

IN THE HIGH COURT OF DELHI AT NEW DELHI

RSA No. 149/2011

Judgment delivered on: 01st November, 2011

Shri Durga Dass Banka Appellant.

Through: Mr. Ashok Chhabra, Adv. for the
appellant.

Vs.

Shri Ajit Singh & Ors. Respondents

Through: Mr. V. S. Singh for respondent no.1
Ms. Mini Pushkarna, Adv. for the
respondent No.2.
Mr. Manish Srivastava for
respondent no.3.

KAILASH GAMBHIR, J.

1. By this Regular Second Appeal filed under Section 100 of the Code of Civil Procedure, 1908 the appellant seeks to challenge the order dated 20.5.2009 passed by the learned trial court and the order dated 8.2.2011 passed by the learned appellate court, whereby the first appeal filed by the appellant against the order dated 20.5.2009 was dismissed.

2. Mr. Ashok Chhabra, learned counsel for the appellant submits that both the learned courts below have given illegal and perverse findings by misconstruing the judgment of the Apex

Court in the case of *Janki Vashdeo Bhojwani & Anr. Vs. Indusind Bank Ltd. & Ors.* 2005 1 AD (SC) 168 by taking a view that since the appellant being the son of the original plaintiff does not have personal knowledge of the facts of the case and therefore he could not have claimed to be fully conversant with the facts and depose in place of his father in his capacity as attorney holder. The contention of the counsel is that the appellant is the son of the original plaintiff but before the learned trial court, the father of the appellant had throughout been appearing and even he had filed his affidavit in evidence and also entered the witness box for the cross-examination, but because of the old age and also because he had suffered a paralytic stroke he could not appear in the matter further. Counsel thus states that in such extenuating circumstances the appellant being the son had filed his power of attorney before the learned trial court and had filed affidavit by way of his evidence. Counsel further submits that the respondent no.1 remained ex-parte throughout before the learned trial court but he had appeared before the first appellate court and now has also appeared before this court. Counsel also submits that the appellant had primarily based his case on the undertaking given by the father of the respondent before the Division Bench of this Court in Crl. Original No.107/1973 wherein

the father of the respondent no.1 had undertaken not to raise any construction over the roof of the shop bearing no. 2562, Gali No. 6, Beadon Pura, Ajmal Khan Road, Karol Bagh, New Delhi and to demolish the unauthorized construction already raised by him over the roof of the said shop. Counsel also submits that the respondent MCD had appeared before the learned trial court and they had not disputed the said position of unauthorized construction being raised by the respondent no.1 over the roof of the shop in utter violation of the said undertaking. Counsel thus urges that the learned trial court as well as the first appellate court without even bothering to look at the said documentary evidence, which was an undertaking given by the father of the respondent no.1, had dismissed the suit of the appellant by taking a hyper-technical view that the appellant being the power of attorney, having no personal knowledge of the facts of the case could not have deposed the same in place of the plaintiff. In support of his arguments, counsel has placed reliance on the judgment of this court in the case of *Om Prakash Vs. Inder Kaur*, 156(2009) DLT 292.

3. Opposing the present appeal, learned counsel for the respondent no.1 submits that no fault can be found in both the orders passed by the courts below and the present appeal

deserves outright dismissal. Counsel submits that the appellant who appeared in the witness box in his capacity as attorney holder had no knowledge of the facts of the case and therefore he was not a competent person to depose on behalf of the original plaintiff. Counsel has invited attention of this court to page 9 of the impugned judgment dated 20.5.2009 wherein the learned trial court has observed that the plaintiff in his evidence has clearly contradicted the case as set up by the plaintiff in the plaint. Counsel thus states that both the courts below rightly placed reliance on the judgment of the Apex Court in *Janki Devi's case (Supra)* by taking a view that the appellant having no personal knowledge of the facts of the case was not competent to depose on behalf of the plaintiff. Counsel for the respondent MCD has not disputed the fact that the unauthorized construction was raised by the respondent no.1 over the roof of the shop in question in contravention of the said undertaking.

4. I have heard learned counsel for the parties at considerable length and given my thoughtful consideration to the arguments advanced by them.

5. A suit for mandatory and permanent injunction was filed by the appellant against the respondent inter alia on the

grounds that he is a owner of the property bearing No.2562, Gali No.6, Beadon Pura, Ajmal Khan Road, Karol Bagh, New Delhi and the respondent no.1 is in occupation of the part of the property. It is further pleaded that in a contempt petition filed by the appellant, father of the respondent no.1 Amrik Singh had given an undertaking to remove three walls, wooden planks and tarpoline, whatever unauthorized construction as existing on the roof of the shop bearing no. 2562, Gali No.6, Beadon Pura, Ajmal Khan Road, Karol Bagh, Delhi with further undertaking not to put any construction of any sort again on the aforesaid roof or use the same in any other manner hereafter. It is also pleaded that in view of the said undertaking given by the father of the respondent no.1 the Hon'ble Division Bench vide order dated 22.8.1975 gave the directions to Mr. Amrik Singh to remove the walls, etc mentioned by him in the statement. The said matter was finally disposed of by the Division Bench of this Court vide order dated 8.9.1975. It is also the case of the appellant that the respondent no.1 on the demise of his father Shri Amrik Singh came into possession of the said shop and despite being aware of the said undertaking given by his father, carried out the construction again on the roof of the said shop. It is further the case of the appellant that a legal notice dated 15.2.2000 was served upon the

