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BEFORE THE COURT OF HON'BLE 3RD ADDITIONAL SENIOR
CIVIL JUDGE, DISTRICT KHEDA AT NADIAD

SP.C.S. No. 122/2014
Exh. No. 74

Bhupendrabhai Dhanjibhai Patel

Aged: 30 years, Occ: Business
Residing at: Uma Township,
National Highway No.8,
Nadiad, Dist: Kheda

.....Plaintiff

Versus

1. **Legal heirs of Late Mohammadiqbal Mohammadyahyah
Ansari**

Mahammadsalman Mohammadiqbal Ansari

Occ:Labour,
Residing at: Nr. Overbridge,
Nr. Chandramani Bhuvani,
Ashram Road,
Nadiad.

2. **Rangi Shrivankumar Mohanbhai(Marvadi)**

Aged: 35 years, Occ:Business
Residing at: Nr. District Sagh Compound Overbridge,
Ashram Road,
Tal:Nadiad, Dist:Kheda

..... Defendants

Appearance:

Learned Advocate **Shri B. C. Patel** for the plaintiff.

Ex-parte for the defendant No.1

Learned Advocate **Shri A. M. Patel** for the defendant No.2

Suit value for the sum of Rs.4,51,000/-

Suit for declaration, permanent injunction, cancellation of document and mesne profits

:JUDGMENT:

1. The plaintiff has filed the present suit for declaration, permanent injunction, cancellation of sale deed and also for mesne profit.

2. The facts of the suit of the plaintiff are that the plaintiff has purchased suit property i.e. City Survey No.1944 having area of total 1367-55 paiki 223-35 sq.mtrs. The said 223-35 sq.mtrs of land is one suit property in the present case. He became the legal owner and occupier of the said suit property by virtue of sale deed dated 18.06.2010. In the said sale deed dated 18.06.2010, there was a mistake of city survey number, therefore, they have executed one another correction deed dated 23.09.2010. The said property was sold by power of attorney holder Dhanjibhai Damjibhai Patel who was power of attorney holder of Mahammadiqbal Mahammadyahyah Ansari. The Mahammadiqbal Mahammadyahyah Ansari has

executed the power of attorney on 05.10.2009 in favour of Dhanjibhai Damjibhai Patel. As such the said power of attorney holder Shri Dhanjibhai Damjibhai Patel has sold the suit property to the present plaintiff. By way of said power Mahammadiqbal Mahammadyahyah Ansari has given the power of total land of 988-97 sq.mtrs to the power of attorney holder. As such the power of attorney holder has all the legal power to sell the suit property and therefore, he is legal owner and occupier of the said property. Inspite of the sale deed executed on 18.06.2010 and 23.09.2010, the defendant no.1 has also sold the property being City Survey No.1944, 600 sq.mtrs paiki 189 sq.mtrs of land to the defendant no.2 by registered sale deed which is also suit property in the present suit. When the plaintiff went to enter his name in the property card on 12.06.2014, he came to know that the name of defendant no.2 has been entered in the property register. As there was dispute regarding payment of stamp duty and inspite of the fact that the plaintiff became legal owner by virtue of sale deed dated 18.06.2010/23.09.2010, the name of the plaintiff was not entered in the property register due to the dispute regarding stamp duty. The plaintiff has, therefore, filed the present suit and sought the following reliefs:

- a) To declare that the defendants have no right or title over the suit property i.e.189 sq.mtrs of land

- b) To order cancellation of sale deed dated 01.07.2011 which is illegal and void ab initio.
- c) To declare that defendant nos.1 & 2 have fraudulently executed sale deed dated 01.07.2011.
- d) To award mesne profit of Rs.2000/- per month for the use of the suit property till its possession is handed over to the plaintiff.
- e) To grant permanent injunction to the effect that the defendants, their agents or servants should not transfer alienate the suit property to any other persons permanently.

3. On service of the summons of the suit, the defendant no.2 appeared before the Court and submitted his written statement vide Exh-21. The defendant no.2 has mainly denied the facts of the suit of the plaintiff. He has contended that four boundaries stated by the plaintiff in his plaint are not correct. The plaintiff has not stated true fact in his plaint i.e. he has stated that he is in possession of the suit property, at the same time he has also sought the reliefs the recovery of possession from the defendant no.2. Such statement appears themselves contradictory. He has further contended that the power of attorney has not been registered inspite of the fact that the power was given to sell the property. The defendant no.1 on the date of execution of power of attorney i.e. 05.10.2009, was not owner of

property of 988 sq. mtrs. Inspite of that fact, he has given power to the Dhanjibhai Damjibhai Patel. A person who is not the owner of the property, cannot give any power to any other persons. In that circumstances, the power dated 05.10.2009 itself is illegal. The sale deed dated 18.06.2010 & 23.09.2010 are executed on the strength of power of attorney dated 05.10.2009. When the power of attorney dated 05.10.2009 itself is illegal, on the strength of the said illegal power of attorney no sale deed can be executed. Therefore, the sale deed dated 18.06.2010 itself is also illegal and does not create any rights. He has also stated that he is the legal owner and occupier of the suit property by virtue of registered sale deed dated 01.07.2011 executed by defendant no.1 in favour of defendant no.2. He has therefore, requested to dismiss the suit of the plaintiff with heavy cost.

