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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 9264 OF 2015

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| 1. | Shaikh Imama Abdul | PETITIONERS |
| | Age - 89 years, Occ - Agriculture | |
| 2. | Fatambi w/o Imam | |
| | Age - 77 years, Occ - Agriculture | |
| 3. | Shaikh Abdul Hamid Imam | |
| | Age - 57 years, Occ - Agriculture | |
| 4. | Saikh Munir Imam | |
| | Age - 37 years, Occ - Agriculture | |
| 5. | Mohamadsaheb Ahemed Shaikh | |
| | Age - 77 years, Occ - Agriculture | |
| 6. | Hali Mabi w/o Lal Shaikh | |
| | Age - 67 years, Occ - Agriculture | |
| 7. | Samabi w/o Abdul Hamid | |
| | Age - 52 years, Occ - Agriculture | |

All R/o Village Kuran, Taluka-Sangamner
District - Ahmednagar

VERSUS

- | | | |
|----|---------------------------------------|-------------|
| 1. | Shaikh Rubabi Suleman | RESPONDENTS |
| | Age - 87 years, Occ - Agriculture | |
| | R/o Village Kuran, Taluka - Sangamner | |
| | District - Ahmednagar | |
| 2. | Shaikh Pirmohammad Bhau | |
| | Age - 45 years, Occ - Agriculture | |
| | R/o Ladgaon, Taluka - Vaijapur, | |
| | District - Aurangabad | |

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Mr. Harshad H. Padalkar, Advocate for the petitioners
Mr. K. N. Shermale, Advocate for respondents No.1 and 2

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[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 11th JULY, 2016

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally with consent of learned advocates for the parties.

2. The petitioners are defendants No.1 to 7 in Regular Civil Suit No.412 of 2007 filed by respondent No.1 for partition and separate possession of the properties referred to in the plaint. Respondent No.1 is stated to be about 87 years of age and has made certain claims as have been referred to in the plaint. The plaintiff has been conducting the proceedings through a power of attorney holder, who happens to be her grandson (son's son). It further appears that defendants No.1 to 7 have failed to file their written statement. Their request to file the same stands rejected throughout till the Supreme Court. The matter has reached the stage of evidence and respondent No.1 has filed affidavit of examination in chief through power of attorney holder. It is at this juncture, application Exhibit-32 had been moved by the petitioners contending that the power of attorney has been executed three years back and that having regard to Order III, Rule 2 and Order XIII and Rules thereunder of the Civil

Procedure Code, a power of attorney holder would not be eligible to give evidence. In the present matter, the suit has been filed seeking personal rights and as such, evidence by power of attorney holder is not liable to be considered. Further, it has been requested to discard the examination in chief given by the power of attorney holder.

3. Aforesaid application had been resisted by the plaintiff stating that the suit is for partition and the power of attorney holder is no other person but is a grandson of the plaintiff. He has personal knowledge of the facts about which deposition has been appearing. It is further submitted that no prejudice would be caused to the defendants by permitting the power of attorney holder to depose on behalf of the plaintiff, who is an age old lady.

4. It appears that during the course of hearing, as has been done in the writ petition, the petitioners have relied upon a decision in the case of *“Janki Vashdeo Bhojwani and Another V/s. Indusind Bank Ltd., and Others”* reported in (2005) 2 SCC 217, as well as on the judgment in the case of *“Bhagwati Devi V/s Jameela Begam and Others”* reported in 2013 (3) Civil L. J. 756 and also on a judgment in the case of *“Man Kaur (deceased by LRs) V/s Hartar Singh Sangha”* reported in

2010 AIR SCW 6198. Reliance on aforesaid judgments has been placed to contend that the power of attorney holder would not be competent to give evidence in respect of the facts which are within personal knowledge of the plaintiff.

5. The trial court, after considering the submissions on either side had rejected application Exhibit-32 considering that the suit has been filed on the ground that the suit properties are ancestral properties of the plaintiff and defendants, she is claiming share in said properties. It appears to have been considered that the power of attorney holder being a grandson, may have reasonably good knowledge of the facts about which deposition has been given.

6. Learned advocate for the petitioners purports to draw attention to paragraph No.7 of the plaint in which the plaintiff has contended that revenue entries have been taken in favour of the predecessor of the defendants, as a manager of family. He contends that while entries in favour of the defendants' predecessor have taken place around 80 years ago, the power of attorney holder had not even been born. In the circumstances, evidence in respect of the contentions as are appearing in paragraph No.7 of the plaint cannot be given by the power of

attorney holder, for it can seldom be said that he has personal knowledge about the same. He, therefore, submits that application Exhibit-32 ought to have been allowed by the court, however, since it has rejected the same, the defendants are before this court. He as such, urges to allow application Exhibit-32.

7. Mr. Shermale, learned advocate for plaintiff - respondents No.1 and 2 contends that the suit is for partition and separate possession, as claimed by the plaintiff, who happens to be grandmother of the power of attorney holder. He thus has reasonable knowledge about the events which have occurred in respect of the ancestral properties. He is not alien or absolute stranger to the suit. He, therefore, submits that it is legal position, which would play a pivotal role about devolution of property after the death of a prime originator. In the circumstances, ado being made about personal knowledge by the power of attorney holder is of little consequence.

8. In order to emphasise that the power of attorney holder can appear as a witness in respect of the facts which are within his knowledge, Mr. Shermale purports to point out that Order III, Rule 2 of the Civil Procedure Code would not be relevant as the

word “acts” used in Rule 2 of Order 3, CPC does not include the act of power-of-attorney holder to appear as a witness on behalf of a party.

9. Mr. Shermale further refers to summary in paragraph No.12 of judgment of the Supreme Court in the case of “*Man Kaur*” (*supra*), which reads as under-

“12. We may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:

(a) An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.

(b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved.

(c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been

handled by an attorney holder, necessarily the attorney holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorized managers/attorney holders or persons residing abroad managing their affairs through their attorney holders.

(e) Where the entire transaction has been conducted through a particular attorney holder, the principal has to examine that attorney holder to prove the transaction, and not a different or subsequent attorney holder.

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his 'state of mind' or 'conduct', normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his tenant, on the ground of his 'bona fide' need and a purchaser seeking specific performance who has to show his 'readiness and willingness' fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or 'readiness and willingness'. Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad."

These observations particularly have been relied on to emphasise that a power of attorney holder can appear as a witness in his personal capacity and in respect of whatever knowledge he has about the case, he can state on oath.

10. In order to buttress his submissions further, learned advocate for the respondents purports to rely on a judgment in the case of “*A. C. Narayanan V/s State of Maharashtra and Another*” with “*G. Kamalakar V/s M/s Surana Securities Ltd., and Another*” reported in *AIR 2014 SC 630*, which according to him is a three judges' bench decision of the Supreme Court and would hold the field rather than the other two decisions which have been sought to be relied upon on behalf of the petitioners.

11. Having regard to aforesaid, it does not appear to be a fit case wherein this court shall cause interlude in the proceedings of the suit. The law as it appears is clear that a power of attorney holder's evidence is to be considered only in respect of facts which can be said to be within his personal knowledge. In the present case, it appears that the plaintiff wants to run the risk with the evidence through the power of attorney holder. In the circumstances, while appreciating the evidence given by the power of attorney holder, the court will have to give regard to

the guidelines as are appearing in the judgments referred to by the parties.

12. Writ petition as such, is not entertained and is dismissed.
Rule is discharged.

[SUNIL P. DESHMUKH, J.]

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