respondent no.1 but despite service of the notice respondent no.1 failed to remove the said unauthorized construction. Based on these facts, the appellant prayed for a decree of mandatory injunction to direct the respondent no.1 to remove unauthorized construction as shown by him in the plan attached with the plaint and restrain the respondent no.1 from carrying out any further construction in the shop in question. The said suit filed by the appellant was not contested by the respondent no.1 and it is only the respondent MCD who had filed the written statement and contested the said suit. The MCD in their written statement did not dispute the fact of raising of unauthorized construction by the respondent no.1. Based on the pleadings of the parties, the learned trial court framed the issues and thereafter the appellant and the MCD led their respective evidence. In the evidence the appellant had filed his own affidavit and after filing of his affidavit he in fact had appeared for his cross-examination and part cross-examination was conducted by the MCD as would be manifest from the order dated 22.9.2004 of the learned trial court. Thereafter, the matter was adjourned for 7.10.2004 for further cross-examination of the appellant but on 7.10.2004, the appellant did not appear because of his illness and a submission was made by his counsel on his behalf that in his place his son will appear

as an attorney to depose on his behalf. Thereafter a fresh affidavit was filed by Mr. Vipin Banka, son of the appellant and his evidence remained unrebutted. The said suit filed by the appellant was dismissed by the learned trial court and the prime reason given by the learned trial court for the dismissal of the said suit was that nowhere the said attorney deposed that he has got personal knowledge about the facts of the said case. After placing reliance on the judgment of the Apex Court in *Janki Devi's case (Supra)*, the learned trial court came to the conclusion that the son of the appellant having no personal knowledge about the facts of the present case was not competent to depose on behalf of his father, the original plaintiff and therefore the plaintiff/appellant had failed to prove the issues, onus of which was upon him. Against the said order of the learned trial court the appellant preferred an appeal and the learned appellate court also taking the same line of thought, dismissed the appeal vide order dated 8.2.2011. Feeling aggrieved with both the said orders, the appellant has preferred the present appeal.

6. The appeal is taken up for final hearing at the stage of admission itself.

7. The substantial question of law which arises in the present case is as to

“Whether an attorney holder can be authorized to depose on behalf of principal when the principal due to old age and serious illness cannot depose himself”.

It is not in dispute between the parties that Mr. Vipin Banka is the son of the appellant and the appellant is 85 years old and suffering from serious illness. It is also not in dispute that the appellant himself had filed the suit and in fact had appeared in the court and had also filed his own affidavit in evidence and had entered the witness box for his cross-examination and it is at that stage due to his serious illness he could not appear for his further cross-examination and then son of the appellant had appeared in the witness box and deposed on behalf of his father. In my considered view, as a special power of attorney holder, Mr. Vipin Banka was fully authorized to depose in place of his father. Once such an authority has been given by the father to his son to depose on his behalf, can it be said that despite the said authority being given the son would not be competent to depose on behalf of his father? Not disputing the legal position that the facts which are within the knowledge of the plaintiff can only be deposed by the plaintiff alone and not by his attorney holder, but the moot question which arises in the present case is where the

father because of his old age and illness gives an authority to his son or any of his family member to depose on his behalf, whether deposition of such an attorney holder can be ignored on the ground that the plaintiff himself did not appear in the witness box.? The answer to this is in the judgment of this court relied upon by the counsel for the plaintiff in *Om Prakash Vs. Inder Kaur*, 156(2009) DLT 292 wherein it was held that the evidence given by a witness cannot be rejected on the ground that he is a father or a relative, nor any adverse inference can be drawn against the plaintiff on the ground that he had not appeared his own witness in the case as the plaintiff is master of his case and he can prove his case without appearing in the witness box.