4. As the defendant no.1 was died, the plaintiff has joined the heirs of defendant no.1 Mohammadiqbal Mahammadyahyah Ansari. The heirs of defendant no.1 Mohammadiqbal Mahammadyahyah Ansari has been served with the summons of the suit. Inspite of the service of the summons, he did not appear before the Court and hence my predecessor has pleased to pass the order of ex-parte against the defendant no.1. Hence, the suit is heard ex-parte against defendant no.1.

5. To prove the suit, the plaintiff has adduced following evidence:

(A) Oral Evidence

Exh	Particulars
44	Deposition of plaintiff Bhupendrabhai Dhanjibhai Patel
55	Deposition of plaintiff's witness Dhanjibhai Damjibhai Patel

(B) Documentary Evidence:

Mark/Exh	Particulars
30	Public notice published in Gujarat Samachar dated 03.12.2010
31	A reply to the public notice dated 04.12.2010 given by the learned Advocate for the plaintiff
32	Registered sale deed dated 01.07.2011 of defendant no.1 to defendant no.2
33	Property card of suit property City Survey No.1944
34	General Power of attorney given by defendant no.1 to Dhanjibhai Damjibhai Patel dated 05.10.2009
35	Affidavit of possession receipt of suit property by defendant no.1 dated 05.10.2009
36	True copy of registered sale deed dated 18.06.2010
37	True copy of correction sale deed of suit property dated 23.09.2010
38	Xerox copy of agreement to sale dated 01.12.2010
39	True copy of deed of cancellation of Banakhat given by Rajeshbhai Bhanubhai Bharvad to defendant no.1
40	True copy of affidavit of defendant no.1 of suit land dated 28.12.2010 regarding possession to be handed over by 31.12.2010.

Plaintiff has submitted closing pursis vide Exh-56

6. The defendant no.2 has produced following evidence:

(A) Oral Evidence

Mark/Exh	Particulars
57	Deposition of defendant no.2 Rangi Shrivankumar Mohanbhai(Marvadi)

(B) Documentary Evidence:

Mark/Exh	Particulars
60	Property card of suit property City Survey No.1944
61	Tax Bill of defendant no.2
62	Death certificate of defendant no.1
63	Circular dated 06.09.2005 of Government of Gujarat for payment of stamp duty in case of POA for sale of immovable property.
64	Order dated 11.05.2016 of Collector, Kheda dismissing C.T.S./R.A./38/2014-15
65	A copy of sale deed dated 08.06.1995 selling 111.68 sq.mtrs of land
66	A xerox copy of sale deed dated 16.06.2010 selling 767.55 by Dineshbhai Chimanlal Patel to Defendant no.1 Mahammadiqbal Mahammadyahyah Ansari
67	Scatch of suit property

Defendant no.2 has submitted closing pursis vide Exh-68

7. For adjudication of the present suit, my predecessor has framed the following issues vide Exh-26.

(૧) શું વાદી સાબીત કરે છે કે, વાદગ્રસ્ત મિલકત તેઓએ કાયદેસર રજીસ્ટર્ડ વેચાણ દસ્તાવેજથી ખરીદ કરેલ અને તે રીતે વાદગ્રસ્ત જગ્યાના કબજા ભોગવટા અને માલિકીમાં હતા ?

- (૨) શું વાદી સાબીત કરે છે કે, પ્રતિવાદીને વાદગ્રસ્ત જગ્યામાં કોઈ હક્ક અધિકાર હતો નહીં છે નહીં ?
- (૩) શું વાદી સાબીત કરે છે કે, પ્રતિવાદી નં.૧ નાએ પ્રતિવાદી નં.૨ ને દાવાવાળી મિલકતોનો જે દસ્તાવેજ કરી આપેલ તે ગેરકાયદેસર કોઈ હક્ક, અધિકાર વગરનો અને વાદીના હક્ક હિતને ગુરુસાન કરતો હોય દસ્તાવેજ એબ ઈનીસ્યો વ્યર્થ છે ?
- (૪) શું વાદી સાબીત કરે છે કે, વાદગ્રસ્ત જગ્યાનો કબજે પ્રતિવાદી પાસેથી મેળવવા હક્કદાર છે ?
- (૫) શું વાદી ગુરુસાનીની રકમ મેળવવા હક્કદાર છે ?
- (૬) શું પ્રતિવાદી સાબીત કરે છે કે, વાદી તેમજ પ્રતિવાદી નં.૧ નાએ ગેરકાયદેસર રીતે ખોટી હદ દિશા અને ખોટું ક્ષેત્રફળ દર્શાવી વાદીને ખોટો દસ્તાવેજ કરેલ જેથી વાદીને કોઈ હક્ક હિત મળતા નથી?
- (૭) શું વાદીનો દાવો સમય મર્યાદામાં છે ?
- (૮) આંક-૬૯ ની અરજી મુજબ ડીલીટ
- (૯) શું વાદી માંગ્યા મુજબની દાદ મેળવવા હક્કદાર છે ?
- (૧૦) શું હુકમ ? હુકમનામું ?

