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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Date of Decision: 04.09.2015**

% **RSA 328/2015**

SATSHIV (BHARAT) & ORS

..... Appellants

Through: Mr. A.J. Khan, Advocate.

versus

M/S INDRUS BUSINESS DEVELOPMENT
THR ITS PARTNERS

..... Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

C.M. No.18352/2015

1. Exemption allowed, subject to all just exceptions.
2. The application stands disposed of.

RSA 328/2015 and C.M. Nos.18351/2015

3. The present second appeal is directed against the judgment and decree passed by the First Appellate Court, i.e. the learned Additional District Judge – 01 (West), Tis Hazari Courts, Delhi in RCA No.12/2011 titled *M/s Indrus Business Development Vs. M/s Satshiv (Bharat) & Others.* By the

impugned judgment and decree, the First Appellate Court has decreed the suit of the respondent/ plaintiff for Rs.1,91,260/- along with interest @ 9% per annum with effect from 20.02.1992.

4. The respondent/ plaintiff's suit being Suit No.16/2002/1995 preferred against the appellants for recovery of Rs.2,28,916/- along with interest had been dismissed by the Trial Court, namely the learned SCJ/RC (West), Tis Hazari Courts, Delhi vide judgment and decree dated 11.01.2011. The learned Trial Court while returning the findings in favour of the plaintiff on the merits of the claim, dismissed the suit solely on the premise that the plaintiff – a partnership firm, had not led in evidence any of the partners of the firm and the only witness produced by the plaintiff was Sh. Ajay Kumar Gupta, who was the attorney appointed by a partner. On the premise that an attorney has no authority to depose as a witness, the testimony of the plaintiff's witness was rejected and the suit dismissed.

5. By the impugned judgment, the First Appellate Court has reversed the said finding on the premise that PW-1 was not only the attorney of the plaintiff firm, but he had deposed on the basis of his personal knowledge since he had personally been carrying on the business and had been interacting, and dealing with the appellants/ defendants in relation to the business transactions between the parties.

6. Learned counsel for the appellants submits that the impugned judgment is contrary to the decision of the Gujarat High Court in *Ajay Kiritakant Ghelani & Others Vs. Mathureshnagar Co-operative Housing Society Ltd. & Another*, AIR 2008 Gujarat 44; and the decision of the

Supreme Court in *Janki Vashdeo Bhojwani & Another Vs. Indusind Bank Ltd. & Others*, AIR 2005 SC 439.

7. Having heard learned counsel for the appellants, perused the decisions relied upon and the impugned judgment of the First Appellate Court as well as the judgment of the Trial Court, and having perused the testimony of PW-1, I find no merit in the present appeal. No substantial question of law arises for consideration in the present case.

8. The plaintiff partnership firm had preferred the suit through one of its partners Smt. Sadhna Gupta, wife of Sh. Ajay Kumar Gupta. In the plaint, the plaintiffs stated in paragraph 1 to the effect that Smt. Sadhna Gupta is well-conversant with the facts and circumstances of the present case and as such she is authorised and competent to file the suit. It was also averred that “*Shri Ajay Kumar Gupta S/o Shri D.N. Gupta of 4596/2, Raghunath Bhawan, 11, Daryaganj, New Delhi – 110002 has been also authorized by Special Power of Attorney to file, sign, verify, make application, affidavit, depose for and on behalf of plaintiff firm, the present case for all intents and purposes*”.

9. Though it is not relevant for the purpose of the present appeal, I may observe in brief that the case of the plaintiff was that it is engaged in the business of export, import and trading. The plaintiffs stated that the defendant was carrying on the business of printing of fabric on job-work basis. The plaintiff was supplying the grey fabric to the defendant from time to time for carrying out the job work of printing. The claim of the plaintiff was that the defendant had not returned the material after carrying out the

said job work, leading to an outstanding claim of Rs.2,28,916/- after taking into account the advances made by the plaintiff.

