed s/o Sajawal Khan (deceased),
represented by legal heirs:-
 - (i). Mst. Zahida Begum, wife,
 - (ii). Mst. Rozina Begum, daughter,
 - (iii). Aamer Rasheed,
 - (iv). Saqib Rasheed, sons,
 - (v). Mst. Zuberia Begum,
 - (vi). Mst. Maria Begum,
 - (vii). Mst. Maynaz Begum, daughters, Caste Sudhan, r/o
Bhetta, Subal Palandari.

.....RESPONDENTS

2. Wazeer Muhammad s/o Ghulam Rasool.
3. Haji Ali s/o Jalal Din,
4. Muhammad Arif s/o Sultan Muhammad, Caste Mangral,
r/o Mohajir Colony, Tehsil and District Pallandari.

.....PROFORMA-RESPONDENTS

[On appeal from the judgment & decree of the High Court
dated 16.12.2014 in Civil Appeal No.03/2013]

FOR THE APPELLANTS: Mr. Asghar Ali Malik,
Advocate.

FOR RESPONDENTS No.1: Sardar Abdul Rauf Khan,
Advocate.

Date of hearing: 19.05.2016.

JUDGMENT:

Mohammad Azam Khan, C.J.— The plaintiff, respondent, herein, filed a declaratory suit for cancellation of gift-deed dated 8th August, 2003, in respect of the land, measuring 5 *kanal*, comprising survey Nos.3163/1427, situate in village Pallandari, alleging therein, that he borrowed an amount of Rs.2,02,000/- from defendant, appellant No.1, herein, and agreed to pay back the amount upto December 2004 and if he failed to pay back the said amount then the defendant will be entitled to get the sale-

deed registered. He also executed a separate agreement and power of attorney on 13th June, 2002. The defendant got entered the words gift-deed and sale-deed additionally in the said power of attorney. The said entries in the power of attorney are fake and fictitious. The possession of the land was handed over to the defendant. Defendant No.1 transferred the said land through a gift-deed in favour of defendant No.2. The defendants in the written statements refuted the claim and alleged that the plaintiff on 13th June, 2002 has executed an agreement-to-sell in favour of defendant No.1 and also executed a general power of attorney in his favour in respect of the said land for transferring the same in his own name or in the name of any other person and he validly transferred the land in the name of his wife. After necessary proceedings the suit filed by the plaintiff was dismissed. An appeal filed by the plaintiff was dismissed by the District Judge Sudhnuti/Pallandari. Dissatisfied, the plaintiff filed second appeal in the High Court. A learned single Judge in the High Court vide impugned judgment dated 16th December, 2014, accepted the appeal while relying upon the judgment of this Court delivered in the case titled

Maqsood Ahmed and another vs. Muhammad Razzaque and 9 others [2009 SCR 38]. In the referred case this Court laid down the rule of law while relying upon the judgment of the Supreme Court of Pakistan delivered in the case reported as *Haji Faqir Muhammad and others vs. Pir Muhammad and others* [1997 SCMR 1811], that an attorney before transferring the land to his own kith and kin has to obtain permission from the principal. The appellants have challenged the said judgment of the High Court by way of instant appeal by leave of the Court.

2. Mr. Asghar Ali Malik, Advocate, counsel for the appellants, submitted that the rule of law laid down in the referred case is correct but it is not applicable in the present case. The said rule of law is applicable in the cases where only the power of attorney is executed in favour of a person. The plaintiff-respondent, herein, sold the land to appellant No.1 through agreement (*Iqrarnama*) Ex. "PA" against the price of Rs.2,02,000/-, handed over the possession of the land and also executed the general power of attorney in respect of the said land in favour of appellant No.1, through which he empowered him to

transfer the land. The agreement is in fact a sale-deed, when read with said agreement, the attorney is empowered to transfer the land through gift-deed in the name of his spouse. The learned counsel submitted that the petition writer, Abdul Aziz, who has written the agreement (*Iqrarnama*) and power of attorney, stated as witness in the Court that he has written the documents on the instruction of the plaintiff. The statement to this effect was not challenged, as such the statement shall be deemed to be admitted. Defendant No.1 has purchased the land and paid the price, therefore, there was no need to seek permission. The learned counsel referred to the statements of the plaintiff. The plaintiff admitted in the cross-examination that he obtained the copies of both the documents after 15 days, as such it was clear that he was in knowledge of the same but he filed the suit after a period of around 1½ years. He referred to the cases reported as *Bashir Ahmed and others vs. Muhammad Qasim and others* [1992 SCR 69] and *Ch. Abdul Karim and 5 others vs. Raja Muhammad Nisar and another* [1998 SCR 296]. The learned counsel further argued that there are concurrent findings of facts recorded by the two

Courts below which cannot be disturbed in second appeal.

He requested for acceptance of appeal.