8. My findings on the above points are as under :-

1. In negative
2. In negative
3. In negative
4. In negative
5. In negative
6. In negative

- 7. In affirmative
- 8. Deleted
- 9. In negative
- 10. As per final order

9. **Reasons for the findings:**

Considering the pleading and contention in the present matter, the following facts are required to be proved and to decide evidentiary value of the documents produced by the parties:-

- (a) Whether the sale deeds dated 18.06.2010 and 23.09.2010 are legal and valid sale deeds ?
- (b) Whether the registered sale deed dated 01.07.2011 is illegal ?
- (c) Whether the Power of Attorney dated 05.10.2009 is a legal and valid document ?

Considering the facts and circumstances of the present case and also considering the provision of Section 92 of the Evidence Act, the suit is required to be decided on the strength of documentary evidence as the suit is on the strength of documentary evidence. Therefore, there is less importance to the oral evidence as compared to documentary evidence on record. However, this Court has

considered oral as well as documentary evidence to decide the present suit.

It is the case of the plaintiff that plaintiff became the legal owner and occupier of the suit property admeasuring 223-35 sq.mtrs of City Survey No. 1944 by way of registered sale deed dated 18.06.2010. The plaintiff has produced vide Exh-36, the said sale deed dated 18.06.2010.

The plaintiff has also averred that due to typographical mistake in survey number of the said sale deed, corrected deed dated 23.09.2010 was also executed by the parties. The plaintiff has produced the corrected (sale) deed dated 23.09.2010 vide Exh-37.

On perusal of the Exh-36 and 37, it appears that the defendant no.1 of Mahammadiqbal Mahammadyahyah Ansari through his power of attorney holder Dhanjibhai Damjigbhai Patel has sold the suit property i .e. 223-35 sq.mtrs of land of City Survey No.1994 to the present plaintiff. It also appears that they are registered sale deed and executed on 18.06.2010 and 23.09.2010. It also appears from the said sale deed, the sellar of the said property has sold 223-35 sq.mtrs of land out of 600 sq.mtrs of land out of 1367.55 sq.mtrs land of City Survey No.1944 to the present plaintiff.

It is also the case of the plaintiff that the defendant no.1 has given his Power of Attorney to Dhanjibhai Damjibhai Patel dated 05.10.2009. On perusal of the power of attorney dated 05.10.2009(Exh-34), it appears that, the Power of attorney is on the stamp paper of Rs.100/-. It also appears that the powers including sale of immovable property i.e. 988.87 sq.mtrs of land of C.S.No.1944 was given. It also appears that power of attorney was executed on 09.10.2009. It is also not registered one.

The learned Advocate for the defendant no.2 has argued that on the date of execution of sale deed i. e. 18.06.2010, the seller of the said property i.e. Mahammadiqbal Mahammadyahyah Ansari has no authority to sell the suit property of 988.87 sq.mtrs. He has also argued that the power of attorney holder Dhanjibhai Damjibhai Patel has sold the present suit property to the plaintiff by virtue of power of attorney dated 05.10.2009. On perusal of the power of attorney Exh-34, it appears that the owner of the suit property i. e. City Survey No.1944 having area 1367-55 sq.mtrs paiki 988.87 sq.mtrs. The said Mahammadiqbal Mahammadyahyah Ansari has given all the power including the power to sell or transfer of the said property, in favour of the father of present plaintiff Dhanjibhai Damjibhai Patel. By virtue of the said power of attorney dated 05.10.2009 Dhanjibhai Damjibhai

Patel has sold the suit property to the present plaintiff. It is the argument of the learned Advocate for the defendant no.2 that on the date of execution of power of attorney i.e. 05.10.2009, Mahammadiqbal Mahammadyahyah Ansari, the person who has given power was not owner of the suit property i.e. 988.87 sq.mtrs of City Survey No.1944. The learned Advocate for the defendant no.2 has argued that the original owner of the land was Dineshbhai Chimanbhai Patel, he was the sole owner of the whole City Survey No.1944 having total area of land 1367.55 sq.mtrs. The original owner Dineshbhai Chimanbhai Patel has sold 600 sq.mtrs land to Mahammadiqbal Mahammadyahyah Ansari on 14.12.1995. By virtue of sale deed dated 14.12.1995 Mahammadiqbal Mahammadyahyah Ansari became the legal owner and occupier of the property having 600 sq.mtrs of area. The said Mahammadiqbal Mahammadyahyah Ansari has sold 265 sq.mtrs of land out of 600 sq.mtrs of land to Mohammad Hanif Pirsabmiya by registered sale deed dated 29.07.1999. The said Mahammadiqbal Mahammadyahyah Ansari has also sold 111.68 sq.mtrs of land to one Natvarbhai Fakirbhai on 08.06.1995. Therefore, the land from 600 sq.mtrs which was owned by Mahammadiqbal Mahammadyahyah Ansari and after sell of 265 sq.mtrs and 111.68 sq.mtrs to different persons, the land 223-32 remains in his name. Therefore, on 05.10.2009, the defendant no.1