10. The plaintiff led the evidence of Sh. Ajay Kumar Gupta as PW-1. He produced his power of attorney as Ex.PW-1/1. He deposed in relation to the business transactions undertaken by the plaintiff firm with the defendants. PW-1 was thereafter cross-examined by the defendants. As aforesaid, the Trial Court, while returning the findings in favour of the plaintiffs on the merits of the claim, dismissed the suit on the premise that PW-1 was not competent to depose in the matter since he was an attorney of the plaintiff firm. The First Appellate Court while reversing the said finding of the Trial Court has, *inter alia*, observed as follows:

“11. In terms of record, PW1 was authorized by one of the partners with execution of Ex. PW1/1 in his favour with specific reference of having been appointed as attorney to do all the necessary acts as required for the purpose of the prosecution of the case including the filing of affidavits, to admit/deny or take back documents etc. and to do all other acts and things which may be necessary to be done for the progress and in the course of prosecution of the case. The absolute power regarding conducting of the case having been conferred upon attorney vide Ex. PW1/1, it cannot be said that PW1 was not authorized to depose on behalf of plaintiff/appellant firm. Besides the abovesaid, as pointed out by Ld. counsel for appellant and also in terms of record, the correspondence between the parties was addressed to plaintiff firm with “kind attention” of PW1 himself which fact also is suggestive of the personal knowledge of PW1 regarding the dealings between the parties and the deposition of person who has dealt with the dealings in his capacity as employee/manager or person responsible for the conduct of affairs of firm cannot be discarded on the point that partners of the plaintiff firm have not been examined in the

matter. Reliance was placed by Ld. counsel for appellant upon AIR 2009 Delhi 70 Mr. Vinay Jude Dias Vs. Ms. Renajeet Kaur wherein it was observed that “ A general power of attorney holder can appear, plead and act on behalf of the party but he cannot become witness on behalf of party. He can only appear in his own capacity since no one can delegate the power to appear in witness box on behalf of himself. There can be no dispute that the attorney of the petitioner can appear in the court on behalf of the party and do the act as specified in power of attorney. An attorney is not an incompetent witness. He can appear in the court and depose in the court as a witness in respect of facts which are in his knowledge. He cannot depose in respect of the facts which are not in his knowledge and knowledge of which has been derived by him from principal without witnessing the facts himself. However, if an attorney has witnessed all those facts himself which were also witnessed by the principal, an attorney cannot be told that he cannot appear in the witness box and depose in the court in respect of the facts known to him”

12. The observation of Ld. trial court regarding there being no authorization in favour of PW1 to depose before the court even otherwise becomes irrelevant as even if the said power had been delegated to the attorney, he still was not competent witness to depose regarding the fact which had not been witnessed by him. The deposition of PW1 in the instant matter based upon his own knowledge of the dealings between the parties, therefore cannot be discarded. Ld. trial court even otherwise on the merits of the case had returned its findings on these issues in favour of plaintiff but for the authorization in favour of PW1 dismissed the suit of plaintiff. Now this court having held PW1 to be competent witness to depose in the matter from the side of plaintiff and there being no cross appeal or cross objections filed by the respondent concerning the findings on merits on these issues i.e issue no. 4, 5, 6, 7 and 8 by Ld. trial court , findings of Ld. trial court are accordingly affirmed on these issues. Regarding findings of Ld. trial court on issues no. 1,3 & 9, again there is no cross appeal or cross objections filed by respondent and there being no challenge to

the findings of Ld. trial court on these issues, findings of Ld. trial court on these issues are also affirmed. ”

11. A perusal of the cross-examination of PW-1 shows that the line of cross-examination adopted by the defendants clearly suggests that it was the witness PW-1 - the attorney and also the husband of the partner Smt.Sadhna Gupta, who was carrying on the business transactions on behalf of the firm with the defendants. The relevant part of the said cross-examination is being reproduced hereinbelow, which demonstrates the personal knowledge of the said witness in relation to the business transactions, and also clearly shows that even the defendant acknowledged the said position by putting question to him which presuppose the fact that he was the one having business dealings on behalf of the plaintiff firm with the defendants. Only the person carrying on the business dealings could have been put such questions, or could have answered them. Pertinently, it was not even suggested to PW-1 that he was not the one carrying on the business of the partnership firm, or that some other person was interacting with the defendants on behalf of the plaintiff firm in the course of the business transactions. The said cross-examination insofar as it is relevant reads as follows:

