

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.374 OF 1990

Balaku Bali Yadav
since deceased by his heirs
and legal representatives

1. Balkubai Balku Yadav & Ors.

....Appellants/Original
Defendants.

V/s.

Smt. Krishnabai Rajaram Mulik
since deceased by her heirs

1. Shri Jagannath Rajaram Mulik and Ors.Respondents/Original
Plaintiffs.

Mr.Ashish Sawant i/b Mr. Ashwinkumar Kapadnis, Advocate for the
Appellants.

Mr. U.B. Nighot, Advocate for the respondents nos.1 to 3.

CORAM : Smt. R. P. SondurBaldota, J.

DATE : 21st July, 2015.

P.C.:

1. The papers are placed on board for speaking to minutes of the order dated 24th March, 2015.

2. Mr. Ashish Sawant appearing for the appellants points a typographical error at paragraph 26 of the order in the direction to the appellant to pay costs to the respondents. Paragraph 26 reads as under:

“The appeal is allowed with costs. The appellant shall pay costs quantified at Rs.35,000/-(Rs. Thirty Five Thousand only) to

the respondents.”.

3. The direction for payment of the cost by the appellant is obviously a typographical error which is required to be corrected. The direction contained in the last sentence of the order shall read as follows:

“The respondent shall pay costs quantified at Rs.35,000/-(Thirty Five Thousand only) to the appellants.”

4. The order be corrected and read accordingly.

(SMT. R. P. SONDURBALDOTA, J.)

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1).Balkubai Balku Yadav and Ors.

.....Appellants
(Orig. Defendants)

: V/S :

Smt. Krishnabai Rajaram Mulik
Since deceased by her heirs

1. Shri. Jagannath Rajaram Mulik and Ors.

.....Respondents
(Orig. Plaintiffs)

* * * * *

Mr. S.V. Kotwal i/by. Mr. A.R. Kapadnis, Advocate for the
appellants.

Mr. U.B. Nighot, Advocate for the respondents.

* * * * *

Coram :- Smt. R.P. SondurBaldota, J.

24th March, 2015.

P.C. :-

1). This Second Appeal is directed against the judgment and order dated 20th December, 1989 passed by the District Court, Satara on Regular Civil Appeal No. 435 of 1986. By the impugned order, the District Court set aside the order of the trial Court dated 18th March, 1986 and decreed the suit for specific performance. The trial Court had

dismissed the suit holding that the transactions between the parties was not of sale, but was of a loan transaction.

2). One, Krishnabai filed suit for specific performance of the agreement dated 30th April, 1974 for sale of the land at Gat no.394 (hereinafter referred to as "the suit property) admeasuring 4 hectares 43 Ares against one, Balku. During the pendency of the suit, Balku died and his heirs, being the widow and minor children were brought on record. During the pendency of the present appeal, Krishnabai also died and her heirs have been brought on record. The parties will hereinafter be referred to by their names.

3). The brief statement of the facts leading to the present appeal is as follows :-

. Krishnabai alleged that, Balku had agreed to sell the suit property to her for the total consideration of Rs.5,000/- and on 30th April, 1974 executed agreement of sale in her favour by accepting Rs.1,000/- towards earnest money. On the same day, Krishnabai had been put possession of the suit property. The agreement of sale bears the thumb impression of Balku. It is the case of Krishnabai that, the agreement had been executed in the presence of witnesses at Satara. The agreement provided that, Balku shall execute sale-deed and

perform his obligation under the contract within a period of 5 years from the date of the agreement. The agreement contained a recital that, possession of the suit property was handed over to Krishnabai on the same day. Krishnabai alleged that, Balku failed to obtain permission from the Competent Authority for completion of the transaction of sale. Eventually, with the change in circumstances, permission of the Competent Authority for sale of the suit property by Balku was no longer required and that condition became redundant. Therefore, Krishnabai served advocate's notice dated 28th November, 1977 upon Balku calling upon him to accept the balance consideration of Rs.4,000/- and complete the transaction of sale. Krishnabai also alleged that she had subsequently paid an amount of Rs.3,600/- to Balku from time to time as mentioned below :-

Rs.560/-	-	23 rd May, 1974
Rs.1,040/-	-	17 th May, 1975
Rs.1,000/-	-	28 th March, 1975
Rs.1,000/-	-	28 th March, 1975

The notice was received by Balku on 3rd December, 1977 but he failed to complete the transaction of sale with Krishnabai.