Mahammadiqbal Mahammadyahyah Ansari was owner of only 223-32 sq.mtrs of land. Therefore, the question of selling of 988.87 sq.mtrs of land on 05.10.2009 does not arise. Hence, he was not legal owner of 988.87 sq.mtrs of land. He has also argued that Mahammadiqbal Mahammadyahyah Ansari has purchased the remaining 767.55 sq.mtrs of land (original 1367.55-600=767.55) from original owner Dineshbhai Chimanbhai Patel by registered sale deed vide Exh-66 dated 16.06.2010. As such the defendant no.1 Mahammadiqbal Mahammadyahyah Ansari became legal owner of property admeasuring 767.55 sq.mtrs of land on 16.06.2010. It is very much clear from the above that defendant no.1 Mahammadiqbal Mahammadyahyah Ansari was legal owner of only land admeasuring 223.32 on 05.10.2009.

The learned Advocate for the no.2 has argued that the power of attorney dated 05.10.2009 Exh-34 is illegal and does not create any right. He has also argued that on 05.10.2009 Mahammadiqbal Mahammadyahyah Ansari was not owner of 988.87 sq.mtrs. On 05.10.2009 Mahammadiqbal Mahammadyahyah Ansari was owner of only 223.32 sq.mtrs of land. Therefore, when a person who is not owner of whole land cannot give power of attorney of such land and therefore, the power of attorney dated 05.10.2009 is illegal. He has

also argued that as per the judgment of the Hon'ble Supreme Court when the power of attorney gives right to sell the property to the person who is not in relation of blood, full amount of stamp is required to be paid as per the market value of the property. The defendant no.2 has produced the judgment of *Hon'ble Supreme Court of in the AIR 2012 SC 206 Suraj Lamp and Industries Pvt. Ltd. Vs. State of Haryana & Anrs.*

The learned Advocate for the defendant no.2 has also argued that the boundaries shown by the plaintiff in his plaint as well as in the registered sale deed Exh-36 are not correctly stated. As per the said Exh-36, 223.35 sq.mtrs of land is situated on the northern side and on the side of Ashram road. He has also argued that the plaintiff has purchased the land of Natwarbhai Fakirbhai which is on the eastern side whereas the land of the defendant no.2 is in the middle side of the Property No.1944. Therefore, the boundaries shown in the sale deed of plaintiff as well as in his plaint and deposition are not true.

The learned Advocate for the defendants has also argued that defendant no.2 is in possession of the suit property since 01.07.2011. In spite of the fact that the defendant no.2 is in possession of the suit

property, the plaintiff has contended that the plaintiff himself in possession of the suit property since 18.06.2010. The revenue record clearly shows that the defendant no.2 is in possession of the suit property 189 sq.mtrs.

The learned Advocate for the defendant has also argued that Exh-34 and 35 which appear in the form of sale deed. The combined reading of Exh-34 & 35 clearly shows that Mahammadiqbal Mahammadyahyah Ansari has given power of attorney of 988.87 sq.mtrs of land including power to sell the property. The Exh-35 shows that it is possession receipt given by Mahammadiqbal Mahammadyahyah Ansari in favour of the present plaintiff for the land of 988.87 sq.mtrs from total land of 1367.55 sq.mtrs of City Survey No.1944. The combined reading of both the documents clearly shows that it is in the nature of sale deed. However, both the documents Exh-34 and 35 are neither registered documents nor paid stamp duty on the said documents, therefore, considering the provisions of Section 17 of the Registration Act and also considering the provision of Transfer of Property Act & Gujarat Stamp Act and also considering the judgment of Hon'ble Supreme Court of in the case of Suraj Lamp(Supra), the Exh-34 & 35 are illegal documents and does not create any right.

The learned Advocate for the defendant no.2 has also argued that as per the Government Circular of Revenue Department dated 06.09.2005 a power of attorney giving right to sell the immovable property also attracts stamp duty as leviable in case of sell transaction of immovable property. The said circular dated 06.09.2005 is produced by the defendant no.2 vide Exh.63.

Now, we see the evidentiary value of the document produced by the plaintiff as well as defendants.

The plaintiff has purchased the suit property 223.35 on the strength of Exh-34 and 35 which are power of attorney and possession receipt. On perusal of Exh-34, it appears that it is a power of attorney given by Mahammadiqbal Mahammadyahyah Ansari in favour of the present plaintiff Shri Dhanjibhai Damjibhai Patel. It is on the stamp of Rs.100/-. On perusal of the said power of attorney, it appears that Mahammadiqbal Mahammadyahyah Ansari has given power in respect of 988.87 sq.mtrs of land out of 1337.55 sq.mtrs of City Survey No.1944 of Nadiad city. It also appears that the said Mahammadiqbal Mahammadyahyah Ansari has also given the right to sell the suit property. It also appears that the both the parties have no blood relation between them.