“It is correct that we used to give the gray fabric to the defendants and the defendants got such material printed and returned to us, and bills in respect thereof were sent by the defendants to us. It is incorrect that I had given any material short. It is incorrect that there was any shortage in material, as the grey fabric amounting to 5919.60 was sent on 20.2.1992 and the respect of shortage who received on 29.3.92. It is correct that shortage report of 48.70 meters was given the plaintiff. There was no such agreement for fulfilling the requirement of the Printer for getting the fabric printed. However, for us, the defendants were the printers. It is

incorrect hat we were told that the defendants will get the fabric printed from Lila Textiles, Jodhpur. It is incorrect to suggest that we had sent 3302.50 meters gray fabric directly to the Printers without the consent of the defendants. It is incorrect that I had taken the delivery directly from the Printers of the above 3302.50 meters. It is incorrect that the total outstanding against us vis Rs.68,130,90 paise. It is correct that we made a payment of Rs.20,000/- by Cheque in February, 1992. It is incorrect that the payment of Rs.55,000/- was made by us to the defendant, towards the part outstanding payment. Volunteered, it was an advance payment. It is correct that the defendants asked us to supply blue matching cutting for getting the fabric printed in August, 1992 and it is incorrect that the same was not given. Volunteered, the fact is, that the same was given on 31.8.1992. It is incorrect that we have never supplied the blue matching cutting. It is incorrect that we have not made the payment of the defendants in respect thereof. It is incorrect that nothing is due to the plaintiff from the defendants. It is incorrect that we have to pay certain amount to the defendant, on the account of full and final payment. It is incorrect that my suit is false.”

12. It is also pertinent to note that in the correspondence undertaken by the appellant/defendants with the plaintiff firm, the said correspondence was also addressed to PW-1 as the correspondence was marked for the “kind attention” of PW-1 Ajay Kumar Gupta himself. The appellant/defendant has not explained as to why it would mark the correspondence address to the respondent firm to PW-1, if PW-1 was not the one dealing with the appellant/defendant firm in the course of the business transaction between the parties. It is, thus, absolutely clear that though the partnership firm had the wife of PW-1 as one of the partner, it was PW-1 who was managing the business of the plaintiff firm. Merely because he stated that he is the power of attorney holder does not detract from his personal knowledge of the

business transactions undertaken between the parties, on account of his personal involvement with the same.

13. There is no doubt that merely on the strength of a power of attorney, the attorney cannot act as a witness since a witness would be competent to depose only in respect of facts of which he has personal knowledge. In the present case, irrespective of the fact that PW-1 is the power of attorney holder of the partner of the plaintiff firm, he is a competent witness since he has personal knowledge of the transaction undertaken between the parties.

14. The decisions relied upon by the appellant in *Janki Vashdeo Bhojwani* (supra) and *Ajay Kiritakant Ghelani* (supra) do not advance the case of the appellant/defendant. In *Janki Vashdeo Bhojwani* (supra), the Supreme Court, inter alia, observed:

*“13. 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”.*

(Emphasis supplied)

15. The aforesaid observations themselves show that in the said case the acts were done by the principal and not the attorney and, where since the principal had personal knowledge in respect of the facts, and not the attorney, the attorney was not a competent witness. However, as aforesaid, the situation is materially different in the present case, since the attorney

PW-1 also had personal knowledge of the business transactions with the appellant/defendant – he having conducted the business of the plaintiff firm with the appellant/ defendant.

16. In *Ajay Kiritakant Ghelani* (supra), the Gujarat High Court relied upon an earlier decision of the Supreme Court in *Janki Vashdeo Bhojwani* (supra) and, *inter alia*, observed in para-11, in respect of the power of attorney holder:

“11. but he cannot depose for them in respect of acts done by them and not by him. Similarly, he cannot depose for the petitioners no.1 and 2 in respect of the matters of which only they can have a personal knowledge and in respect of which they are liable to be cross examined”.

(Emphasis supplied)

17. Once again, the aforesaid observations clearly indicate that in respect of the acts done by the principal and not by the attorney, the attorney is not competent to depose. However, in respect of acts done by him, he is competent to depose.

18. For all the aforesaid reasons, I find no merit in the present appeal. No substantial question of law arises for consideration by this Court in the present appeal. The appeal is, accordingly, dismissed.

VIPIN SANGHI, J

SEPTEMBER 04, 2015

B.S. Rohella