4). Balku contested the suit specifically denying that,

he had agreed to sell the suit property to Krishnabai. According to him, on the date of the agreement i.e. 30th April, 1974 Krishnabai had paid him a sum of Rs.1,000/- by way of a handloan and obtained his thumb impression on the document representing it to be a "Thev-Pavati". Balku also denied having received a sum of Rs.3,600/- from time to time from Krishnabai and that she had been put in possession of the suit property by him. It was the further case of Balku that, it was impossible for him to sell the suit property on 30th April, 1974 in view of the fact that the suit property had been mortgaged to Land Mortgage Bank and its possession had been handed over to the bank. He pleaded that, in the year 1964 he had taken loan from the bank and executed mortgage deed in respect of the suit property in favour of the bank and had continued to be in possession thereof as the tenant of the bank. He thus pleaded that, the agreement of sale relied upon by Krishnabai and others is a false document.

5). Krishnabai did not depose in the trial . She led the evidence of her Constituted Attorney, her husband, witness- Vishnu Yayate and witness, Dattatray Jimpre. Since Balaku

had died during the pendency of the suit, the evidence led on behalf of the defendants was of his widow, Bakulabai and witness, Bhikaji Yadav. On appreciation of the evidence, the trial Court held that Krishnabai had failed to prove the agreement of sale dated 30th April, 1974 and also that she was ready and willing to perform her part of the contract. She had failed to establish that, Balaku had handed over possession of the suit land to her on the date of the agreement of sale. It further held that, the heirs of Balaku had proved that the transaction dated 30th April, 1974 was a loan transaction and the suit filed by Krishnabai was not maintainable. It further held that, Krishnabai had got the agreement of sale executed by playing fraud upon Balku. Consequently, Krishnabai was held to be not entitled for specific performance. With these findings, the trial Court dismissed the suit.

6). Being aggrieved by the dismissal of the suit, Krishnabai preferred Regular Civil Appeal No. 435 of 1986 to the District Court, Satara. By the judgment and order dated 20th December, 1989 the District Court allowed the appeal , set aside the decree of dismissal by the trial Court and

decreed the suit. It directed heirs of Balaku to execute sale-deed in respect of the suit property in favour of Krishnabi on accepting the balance consideration of Rs.1,400/-. Krishnabai was directed to deposit Rs.1,400/- in the Court for the purpose of paying over to the defendants. There was further direction to deliver possession of the suit property after execution of the sale-deed.

7). The present appeal was admitted on 15th November, 1990 for consideration of Grounds No.10 and 11 of the appeal memo as substantial questions of law. The same read as follows :-

“10. Whether the Appellate Court ought to have concurred with the finding of the trial Court and observe that the so called agreement of sale is nothing but a loan transaction.”

“11. Whether the appellate Court ought to not to have exercised discretion in passing decree of specific performance in view of the circumstances, under which the alleged contract of sale was entered into was such that the alleged contract though not voidable given the respondent/plaintiff an absolutely unfair advantage over the appellants/defendants. The suit land admeasuring 4.43 hectares and price alleged to have agreed was only Rs.5,000/-. The appellate Court ought to have seen that the said consideration of Rs.5,000/-, in no case, would be adequate consideration and as such the Appellate Court should have dismissed the appeal.”