On perusal of the Exh-35, it appears that it is document written on stamp paper of Rs.10/- and notarized before the notary. It appears that Mahammadiqbal Mahammadyahyah Ansari has given possession of 988.87 sq.mtrs of land on receipt of the amount from Dhanjibhai Damjibhai Patel. It clearly appears that the said document is in the nature of sale deed. It also appears that the said document are not registered. Moreover, the plaintiff has also produced vide Exh.40 dated 28.12.2010 the affidavit stating that the possession will be handed over by 31.12.2010.

Now the question is whether, the power of attorney dated 10.05.2009, Exh.34 creates any rights and what is it's evidentiary value.

The Hon'ble Supreme Court has in the case of Suraj Lamp(Supra) held that

“8. We may next refer to the relevant provisions of the Indian Stamp Act, 1999(Note: Stamp Laws may vary from State to State, though generally the provisions may be similar). Section 27 of the Indian Stamp Act, 1899 casts upon the party, liable to pay stamp duty, an obligation to set forth in the instrument all facts and circumstances which affect the chargeability of duty on that

instrument. Article 23 prescribes stamp duty on 'Conveyance'. In many States appropriate amendments have been made whereby agreements of sale acknowledging delivery of possession or power of attorney authorizes the attorney to 'sell any immovable property are charged with the same duty as leviable on conveyance.

“15. Therefore, a SA/GPA/WILL transaction does not convey any title nor create any interest in an immovable property. The observations by the Delhi High Court, in Asha M. Jain Vs. Canara Bank, 94(2001) DLT 841, that the “concept of power of attorney sales have been recognized as a mode of transaction” when dealing with transactions by way of SA/GPA/WILL are unwarranted and not justified, unintendedly misleading the general public into thinking that SA/GPA/WILL transaction are some kind of a recognized or accepted mode of transfer and that it can be a valid substitute for sale deed. Such decisions to the extent they recognize or accept SA/GPA/WILL transactions as concluded transfers, as contrasted from an agreement to transfer, are not good law.”

“16. We therefore, reiterate that immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance. Transactions of the nature of 'GPA sales' or 'SA/GPA/WILL transfers' do not convey title and do not amount to transfer, nor can they be recognized or valid mode of transfer of

immovable property. The Courts will not treat such transaction as completed or concluded transfers or as conveyance as they neither convey title nor create any interest in an immovable property. They cannot be recognized as deeds of title, except to the limited extent of Section 53A of the TP Act. Such transaction cannot be relied upon or made the basis for mutations in Municipal or Revenue Records. What is stated above will apply not only to deeds of conveyance in regard to freehold property but also to transfer of leasehold property. A lease can be validity transferred only under a registered Assignment of Lease. It is time that an end is put to the pernicious practice of SA/GPA/WILL transactions known as GPA sales.”

19. We make it clear that our observations are not intended to in any way affect the validity of sale agreements and power of attorney executed in genuine transactions. For example, a person may give a power of attorney to his spouse, son, daughter, brother, sister or a relative to manage his affairs or to execute a deed of conveyance. A person may enter into a development agreement with a land developer or builder for developing the land either by forming plots or by constructing apartment buildings and in that behalf execute an agreement of sale and grant a Power of Attorney empowering the developer to execute agreements of sale or conveyance in regard to individual plots of land or undivided shares in the land relating to apartments in favour of prospective

purchasers. In several States, the execution of such development agreement and power of attorney are already regulated by law and subjected to specific stamp duty. Our observations regarding 'SA/GPA/WILL transactions' are not intended to apply to such bona fide/genuine transactions.

The combined reading of documents Exh.34 and 35 appears in the form of sale of immovable property.

As per the provision of Section 54 of Transfer of Property Act, transfer of property as defined under Section 5 of the Act can be made by registered instrument.

The provision of Section 23 of Indian Stamp Act prescribes stamp duty on conveyance. The power of attorney authorities the attorney to sell any immovable property are charged with duly leviable on conveyance.

If we referred to the Government Circular in Revenue Department dated 06.09.2015, it is provided in the said Circular that the power of attorney giving right to sell the immovable property also attracts stamp duty as leviable in case of sell transaction of immovable property. In view of the above Circular which is exhibited at 63.

It clearly provides that from the date 06.09.2005, the power of attorney which gives the power to sell the tangible immovable property requires full amount of stamp duty as required in the case of sell immovable property. Here in the present case Exh-34, which is power of attorney given by defendant no.1 to Dhanjibhai Damjibhai Patel and also authorized to sell the immovable property of 988.87 sq.mtrs of land, therefore, in view of the above Government Circular the power of attorney Exh-34 which has on the stamp of Rs.100/- have no evidentiary value considering the provision of Section 34 of Gujarat Stamp Act, 1958.

The provision of Bombay Stamp Act the power of attorney when given for consideration and authorising to sell immovable property attracts stamp duty as leviable under clause (f) of Article 48 of Bombay Stamp Act. However, the relatives as specified, requires stamp duty of Rs.500/-. Section 17 of Registration Act provides compulsory registration of any document other than testamentary instruments which purports or operates to create, declare, assign, limit or extinguish whether present or future any right title or interest whether vested or contingent value of Rs.100/- and upwards or in immovable property.

