

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 2219 OF 2015
WITH CA/10670/2015 IN WP/2219/2015

SARASWATI AMBADAS ITHAPE AND OTHERS
VERSUS
LATABAI BABASAHEB WAKHARE AND ANOTHER

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Advocate for Petitioners : Mr. P. S. Pawar
Advocate for Respondent No. 1 : Mr. D. R. Jayabhar
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CORAM : V. K. JADHAV, J.

DATED : 14th JANUARY, 2016

PER COURT :-

1. By consent of learned counsel for respective parties, heard finally at admission stage.
2. Respondent/defendant No.1 has contested the suit instituted by petitioners/plaintiffs for declaration, partition and separate possession alongwith a decree of perpetual injunction. Respondent/defendant No.1 has executed power of attorney in favour of her husband and the power of attorney holder/husband of defendant No.1 has filed his affidavit of evidence after the plaintiffs' evidence is closed. Consequently, the petitioners/original plaintiffs have raised objection by filing an application Exh.117, contending therein that respondent/defendant No.1 can only explain the nature of transaction and the questions involved in the suit can only be answered by defendant No.1 by entering into witness box. The trial court, by the impugned order dated 03.01.2015 passed below Exh.117 in

RCS No. 59 of 2012, rejected the application. Hence this writ petition.

3. Learned counsel for petitioners submits that the sale deed came to be executed by petitioners/plaintiffs in favour of defendant No.1. It is thus, necessary for defendant No.1 to step into witness box and explain the nature of transaction, when the petitioners/plaintiffs have come with a specific case that there is no out and out sale as such, and the said sale deed was executed as a security for loan. Learned counsel further submits that the power of attorney may depose for the principal in respect of the acts, which he has rendered in exercise of power granted by the principal and he cannot depose for the principal in respect of the matter of which, only the principal can have personal knowledge. Learned counsel for the petitioners, in order to substantiate his submissions, places his reliance on the following cases:

1. ***Janki Vashdeo Bhojwani and another v. Indusind Bank Ltd. and others***, reported in ***AIR 2005 Supreme Court 439*** and
2. ***Mahendra Pratap Singh (deceased) and another v. Smt. Padam Kumari Devi***, reported in ***AIR 1993 Allahabad 143***.

4. Learned counsel for the respondent submits that in the pleadings of the plaintiffs, almost for every step before execution of sale deed and even after that, name of husband of defendant No.1 is referred. Learned counsel further submits that defendant No.1 cannot be compelled to enter into witness box and depose. It appears from the pleadings of plaintiffs itself, that the husband of defendant No.1 has knowledge about the entire

transaction and he was present alongwith defendant No. 1 when the sale deed in question was executed. Learned counsel further submits that only because the power of attorney is executed in favour of husband, the relation between defendant No.1 and her husband does not cease to exist. Learned counsel further submits that the effect of non-examination of defendant No.1 and examination of her power of attorney alone can be considered only at the time of final hearing of the suit. Learned counsel thus, submits that there is no substance in this petition and the same is liable to be dismissed. Learned counsel, in order to substantiate his submissions, places reliance on the following cases :

1. ***Smt. Sharadamma v. Smt. Kenchamma and Others***, reported in ***AIR 2007 Karnataka 17***,
2. ***Yellappa v. Yellamma and others***, reported in ***AIR 2007 Karnataka 181***, and
3. ***Shaikh Rafath Begum v. T. V. R. Anjaneyulu (died through Lrs.)***, reported in ***AIR 2007 Andhra Pradesh 23***.

5. In the case of ***Janki Vashdeo Bhojwani*** (supra), relied upon by learned counsel for petitioners, the Apex Court, while remanding the matter in appeal, issued certain directions. The Debt Recovery Tribunal was directed to permit the parties to lead evidence, both oral and documentary. The Apex Court has made it clear that the burden of proving that the appellants have a share in the property will be on the appellants. In light of these directions, it is observed in paragraph No. 12 of the judgment that it was obligatory on the appellants to have entered the box and discharged

the burden by themselves. It is also observed that the power of attorney holder does not have the personal knowledge of the matter of the appellants and therefore he can neither depose on his personal knowledge nor can he be cross-examined on those facts which are to the personal knowledge of the principal.

6. In the case of ***Shaikh Rafath Begum*** (supra), relied upon by learned counsel for respondents, by referring the case of ***Janki Vashdeo Bhojwani*** (supra), it is held that merely because the plaintiff gives power of attorney to her husband, the relationship between them does not cease to exist and the question whether the evidence given by the husband, as a power of attorney, is useful for deciding the issues in the suit or not has to be decided by the Court at the time of disposal of the case, but not at the stage of recording evidence. Similar observations have been made in the case of ***Smt. Sharadamma*** (supra) and in another case of ***Yellappa*** (supra).

7. In view of the above observations, it is clear that it is not the duty of the Court to direct the parties or compel them as to in what manner they should conduct their case before the court or what quality of evidence they should adduce before the court. The petitioners/plaintiffs certainly have liberty to raise the question at the time of disposal of suit and certainly not at the stage of recording evidence.

8. In light of above, the Writ Petition is devoid of any merit and the same is hereby dismissed. In the circumstances, there shall be no order as to costs.

9. Pending Civil Application No. 10670 of 2015 is also disposed of.

(V. K. JADHAV, J.)

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