8). During the course of submissions, Mr. Kotwal the

learned Advocate appearing for the appellant has raised one more substantial question of law relating to the effect of failure on the part of Krishnabai to depose in her suit and the evidentiary value of deposition of her husband, her Constituted Attorney. Therefore, the third substantial question of law to be considered is "Whether the husband of Krishnabai could appear as a witness on behalf of Krishnabai in her capacity as the plaintiff"?

9). Before advertng to the facts of the case, the evidence led by the parties thereon and the findings of the Courts below, it will be necessary to look into the impact of Krishnabai not stepping into the witness box and deposing in favour of her case and leading the evidence of her Constituted Attorney. Mr. Kotwal submits that, failure on the part of the party to the suit in appearing in the witness box and stating his own case on oath and in not offering himself for cross-examination by the other side, a presumption would arise that the case set up by him, is not correct. He further submits that, now it is well established position in law that the evidence of the Constituted Attorney must be limited to the facts within his personal knowledge and the acts done by him in exercise of the power granted by the instrument. He

cannot depose generally on the case of the party represented by him. Mr. Kotwal, seeks support from the decision of the Apex Court in **Janki Vashdeo Bhojwani and Another Versus. Indusind Bank Ltd. and Ors. reported in (2005) 2 Supreme Court Cases page 217** and paras-13, 15, 17, 18 and 21 thereof, in particular :-

“13. Order 3, Rules 1 and 2 CPC, empowers the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order III, Rules 1 and 2 CPC, confines only in respect of "acts" done by the power of attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power of attorney holder has rendered some "acts" in pursuance to 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. Similarly, he cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.”

“15. Apart from what has been stated, this Court in the case of Vidhyadhar vs. Manikrao and Another, (1999) 3 SCC 573 observed at page 583 SCC that

17. "where a party to the suit does not appear in the witness-box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct".

“17. On the question of power of attorney, the High Courts have divergent views. In the case of

Shambhu Dutt Shastri Vs. State of Rajasthan, 1986 2WLL 713 it was held that a general power of attorney holder can appear, plead and act on behalf of the party but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in witness box on behalf of himself. To appear in a witness box is altogether a different act. A general power of attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff."

"18. The aforesaid judgment was quoted with the approval in the case of Ram Prasad Vs. Hari Narain & Ors. AIR 1998 Raj. 185. It was held that the word "acts" used in Rule 2 of Order III of the CPC does not include the act of power of attorney holder to appear as a witness on behalf of a party. Power of attorney holder of a party can appear only as a witness in his personal capacity and whatever knowledge he has about the case he can state on oath but he cannot appear as a witness on behalf of the party in the capacity of that party. If the plaintiff is unable to appear in the court, a commission for recording his evidence may be issued under the relevant provisions of the CPC."

"21. We hold that the view taken by the Rajasthan High Court in the case of *Shambhu Dutt Shastri* (supra) followed and reiterated in the case of *Ram Prasad* (supra) is the correct view. The view taken in the case of *Floriano Armando Luis* (supra) cannot be said to have laid down a correct law and is accordingly overruled.

10). The above view is reiterated and further clarified by the Bench of three Judges by the Apex Court in **A.C. Narayanan v. State of Maharashtra and anr. reported in AIR 2014 SC page 640**. While considering the position of

the Constituted Attorney in the matter of proceedings under Section 138 of the Negotiable Instruments Act, the Apex Court held that it is required by the complainant to make specific assertions as to the knowledge of the power of attorney holder in the said transaction explicitly in the complaint and the power of attorney holder who has no knowledge regarding the transactions cannot be examined as a witness in the case.