The documents Exh-34 is power of attorney and Exh.35 is a possession receipt. Moreover, it also appears that there is no relation between the power of attorney holder and power giver. It appears that the Exh.34 and Exh.35 are in the nature of sale deeds. However, with a view to avoid stamp duty, the parties have resorted to such way.

As held by the Hon'ble Supreme Court in the case of Suraj Lamp(supra) sale by power of attorney is not valid sale. Moreover, as held by the Hon'ble Supreme Court, the power of attorney authorising the power of attorney the power to sale immovable property requires the full amount of stamp duty. However, in the present case the Exh.34 is only on the stamp duty of Rs.100/-. Therefore, considering the ratio laid down by the Hon'ble Supreme Court in Suraj Lamp(Supra) case would squarely applicable in the present case. Therefore, considering the provision of Gujarat Stamp Act, Indian Stamp Act, Registration Act, Transfer of Property Act and ratio laid down by the Hon'ble Supreme Court in the case of Suraj Lamp(Supra), the documents Exh.34 & Exh.35 are not a valid and legal documents and therefore do not create any legal rights.

Moreover, the plaintiff has purchased the land of 223.35 sq.mtrs of land from Mahammadiqbal Mahammadyahyah Ansari

through the power of attorney Dhanjibhai Damjibhai Patel on 18.06.2010-23.09.2010. It appears from the record that the City Survey No.1944 was originally belonged to Dineshbhai Chimanbhai Patel. The said Dinesh Chimanbhai Patel was the owner of total land of 1367.55 sq.mtrs of land. The said Dinesh Chimanbhai Patel has firstly sold 600 sq.mtrs of land out of 1367.55 sq.mtrs of land to defendant no.1 Mahammadiqbal Mahammadyahyah Ansari. On perusal of Exh-33 which is the property card of City Survey No.1944. On perusal of the said Exh-33, it appears that Dinesh Chimanbhai Patel has sold 600 sq.mtrs of land out of 1367.55 sq.mtrs to defendant no.1 Mahammadiqbal Mahammadyahyah Ansari. It also appears from the said document that Mahammadiqbal Mahammadyahyah Ansari has sold 111.68 sq.mtrs of land out of 600 sq.mtrs of land to Natwar Fakirbhai on 08.06.1995. Thereafter, defendant no.1 Mahammadiqbal Mahammadyahyah Ansari has also sold 265 sq.mtrs of land out of 600 sq.mtrs of land to Mahammadhanif Pirsabmiya on 29.07.1999. Therefore, the land remains with defendant no.1 Mahammadiqbal Mahammadyahyah Ansari on 29.07.1999 was 223.32 sq.mtrs of land. Therefore, he was the owner of 223.32 sq.mtrs of land on 29.07.1999 or on 05.10.2009. The plaintiff has executed sale deed from Mahammadiqbal Mahammadyahyah Ansari through his power of attorney.

Mahammadiqbal Mahammadyahyah Ansari has given power of attorney of 988.87 sq.mtrs of land to Dhanjibhai Damjibhai Patel on 05.10.2009. It clearly appears from the record that on 05.10.2009, Mahammadiqbal Mahammadyahyah Ansari was not owner of 988.87 sq.mtrs of land because he has purchased another land 767.55 sq.mtrs of land from Dineshbhai Chimanbhai Patel on 16.06.2010. It also appears that a sale deed was made between Dineshbhai Chimanbhai and Mahammadiqbal Mahammadyahyah Ansari on 05.10.2009, however, it was got registered only on 16.10.2010. As per the provision of Section 17 of the Registration Act and also as per the provision of Section 54 of the Transfer of Property Act, a transfer of any tangible immovable property can only be effected by registered sale deed. Here in the present case, the sale deed between defendant no.1 and Mahammadiqbal Mahammadyahyah Ansari, registered only on 16.10.2010. Therefore, it is very much clear that defendant no.1 became legal owner of 988.87(990.87) only on 16.10.2010. Therefore, till 05.10.2009, he was not the owner of 988.87 sq.mtrs of land. A person who is not owner of land cannot give any type of power to any other persons. It is necessary to refer the provision of Section 7 of Transfer of Property Act, which provides that every person competent to contract and entitled to transfer property or authorized to dispose of transferable property not his own

is competent to transfer such property. Here in the present case, defendant no.1 till 05.10.2009, not become the legal owner of 988.87 sq.mtrs of property. Therefore, he was not authorized to transfer 988.87 sq.mtrs on 05.10.2009. Therefore, the power of attorney and possession receipt Exh.34 & Exh.35 are not legal documents. As, the person who has given power was not so authorized to do. Considering this point also Exh-34 and 35 appear to be not legal documents and do not create rights in immovable property.

Considering the discusssion as above Exh-34 and 35, cannot be term as legal document and therefore, do not create any right or interest in immovable property and, therefore, they have no evidentiary value.