In the case reported as *Bashir Ahmed and others vs. Muhammad Qasim and others* [1992 SCR 69], it was observed that while interpreting a power of attorney the scope and connotation are to be understood in view of contents of the same in each particular case. The intention of the person executing the power of attorney is to be seen while interpreting the document.

In the case reported as *Ch. Abdul Karim and 5 others vs. Raja Muhammad Nisar and another* [1998 SCR 296], it was observed by this Court that it is well settled principle of law that facts admitted need not to be proved.

3. While controverting the arguments, Sardar Abdul Rauf Khan, Advocate, counsel for the other side, submitted that the judgment of the High Court is perfectly legal. It is based on the rule of law laid down by this Court in the case reported as *Maqsood Ahmed and another vs. Muhammad Razzaque and 9 others* [2009 SCR 38]. An attorney cannot transfer the land through gift-deed to his spouse. The attorney has transferred the land to his wife without permission of the plaintiff, which was not permissible under law. He requested for dismissal of the appeal.

4. We have heard the learned counsel for the parties and perused the record with utmost care.

5. The claim of the plaintiff-respondent, herein, is that he borrowed Rs.2,02,000/- from defendant-appellant No.1, herein, and agreed to pay back the said amount up to December, 2004 and if he failed to pay back the amount then the defendant No.1 will get the sale-deed registered. He executed an agreement (*Iqrarnama*) on 13th June, 2002 and also executed a power of attorney for looking after the property but the defendant has entered the words “*transfer of land through gift and sale*” additionally in the power of attorney and also transferred the land in the name of defendant No.2, who is his wife, before December, 2004. The receiving of amount of Rs.2,02,000/- is admitted. The execution of agreement (*Iqrarnama*) and power of attorney is also admitted by the plaintiff. The questions remain left whether the amount of Rs.2,02,000/- was received as sale price or it was borrowed and whether the agreement for sale of land was correctly written and the words sale and gift were later on inserted in the power of attorney or not and the rule of law laid down by this Court

in the case reported as *Maqsood Ahmed and another vs. Muhammad Razzaque and 9 others* [2009 SCR 38], is applicable in the present case or not.

6. Before proceeding further, it may be observed that the rule of law laid down in the case reported as *Maqsood Ahmed and another vs. Muhammad Razzaque and 9 others* [2009 SCR 38], is correct that holder of general power of attorney in alienating the property of his principal in favour of those who are so closely related to the agent that ultimate beneficiary would be the agent himself, he should in his own interest obtain the consent of the principal failing which the principal is at liberty to repudiate the transaction. The rule is based upon section 216 of the Contract Act which provides that if an agent without the knowledge of the principal deals in the business of the agency on his own account instead of on account of his principal, the principal is entitled to claim from the agent any benefit which may have resulted to him from the transaction. This view is consistently being followed by the Superior Courts of Pakistan since long, but the question in the present case is quite different. The

plaintiff claimed that he borrowed the amount of Rs.2,02,000/- and executed the agreement (*Iqrarnama*) and claimed that he fixed the specific date that up to the said date if he failed to pay back the said amount, the defendant will be at liberty to get the sale-deed registered. He also claimed that he also executed a power of attorney in favour of defendant No.1. We deem it proper to reproduce both the documents i.e *Iqrarnama* and power of attorney which read as under:-

"اقرار نامہ۔"

محمد رشید خان ولد سجاول دین خان قوم سدھن ساکن موضع پلندری تحصیل و ضلع سدھنوتی/پلندری مقرر شناختی کارڈ نمبر

خالد محمود ولد سرور خان وم سدھن ساکن موضع پلندری تحصیل و ضلع سدھنوتی/پلندری مقرر شناختی کارڈ نمبر علیہ