8. The case of *Janki Vashdeo (Supra)* on which reliance was placed by both the courts below reaffirms the well settled law that the power of attorney holder cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge of. However the said legal position is not attracted to the facts of the case at hand. The question that arises for consideration is that *whether what was deposed by the attorney holder, the son of the plaintiff appellant herein, was something that the principal had a personal knowledge of or was relating to some act done by the plaintiff which only he was privy*

to. The answer to this question is an emphatic no. As is evident from the facts of the case at hand, the suit was instituted to get the order of the Hon'ble Division Bench of this Court enforced where the undertaking was given by the father of the appellant not to raise any unauthorized construction and to remove the existing construction which was unauthorized in the said order. Can it be said that the order of the court is something that the principal alone would have personal knowledge of? The order was of the court and the attorney deposing regarding the same is not something to be in his personal knowledge but a fact which has been proved on record. Here it would be relevant to refer to the judgment of this court in the case of ***Capt.Praveen Davar(Retd) & Anr. vs. Harvansh Kumari & Ors. 2010(119)DRJ560*** wherein the court while distinguishing the judgment in the case of *Janki Vashdeo Bhijwani* held as under:

"16. An attempt was made by Mr. Singla, the learned senior counsel for the appellants to contend that none of the plaintiffs having entered into the witness box to assert their title, the evidence of PW-1 Shri Bihari Lal Walia, the Attorney of the respondents, could be of no assistance to the respondents. Relying upon the judgment of the Hon'ble Supreme Court in Janki Vashdeo Bhojwani and Anr. v. Indusind Bank Ltd. and Ors. : AIR 2005 SC 439, the learned senior counsel for the appellants contended that the word "acts", employed in Order 3 Rules 1 & 2 CPC, was confined to acts done by the power of attorney holder in exercise of powers granted by the instrument and was not inclusive of deposing in place and instead of the principal in respect of the matters in which the acts were done by the principal and not by him, and in which only the principal could have a personal knowledge. Apart from the fact that this

point was not urged before the learned trial court and has been taken up for the first time in this appeal, there is, even otherwise, in my view, no merit in the same. The provisions of Order 3 Rules 1 and 2 CPC, as is clear from a reading thereof, contain no impediment to the Attorney deposing in place of and instead of the landlord. In *Smt. Ramkubai (since deceased) by Lrs and Ors. v. Hajarimal Dhokalchand Chandak and Ors.* : AIR 1999 SC 3089, the Supreme Court while dealing with a case where the landlady did not appear in the witness box herself, but instead produced her son, who was also her G.P.A. holder, held that it was not important or essential for the landlord/landlady to enter the witness box to support the case. [See also: *Om Prakash v. Inder Kaur* 2009 107 DRJ 263 and *Satnam Channan v. Darshan Singh* 2006(2) RCR (Civil) 615 P and H].

17. The judgment in *Janki Vashdeo Bhojwani's* case (*supra*) relied upon by the learned senior counsel for the appellants also does not come to the aid of the appellants and is clearly distinguishable. It has been held in the said case that if the power of attorney renders some acts in pursuance of the power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Further, it has been held that he cannot depose for the principal in respect of the matters, in which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined. **It nowhere states that even though the facts deposed are not facts within the personal knowledge of the principal alone, the power of attorney holder cannot depose on behalf of the principal.**

(emphasis supplied)''

Hence, in my considered view the learned courts below have misinterpreted the import of the judgment of the Apex Court and applied it to the facts of the case at hand. It would also be pertinent to mention here the judgment of this court in the case of ***Mr. Vinay Jude Dias vs. Ms. Renajeet Kaur* AIR 2009 Delhi 70** wherein the court while dealing with the deposition of the attorney

holder with regard to the fact that whether the parties before the court were married or not held as under:

"Facts which are within the special knowledge of principal and are not in the knowledge of attorney can only be deposed by the principal. Whether the parties were married on a particular day, is not a private act of the parties. Marriage is normally a public act in this country and evidence can be given by anyone who has knowledge of the fact. Whether the parties are living separate or not is also known to other people associated with the parties and is not something secret. Similarly, for how long parties were living separate can be deposed in the Court by any person who is aware of the facts. If an attorney aware of these facts and can answer the questions of the Court, the attorney cannot be told that he is not a competent witness or his statement would not be recorded. Similarly an attorney, on the basis of instructions/directions given to him, can answer the queries, if there was any possibility of parties patching up and living together or the marriage has broken down irretrievably. An attorney has to be allowed to appear in the witness box and make statement. The Court may reject that part of his statement which is based on hearsay or which he has no personal knowledge. But he cannot be prevented from appearing in the witness box and deposing and answering the queries. Same is the import of judgment of Supreme Court in Janaki Vasudeo Bhojwani (supra) wherein Supreme Court had not debarred an attorney from appearing in the witness box but the Supreme Court has stated the facts which are only in the knowledge of the principal, about those facts attorney cannot testify in the Court."

9. Hence, any act which is not a private act or which is not something the principal alone can have personal knowledge of can be deposed by the attorney holder and taken in evidence while deciding the issues. There is no bar hence under the Code or otherwise where the attorney holder is deposing regarding a fact which is proved on record. The learned trial court was required to consider the documentary evidence instead of giving any

weightage to the oral evidence led by the son of the appellant. The copy of the said order was placed and proved on record by the son of the appellant. Perusal of the said order would clearly show that a clear undertaking was given by the father of the defendant that he would not raise any unauthorized construction and that was the only relevant factor of consideration.

10. Hence, in the light of the above dismissed, the present appeal is allowed.

November 01, 2011
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KAILASH GAMBHIR,J