10. **ISSUES**

Issue No.1

Issue no.1 is whether the plaintiff proves that he is the legal owner and occupier of the suit property i.e. 223.35 sq.mtrs by virtue of legal sale deed ? It is the case of the plaintiff that he has executed sale deed dated 18.06.2010 from Mahammadiqbal Mahammadyahyah Ansari from his power of attorney Dhanjibhai Damjibhai Patel who has got power by virtue of Exh-34 and 35. This

Court has clearly held that on the date of power given by Mahammadiqbal Mahammadyahyah Ansari i.e. on 05.10.2009, Exh.34, he was not the owner of land of 988.87 sq.mtrs of City Survey No.1944. Therefore, on 05.10.2009, Mahammadiqbal Mahammadyahyah Ansari has no legal right to give power in respect of 988.87 sq.mtrs of land. It also appears that as per the judgment of Hon'ble Supreme Court, the power in respect of any immovable property is given to any person not in blood relation requires full amount of stamp duty. This Court has categorically declared that Exh-34 and 35 are not valid and legal documents and do not create any right in immovable property. Therefore, sale deed dated 18.06.2010 Exh-36 which is based Exh-34 and 35 does not create any rights. The plaintiff has also failed to prove that he is in the possession of suit property. Therefore, the prayer of the plaintiff to declare him legal owner and occupier by virtue of sale deed dated 18.06.2010 Exh-36 & 37 cannot be granted. The plaintiff failed to prove his legal ownership owner the suit property i.e. 223.35 sq.mtrs. Therefore, the plaintiff has failed to prove issue no.1 and it is held in negative.

Issue No.2 & 3:

Issue no.2 is whether the plaintiff proves that the defendants have no legal right in the suit property ?. Issue no.3 is whether the

plaintiff proves that the sale deed executed by defendant no.1 in favour of defendant no.2 is void ab initio ?. The plaintiff has sought the reliefs for cancellation of registered sale deed dated 01.07.2011 executed in favour of defendant no.2 by defendant no.1 Mahammadiqbal Mahammadyahyah Ansari.

The learned Advocate for the plaintiff has argued that since the defendant no.2 has executed the sale deed subsequent to the execution of sale deed by plaintiff, the sale deed dated 01.07.2011 is illegal sale deed. The plaintiff has relied upon the citation of *AIR 1972 Allahabad 376 (V 59 C 100) (Lucknow Bench), Debi Prasad and others Vs. Smt. Maika and others*. It is held by the Hon'ble Allahabad High Court that "the requisite condition for cancellation of instrument are:

1. *That the plaintiff was such a person against whom the instrument was void or voidable;*
2. *That the plaintiff could entertain a reasonable apprehension that if such instrument is left out standing, it may cause him serious injury, and*
3. *That the court must adjudge the instrument void or voidable.*

On perusal of the ratio laid down by the Hon'ble Allahabad High Court, it appears that three conditions are required to be fulfill

for the cancellation of any instruments. Herein in the present case, the plaintiff has failed to prove illegality of document of sale deed dated 01.07.2011 Exh-32. On the contrary, the plaintiff has failed to prove legality of sale deed dated 18.06.2010 Exh-36. Therefore, considering peculiar facts and circumstances of the present case, the citation relied upon by the plaintiff is not helpful to him. It appears that the sale deed dated 01.07.2011 Exh.32, is the registered sale deed executed by the both the parties and executed on proper stamp amount. Moreover, it appears that on 01.07.2011, the seller defendant no.1 Mahammadiqbal Mahammadyahyah Ansari was the legal owner of 223.32 sq.mtrs of land and out of this 223.32 sq.mtrs of land he has sold 189 of sq.mtrs of land to defendant no.2. This Court has held that sale deed Exh-36 & 37 is illegal and does not create any right. Therefore, on 01.07.2011, Mahammadiqbal Mahammadyahyah Ansari-defendant no.1, was legal owner and occupier of the suit property i.e. 189 sq.mtrs of land . Therefore, by virtue of sale deed dated 01.7.2011, the defendant no.2 has become the legal owner and occupier of the suit property. It appears that there is no infirmity or illegality in the registered sale deed dated 01.07.2011. Therefore, the prayer of the plaintiff that the registered sale deed dated 01.07.2011 Exh-32 is illegal as it was executed subsequently after execution of sale deed dated 18.06.2010 Exh-36

cannot be granted. Therefore, the plaintiff has failed to prove the fact that the sale deed dated 01.07.2011 is illegal. On the contrary, it is very much clear that the said document Exh-32 is the legal and valid document. Therefore, plaintiff has failed to prove issue no.2 & 3 and therefore, issue no.2 & 3 are held in negative.

Issue no.5

Whether the plaintiff is entitled to recover the mense profits from the defendant no.2. The plaintiff has not produced any evidence to show that the rental income of the suit property is Rs.2000/- per month. Moreover, plaintiff has failed to prove his legal ownership over the suit property. Therefore, the plaintiff is not entitled to recover any mense profits from the defendants. Therefore, issue no.5 is also held in negative.

Issue No.6

Issue no.6 is whether the defendant no.1 proves that the plaintiff has shown the false boundaries of the suit properties and also false measurement of the suit property and thereby executed illegal sale deed and therefore, the plaintiff would not get any right in the suit property.