جو کہ اراضی مندرجہ انتقال نمبر ۹۹۶ نمبر خسرہ ۱۳۲۷ من تعدادی ۵ کنال موجودہ حصہ داری مقرر اور مجرائی سابق ۱۰ کنال ڈگری شدہ رقبہ و نمبر خسرہ ۱۳۲۸ تعدادی ۱۶ کنال ۱۱ مرلہ شاملات دھ ملکیتی و مقبوضہ جملہ حقوق ملکیت و قبضہ کاشت مع جملہ حقوق داخلی و خارجی، معہ درختان، راستہ گیل، پانی، چراگاہ وغیرہ بالعوض مبلغ دو لاکھ دو ہزار روپے بدست خالد محمود خان ولد سرور خان قوم سدھن ساکن موضع نکر جھنڈا بگلہ تحصیل و ضلع سدھنوتی/پلندری دوام کے تحت فروخت کر دی ہے اور سالم زر بدل بتفصیل ذیل نقد و بزریرہ چیک وصول پائے۔ (۱) نقدی بتیس ہزار روپے مورخہ ۲۰۰۲۔۵۔۶ کو (۲) چیک مسلم کمرشل بینک پلندری زیر چیک نمبر ۳۷۶۸۵۹۷۳ مورخہ ۲۰۰۲۔۶۔۰۳ کو (۳) چیک نیشنل بینک آف پاکستان پلندری زیر نمبر ۳۲۵۳۲۸ مورخہ ۲۰۰۲۔۰۶۔۱۳ جملہ مبلغ دو لاکھ دو ہزار روپے سر اجلاس نوٹری پبلک وصول پا کر قبضہ اراضی ڈگری شدہ پانچ کنال موجودہ و شاملات دھ ۱۶ کنال ۱۱ مرلے جملہ تعدادی ۲۱ کنال ۱۱ مرلے واقع موضع پلندری ہر مقرر علیہ مذکور کو موقع پر قابض کر دیا گیا ہے۔ نسبت زر بدل و قبضہ کوئی نزاع باقی نہ رہا ہے۔ نیز آج ہی مقرر علیہ مذکور کو مختار نامہ عام بھی رجسٹری کر دیا ہے مقرر علیہ مذکور کو اختیار ہے کہ وہ ترقی آبادی کرنے، خدا نخواستہ اراضی ملکیتی و شاملات دھ مقرر کے قبضہ سے کسی قسم قانونی یا واقعاتی سقم نکل جائے تو من مقرر سالم زر بدل مع ترقی آبادی مقرر علیہ مذکور کو یکمشت ادا کرنے کا پابند ہے۔ اب آئندہ مقرر یا دیگر کسی وارث کا اراضی محولہ بالا کے ساتھ کوئی تعلق واسطہ نہ رہا ہے۔ مقرر علیہ بوقت تقسیم شاملات اقرارنامہ ہذا کی رو سے بیع نامہ پر استحقاق مقرر

کے تحت انتقال بنام خود درج کروانے کا حقدار ہو گا۔ لہذا بقابمی ہوش و حواس
خمسہ بلا کسی جبر و اکراہ غیرے حسب رضامندی خود اقرار نامہ ہذا رو برو
گواہان حاشیہ متذکرہ تحریرہ ہے۔ ۲۰۰۲-۰۶-۱۳

"مختار نامہ۔"

محمد رشید خان ولد سجاول دین خان قوم سدھن ساکن موضع پلندری تحصیل و
ضلع سدھنوتی/پلندری مقرر شناختی کارڈ نمبر

خالد محمود ولد سرور خان وم سدھن ساکن موضع پلندری تحصیل و ضلع
سدھنوتی/پلندری موضع نکر جھنڈا بگلہ تحصیل و ضلع سدھنوتی/پلندری مختار
عام۔

جو کہ اراضی مندرجہ انتقال نمبر ۹۹۶ نمبر خسره ۱۳۲۷ من تعدادی ۱۵ کنال
واقع موضع پلندری ملکیت مقرر سے قبل ازیں رقبہ ۱۰ کنال بروئے ڈگری و
تبادلہ منتقل ہو ا ہے۔ بقیہ رقبہ تعدادی پانچ کنال واقع موضع پلندری بقیہ موجودہ
رقبہ سالم حصہ داری مقرر کا انتظام و انصرام و دیکھ بھال وغیرہ کرنے سے
مقرر بوجہ عذیم الفرشی قاصر ہے پس مقرر اپنے اعتمادی مسمی خالد محمود ولد
سرور خان قوم سدھن ساکن نکر جھنڈا بگلہ تحصیل و ضلع سدھنوتی کو مختیار
عام مقرر کر کے حق و اختیار دیتا ہے کہ مختیار عام مذکور مقرر کی موجودہ
سالم بقیہ حصہ داری پانچ کنال محولہ بالا کا جملہ انتظام و انصرام و دیکھ بھال
وغیرہ خود کرے اراضی محولہ بالا کو بذریعہ بیعنامہ /بہ نام وغیرہ منتقل و
فرخت کرے قبضہ منتقل کرے، تعمیر و ترقی کرے۔ غرضیکہ مختیار عام
مذکور کو وہ تمام اختیارات و حقوق مقرر کی ملکیتی اراضی ۵ کنال و شاملات
دھ نمبر خسره ۱۳۲۸ واقع موضع پلندری کی نسبت جو مقرر کو حاصل ہیں آئندہ
تمام و کمال مختیار عام مذکور کو حاصل ہیں۔ مختیار عام مذکور جملہ ساختہ و
پرداختہ بمثل ذات کردہ کو مقرر کو منظور و قبول ہے۔ لہذا رو برائے گواہان
مختیار نام ہذا متذکرہ تحریر ہے۔ ۲۰۰۲-۰۶-۱۳