11). Mr. Kotwal submits that, though the decisions of the Apex Court in *Janki Bhojwani's* (supra) case and *A.C. Narayanan's* (supra) case. were not available when the parties in the present appeal went for trial, the precedents would have a retrospective effect if not specifically stated to be so otherwise. In this connection, he relies upon two decisions of the Apex Court in **Sarwan Kumar and another Versus. Madan Lal Aggarwal, reported in (2003) 4 SCC page 147** and **P.V. George and Others vs. State of Kerala and Others, reported in (2007) 3 SCC page 557.**

12). The facts in *Sarwan Kumar's* case (supra) were that, after dismissal by the Apex Court of Special Leave Petition to challenge an ex-parte eviction decree, the execution proceedings were revived. The judgment-debtors

filed their objections under Section 47 Civil Procedure Code, objecting to execution of the decree, inter-alia, on the ground that commercial tenancy in the State of Delhi was heritable in view of the law declared by the Apex Court in the case of **Gian Devi Anand v. Jeevan Kumar, reported in (1985) 2 SCC page 683** and therefore the Civil Court lacked inherent jurisdiction to pass such a decree. The Executing Court overruled the objections because the decision in *Gian Devi's* case (supra) was subsequent to the decree. The High Court took the same view holding that the decision in *Gian Devi's* case was prospective in application. The Apex Court disapproved the view for the reasons stated at para-15 of the decision, which read as under:

“15. For the first time this Court in *Golak Nath Vs. State of Punjab*, AIR 1967 SC 1643 accepted the doctrine of "prospective overruling". It was held:

"As this Court for the first time has been called upon to apply the doctrine evolved in a different country under different circumstances, we would like to move warily in the beginning. We would lay down the following propositions: (1) The doctrine of prospective overruling can be invoked only in matters arising under our Constitution; (2) it can be applied only by the highest court of the country, i.e., the Supreme Court as it has the constitutional jurisdiction to declare law binding on all the courts in India; (3) the

scope of the retroactive operation of the law declared by the Supreme Court superseding its "earlier decisions" is left to its discretion to be moulded in accordance with the justice of the cause or matter before it."

The doctrine of "prospective overruling" was initially made applicable to the matters arising under the Constitution but we understand the same has since been made applicable to the matters arising under the statutes as well. Under the doctrine of "prospective overruling" the law declared by the Court applies to the cases arising in future only and its applicability to the cases which have attained finality is saved because the repeal would otherwise work hardship to those who had trusted to its existence. Invocation of doctrine of "prospective overruling" is left to the discretion of the court to mould with the justice of the cause or the matter before the court. This Court while deciding the Gian Devi Anand's case (supra) did not hold that the law declared by it would be prospective in operation. It was not for the High Court to say that the law laid down by this Court in Gian Devi Anand's case (supra) would be prospective in operation. If this is to be accepted then conflicting rules can supposedly be laid down by different High Courts regarding the applicability of the law laid down by this Court in Gian Devi Anand's case (supra) or any other case. Such a situation cannot be permitted to arise. In the

absence of any direction by this Court that the rule laid down by this Court would be prospective in operation the finding recorded by the High Court that the rule laid down in Gian Devi Anand's case (supra) by this Court would be applicable to the cases arising from the date of the judgment of this Court cannot be accepted being erroneous”.

13). The observations relied upon by Mr. Kotwal at para-19 of the decision in **P.V. George's** (supra) case read as follows :-

“19. It may be true that when the doctrine of stare decisis is not adhered to, a change in the law may adversely affect the interest of the citizens. The doctrine of prospective overruling although is applied to overcome such a situation, but then it must be stated expressly. The power must be exercised in the clearest possible term. The decisions of this Court are clear pointer thereto.”

14). From the decisions cited above, it is seen that the decisions of the Apex Court in *Janaki Bhojwani'* case (supra) and *A.C. Narayan's* case (supra) will have retrospective effect in operation, the statement of law therein being of procedural law. The judgments do not specifically state the same to be prospective in effect.

15). Now, the evidence led by the parties will have to be

appreciated in the light of the above two decisions. Also considering the fact that the lower appellate Court had reversed the decree of the trial Court, it will be necessary to look into the decree of the trial Court to some length along with the evidence led by the parties.