The learned Advocate for the defendant no.2 has argued that the suit property shown by the plaintiff i. e. 223.35 sq.mtrs of land is

situated on the northern and on the side of Ashram road whereas the property of defendant no.2 i.e. 189 sq. mtrs of land is situated on the northern side of property of Natwarbhai Fakirbhai and on the southern side the garage of Mohammad Hanif Pirsabmiya. Therefore, the suit property of defendant no.2 i.e. 189 sq.mtrs of land is situated in between the property of Natwarbhai Fakirbhai and Mohammad Hanif Pirsabmiya.

The learned Advocate for the plaintiff has argued that the plaintiff has purchased 223.35 sq.mtrs of land whereas as per the say of the defendant no.2 he has purchased 189 sq.mtrs of land. As such the plaintiff has purchased the whole remaining property of Mahammadiqbal Mahammadyahyah Ansari. Therefore, the argument of the learned Advocate of defendant no.2 is not tenable and property shown by the plaintiff in the sale deed is correct and its measurement and boundaries are also correct.

On perusal of the plaint of the plaintiff, it appears that the plaintiff has stated for boundaries of the suit properties i.e. 223.35 sq.mtrs of land. On perusal of Exh-36 which is sale deed dated 18.06.2010, it appears that the four corner and boundaries shown in the said sale deed Exh-36 which are same as in the case of four corners and boundaries shown in the plaint. Moreover, on perusal of

the said Exh-36 the photograph of the suit properties also shown in the said sale deed, therefore, there is no anomaly regarding the location and measurement and four boundaries shown in the sale deed and plaint. Therefore, the defendant no.2 has failed to prove the issue no.6 in his favour and therefore, it is held in negative.

Issue no.7:

Issue no.7 is the suit of the plaintiff is within the period of limitation. The learned Advocate for the defendant no.2 has also argued that the suit of the plaintiff beyond the period of limitation as plaintiff has knowledge since 2011, regarding execution of sale deed by the defendant no.2 and the plaintiff has filed the present suit in the year 2014 which is after 3 years of execution of sale deed by the defendant no.2. Therefore, the suit of the plaintiff is required to be rejected on the ground of limitation.

The learned Advocate for the plaintiff has argued that the reasons for the institution of the present suit is shown in the plaint at para-7 wherein it is stated by the plaintiff that he came to know about the execution of sale deed by the defendant no.2 only on 20.06.2014 when he went to enter his name in the revenue record of the suit property. The learned Advocate for the plaintiff has also argued that considering the provision of Article 65 there is a limitation for the suit

for possession of immovable property or any interest therein based of title can be filed within the 12 years from the date of possession of the defendant became adverse to the plaintiff. Herein in the present case, the plaintiff came to know about the possession and the execution of sale deed only on 20.06.2014. Therefore, the suit of the plaintiff is within the period of limitation.

Considering the provisions of Article 65 of the Limitation Act, there is a provision for limitation to file the suit for possession is 12 years. Even we count from the date of execution of sale deed which is 01.07.2011, the plaintiff has to file the suit within the period of 12 years which came to end of 2023. The plaintiff has filed the suit in the year 2014. Considering the provision of Article 65 of the Limitation Act, it appears that the suit of the plaintiff is within the period of limitation. Therefore, this Court of the view that the suit of plaintiff is within the period of limitation, therefore, issue no.7 is held in affirmative.

Issue no.4 & 9

Issue no.4 is whether the plaintiff is entitled to recover possession of the suit property and issue no.9 is whether the plaintiff is entitled to get relief claimed ? It appears that issue no.4 is included in issue no.9 and therefore, it is discussed co-jointly. The plaintiff has

failed to prove the fact that the sale deed dated 01.07.2011 executed in favour of the defendant no.2 is illegal. The plaintiff has also failed to prove that he is legal owner and occupier of the suit property by virtue of sale deed dated 18.06.2010 and 23.09.2010. As such when the plaintiff has failed to prove his legal ownership over the suit property and also not proved the illegality of sale deed dated 01.07.2011, he is not entitled to reliefs claimed.

The defendant no.2 has by application Exh.73 requested to allow the cost in case the suit is rejected. The defendant no.2 has requested to grant cost of Rs. 7,500/- which was ordered by my predecessor. On perusal of the order passed on the Review Petition No.17/2016, it appears that the said cost was awarded for filling Review Petition by the defendant no.2 on the ground of frivolous litigation. Considering the order passed by my predecessor, it is not just and proper to award the above cost in the present case. Hence, the application Exh.73 of the defendant no.2 is required to be rejected.

Considering the facts and circumstances of the present case, the plaintiff has failed to prove his case by preponderance probability and therefore, he is not entitled to the reliefs claimed. Hence, issue

no.4 and 9 are held in negative and following final order is passed in the interest of justice:-

ORDER

1. **The suit of the plaintiff is hereby dismissed.**
2. **The plaintiff should pay the cost of the suit to the defendant no.2.**
3. **The application Exh.73 of the defendant no.2 is hereby rejected.**

Signed and pronounced in the open court today i.e. on 22nd day of the month of February-2018

Nadiad
Date: 22/ 02/2018

(MEHUL GIRISHBHAI SHAH)
3rd Addl. Senior Civil Judge,
Nadiad.
[GJ 00962]

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