A perusal of *Iqrarnama* reveals that it has been
executed by the plaintiff on 13th June, 2002, through
which he sold the land measuring 5 *kanal* from survey
No.1427-min and from survey No.1428, the *shamilat deh*
land measuring 16 *kanal* 11 *marla* with all rights against
the price of Rs.2,02,000/- in favor of Khalid Mehmood s/o
Sarwar Khan, resident of Nakar Jhanda Bagla and
received the total amount with detail i.e. 32,000 in cash

on 6.05.2002, Cheque of Muslim Commercial Bank Pallandari, bearing No.47685973, received on 03.06.2002, and Cheque of National Bank of Pakistan, Pallandari bearing No.325428, received on 13.06.2002, total amounting to Rs.2,02,000/-. He received the said amount in presence of the notary public. It is further written that possession of the land has been handed over to defendant No.1. Nothing from the price is left. A perusal of the power of attorney executed on 13th June, 2002, the same date when the agreement (*Iqrarnama*) was written, reveals that it has been executed in respect of the same land which is subject of *Iqrarnama* and the plaintiff has empowered defendant No.1 not only for management of the said land but also for transferring the land through sale or gift. The execution of both the documents is admitted by the plaintiff. The only question which remains left that the words “*transfer of land through sale and gift*” were additionally entered, later on, or not. A perusal of the same reveals that the documents i.e. the power of attorney annexure “DA” and *Iqrarnama*, annexure “DB” are original documents. There is no addition in the said documents.

7. Although the perusal of evidence is not the function of this Court but in particular circumstances of the case we deem it necessary to go through the statements of the witnesses, particularly, the statement of the plaintiff and that of the petition writer, who was scribe of the *Iqrarnama* and the power of attorney. The plaintiff himself stated in the cross-examination that after a few days of writing the documents, he obtained the copies of the said documents. The petition writer appeared in the Court as witness and stated that he wrote the documents annexure “DA” and “DB” on the instruction of the plaintiff, got affixed the signatures of the plaintiff and the witnesses, as such it is proved that the documents annexure “DA” *Iqrarnama* and the power of attorney annexure “DB” were executed by the plaintiff and its execution is proved.

8. The execution of *Iqrarnama* and power of attorney is not denied by the plaintiff. He only disputed that the words (بيع) and (بہ) were not written according to his instruction by the petition writer. The petition writer has stated that he has written both the documents under the

instructions of the plaintiff. The burden of proof plays an important role in a case. A party who alleges a particular fact, the initial burden of proof is upon the same party to discharge the same and if the party proves the same then such party is entitled for the relief. In the case reported as *Haji Muhammad Idrees vs. Ch. Mehmood Ahmed and another* [2000 SCR 166], this Court at page 171 of the report observed as under:-

“...It is correct that initial burden of proof in a case is always on the plaintiff, but if the plaintiff discharges that onus and makes out a case which entitles him to relief, the onus shifts on defendant to prove the circumstances, if any, which disentitle the plaintiff to that relief.....”

In the case reported as *Muhammad Yousaf vs. Nisar Ahmed and another* [NLR 2002 Civil 423], it observed as under:-

“.....It is an established principle of law that a person who asserts/alleges a particular fact and wants the Court to believe that such fact exists he shall be required to prove the existence of such a fact....”

In the case reported as *Messer Noorani Travels, Karachi vs. Muhammad Hanif and others* [2008 SCMR 1395], the Supreme Court of Pakistan observed as under:-

“...As per Article 119 of the Qanun-e-Shahdat order, burden of proof as to any particular fact lies on that person who wishes to believe the Court in its existence unless it is provided by law that proof of that fact lies on another person....”

Similarly, in the case reported as *Sarfraz Ahmed Khan vs. Azad Government and others* [2012 PSC 1145], this Court observed in para 20 of the report as under:-

“...Initially the burden of proof is on the party who alleges the fact. If the party discharges the burden, then it shifts on the other party.....”

The plaintiff after admitting that he received the price of Rs.20,2000/- from defendant No.1 and executed the power of attorney where he admitted that he has sold the land to defendant No.1 and has received the price of the same and handed over the possession of the land to defendant No.1 and also admitted in the plaint that he has executed the power of attorney and alleged in the plaint that he has borrowed the money from defendant No.1 and there was an agreement that if he failed to return back the

money after the December, 2004, then the defendant has a right to get the sale-deed registered and the words ‘sale’ and ‘gift’ were got entered in the power of attorney by the defendant without his permission. After admitting the execution of *Iqrarnama* and power of attorney he failed to discharge the burden of proving the alleged facts. He is not entitled to any relief. The judgment and decree of the High Court is not maintainable.

The result of the above discussion is that the appeal is accepted. The judgment and decree of the High Court is set aside and that of the lower Court is restored. The suit filed by the plaintiff is dismissed. There will be no order as to costs.

CHIEF JUSTICE

JUDGE

Mirpur.

. .2016.