16). The pleadings of Krishnabai do not explicitly state that her constitutional attorney has complete knowledge of the transaction. The Constituted Attorney starts his deposition by stating that he has taken instructions from Krishnabai to depose in the court in respect of the suit transaction. He deposes about the events prior to execution of the agreement without stating that he was present at the relevant time. At paras 4, 5 and 6 of his deposition, he refers to the payments made to Balku without disclosing the dates and places of the payments. He baldly states that he was present throughout the suit transaction and on every occasion, when amount was paid.

17). The next crucial evidence was regarding the readiness and willingness of Krishnabai to complete sale transaction by performing her obligations under the agreement. This could not have been evidenced by the statements of the Constituted Attorney. The readiness and

willingness had to necessarily come from the mouth of Krishnabai, because it is the evidence of her state of mind. The Constituted Attorney stated "since the time of suit transaction and thereafter plaintiff had sufficient funds to pay consideration of land". Firstly, this is a bald statement about the financial position of Krishnabai. Secondly, the evidence as regards the same ought to have come from Krishnabai. The Constituted Attorney is not expected to know the financial condition of Krishnabai. If by way of any special circumstances, he claims to know about it, there ought to have been the evidence of the circumstances. Further there is nothing on record to indicate the financial status of Krishnabai. In his cross-examination, the Constituted Attorney admits that Krishnabai was able to come to the Court for deposing in the matter. There is no explanation offered for Krishnabai not examining herself.

18). At paras 7 and 8 of his deposition, the Constituted Attorney apparently forgot that he was deposing only as a Constituted Attorney and he was not himself the plaintiff. He states "Prior to institution of suit, I have served notice on the defendant to complete the transaction" and "I am willing to pay remaining amount of Rs.1,400/- to the defendant towards

purchase price.” and “At the time of agreement of sale, deceased Balaku Yadav gave me possession of the suit land. One year thereafter, he complained about possession. I was in possession of suit land for about 1 and 1 year after sale. At present, defendants are in possession of actual suit land. I claimed specific performance of contract and restoration of possession from the defendant”.

19). For the above reasons, it must be held that the Constituted Attorney of Krishnabai not only could not have appeared as a witness on her behalf in her capacity as the plaintiff, but his evidence as one of her witnesses also was not sufficient. Hence, the suit was liable to be dismissed.

20). The trial court has considered the evidence of the attesting witness examined by Krishnabai and inferred that attestation by him is not probable. It observes :

“In this context, cross-examination of this witness plays important role. The cross-examination discloses that his witness had come in contact with deceased Balaku in one suit and that prior to coming in the Court, he did not know deceased Balaku. His evidence is clear to infer that he knew husband of the plaintiff at the relevant time. Considering the reply in the cross-examination, it touch my mind that it is not possible that deceased defendant could have brought this witness attesting to execution of the documents. In peculiar circumstances that prior there to this witness, Mr. Yadate did not knew

deceased defendant, now I will go through evidence of Mr. Zimpre, he does not corroborate this witness on the point that it was defendant, who called witness to attest the execution of document. It is also not case of the plaintiff's husband Rajaram Mulik. It, therefore leads me to infer that attestation of witness, Vishnu Yadate is not probable."

21). Mr. Nighot for the respondent sought to argue that the observations of the trial court are nothing but conjectures and hence deserve to be ignored. I find no substance in the submission. The trial court is seen to have logically arrived at the inference. This is established by the following further observations of the trial court.

"It is true that he has signed on the documents, but merely because he has signed, in peculiar facts and circumstances of this case. His evidence does not inspire confidence in me to say that he was present at the time of actual writing and putting T.I.O. deceased defendant. The defence of the defendant that signature of witness, Mr. Yadate was obtained by plaintiff later on is probable. It is also pertinent to note that Rajaram Mulik in his evidence stated that at the relevant time of transaction, his wife plaintiff was present and stamp was purchased by deceased-Balaku. But his witness, Mr. Yadate does not say about the presence of plaintiff herself. Thus even though deceased-defendant had admitted to receipt of Rs.1,000/- on 30.4.1974, the evidence on record is not cogent, satisfactory and reliable to infer that those were accepted being earnest money and that defendant had intention to sale the property."

22). The trial court next held that Krishnabai had established payment of Rs.3,600/- to Balku. But since none of the witnesses examined by her deposed that the payment was towards consideration of the suit property, it held that the payment was by way of hand-loan. There is no infirmity in the finding.

23). The trial court also considered the pleadings of Balku and evidence led by Bakula, his widow that Balku had already mortgaged the suit property to Satara Zilla Co-operative Land Mortgage Bank on 6th November, 1964, pursuant to which the Bank held title to the property and Balku was the Bank's tenant. The loan from the Bank was repaid on 8th June, 1979 and thereafter the property released from mortgage. Thus, as on the date of agreement for sale, the same was not available for sale. Mr. Nighot is unable to explain the circumstance.

24). Perusal of the impugned judgment shows that the Appellate Court was impressed by the fact that there was the document of agreement of sale executed, which document was produced before the court. It observes in it's order:

“ No, if the transaction had been a loan transaction, it can be at the outset said that the document should not have styled as

agreement to sell. It has come in the evidence that the document was read over to the executant, now if the contents that it was a document of agreement of sale and if it was embodying the contents that an amount of Rs.1,000/- was paid as an earnest money and if the document had also containing the things as to when and how the sale deed was to be executed, who were to borne the expenses for the same and how the possession was to be given etc. were contents after the reading of which the persons have come for executing that document would have decided not to sign such document if it embodying the contents disclosing the true nature of the transaction. The contents of the document i.e. the evidence which coming in the form of the document will therefore certainly carry more importance and on going through the contents of the document, it can be found that there found absolutely nothing vague in it. On the other hand, contents of the document are very clear and definitely import a meaning of agreement of sale. The contents of the document therefore very clearly mentions at many places where from it can be disclosed that it is certainly a document of agreement of sale."

It further holds that illiteracy of Balku was not sufficient to show that he could have been deceived. Another fact which weighed heavily with the Appellate Court was the evidence of subsequent payment to Balku. It, however, lost sight of several other aspects of the case that were relevant to decide the dispute. Taking the totality of the evidence into consideration, the appellate court ought to have concurred

with the decision of the trial court.

25). Coming to the second substantial question of law, the evidence of Bakula and her witness is that the value of the land allegedly sold to Krishnabai was at the relevant time for more than Rs.5,000/-. The witnesses of Krishnabai have said nothing in their depositions about the value of the suit land. The cross-examination of the witnesses on their evidence that it was @Rs.3,000/- per acre is not worth the name. Hence, the evidence of the defendants on this aspect ought to have been accepted. But the Appellate Court rejected the contention for the following reasons:

“It is admitted by witness No.1 for the defendant heirs, Bakula Balku Yadav in her deposition at Exhibit 14 that the suit land is situate adjoining to the hilly track and out of the entire area, some in about 10 acres area only a small grass grows up at height of two inches only. It is also then admitted by her that rainfall in the village Atit is also very underlain. And she then has also deposed that she cannot know the rate of price of per acre of such land in the year 1974, then in such circumstances, it will certainly have to be said that the suit land is not at all a land of very good quality of or fertility and it is almost situate near the hilly track and then in such circumstances, the price of Rs.5,000/- for such land. The contention of the defendant that the price alleged to have been agreed is also not good and adequate consideration, is also not a good defence.”

The reasons given will not hold good in the absence of specific evidence as regards the value of the land so located. Hence, the question must be answered in favour of the defendants.

26). The appeal is allowed with costs. The order impugned in the appeal dated 20th December, 1989 passed by the District Court, Satara is set aside. The respondent shall pay costs quantified at Rs.35,000/- (Rs. Thirty Five Thousand only) to the appellants.

(Smt. R.P. SondurBaldota, J.)

(The order is corrected pursuant to speaking to minutes order dated 21st July,2015.)