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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.799 OF 2016

Baban Dhondiram Hire
(Died) LRs and Others

APPELLANTS

1A. Tulsiram s/o Baban Hire
Age - 58 years, Occ - Agriculture

1B Gangadhar s/o Baban Hire
Age - 56 years, Occ - Agriculture

1C. Smt. Kesharbai Baban Hire (Died)

All R/o Gopalpur (Khamgaon)
Taluka - Newasa, District - Ahmednagar

VERSUS

Kamalbai Goraknath Dagde
Age - 52 years, Occ - Agriculture / Household
R/o Bhenda (Bk), Taluka - Newasa,
Through General Power of Attorney,
Goraknath s/o Bhikaji Dagde,
Age - 59 years, Occ - Agriculture & Service
R/o Bhenda, Taluka - Newasa,
District- Ahmednagar

RESPONDENT

.....
Mr. P. R. Katneshwarkar, Advocate for the appellants
Mr. A. P. Bhandari, Advocate for the respondent
.....

[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 15th DECEMBER, 2016

ORAL JUDGMENT :

1. Heard learned advocates for the parties.

2. Proceedings bearing Special Civil Suit No.50 of 2010 (Old No.16 of 2008) were initiated for specific performance by plaintiff – respondent against defendant – appellant.

3. The background being succinctly referred to is that - an agricultural land admeasuring 1 *Hectare* 21 *Are* situated at Gevrai, Taluka - Newasa bearing block No.157/3 owned by the appellant - original defendant was agreed to be sold for consideration of Rs.2,25,000/- under a written agreement entered into between defendant and the respondent - plaintiff on 13th March, 2006. An earnest amount of Rs.1,00,000/- had been parted with by the plaintiff. The balance amount of consideration was agreed to be paid at the time of execution of sale deed. Permission from the government was necessary for alienation of the land and it was further agreed that on obtaining permission, sale deed would be executed within a period of one month.

4. The defendant had moved by an application to the Collector for permission to sale suit land on 12th April, 2006 and accordingly permission came to be granted under a communication dated 7th December, 2007 by Tahsildar.

5. Possession of suit land was handed over to the plaintiff on

the date of agreement itself i.e. on 13th March, 2006. A separate possession receipt had been executed by the defendant.

6. It is case of plaintiff that expenses required for permission were borne by the plaintiff, which were about Rs.9,000/- to be adjusted towards consideration amount.

7. The plaintiff stated he demanded execution of sale deed. However, the defendant dillydallied. A notice came to be issued on behalf of the plaintiff on 7th February, 2008 calling upon the defendant to be present at the office of Sub-Registrar, Newasa on 18th February, 2008 for execution of sale deed by accepting balance consideration. The notice had been duly served on the defendant. The plaintiff along with her husband had been in the office of Sub-Registrar through the day on 18th February, 2008, however, the defendant had not come.

8. Against aforesaid, the defendant contended that he had not agreed to sell suit land and had not executed agreement of sale. He denied handing over of possession of suit land to the plaintiff under agreement.

9. Defendant's case is that he had borrowed an amount of Rs.10,000/- from the plaintiff and for security of repayment of

said amount, the plaintiff had obtained signatures on blank stamp papers and those have been misused by writing an agreement of sale. So is the case in respect of the permission from the government to sale the suit land and that permission has been procured without his knowledge and consent.

10. Based on said pleadings, the trial court framed issues *viz.*, whether the plaintiff proves that the defendant had agreed to sale suit land to her and had accepted earnest amount; whether the defendant proves that he had borrowed amount of Rs.10,000/- from the plaintiff by way of security purportedly had obtained defendant's signature on a blank stamp paper and the same has been misused for writing agreement of sale; whether the plaintiff proves that she was always ready and willing to perform her part of contract and defendant has failed to perform his part of contract.

11. The trial court under its judgment and decree dated 10th March, 2011 found the agreement to have been executed and defendant is not in a position to show that the amount has been borrowed by way of a loan. The trial court further held that the plaintiff cannot be said to be ready and willing to perform her part of contract and as such, had partially decreed the suit

refusing the specific performance, however, granted decree of return of amount and further directing the plaintiff to hand over possession of the suit land to the defendant and putting some conditions in respect of the same.

12. Under the circumstances, proceedings ensued against aforesaid partial decree at the instance of the plaintiff bearing Regular Civil Appeal No.303 of 2014 (erstwhile 87 of 2012). The appellate court framed points with respect to readiness and willingness of plaintiff to perform her part of contract, her entitlement to specific performance of agreement of sale and as to whether any interference with is required in the judgment and order of the trial court, holding in its judgment and decree dated 8th July, 2016 the plaintiff to have proved, her readiness and willingness, her entitlement for specific performance and accordingly considered that interference was called for in the judgment and order passed by the trial court.

13. Learned advocates for the parties, during the course of hearing have referred extensively to the evidence which had been led. The plaintiff had led evidence through power of attorney holder, who is her husband – Gorakhnath Dagade. Since both the courts concur on that agreement of sale had been

executed, it may not necessary to dwell on this aspect. Before the trial court original agreement of sale, possession receipt and other related documents including seven twelve extracts and copies of mutation entires were produced. In defence, the defendants examined himself and no other evidence had been led on his behalf, either documentary or otherwise.

14. The trial court had decided issue No.3 in respect of readiness and willingness as required under section 16 (c) of the Specific Relief Act would not said to have been satisfied in the present case by evidence through power of attorney holder considering that power of attorney holder cannot depose the acts done by the principal and would not be able to depose for the principal in respect of the matter which only principal can have personal knowledge, observing that may be the bank statement of her husband discloses sufficient balance and the same might have been withdrawn for the purpose, but it cannot be said that it had really offered personally by the plaintiff to the defendant and further went on to consider (rather a surmise) that to show plaintiff is and was ready and willing to come over to Newasa on 18th February, 2008 to get execution of sale deed, practically plaintiff did not appear but she might have remained under impression that as defendant failed to give reply to her notice,

she presumed that to her willingness, the defendant would not take initiative to co-operate and considered that this state of mind can be easily gathered since she did not step into witness box, as argued on behalf of the defendant.

15. Learned advocate Mr. Katneshwarkar purports to propose a question to be examined in this matter, which according to him is a substantial question of law *viz.*, whether in the absence of plaintiff entering witness box and under the circumstances depriving the defendant of an opportunity to cross examine the plaintiff in order to elicit state of mind of the plaintiff in order to challenge her claim about her being ready and willing to perform her part of contract, can the statutory requirement be said to have been satisfied by plaintiff ?

16. Looking at the evidence which has emerged on record, particularly that the fact has been established about issuance of notice to remain present before Sub-Registrar on 18th February, 2008, about its receipt at the end of the defendant, about presence of the plaintiff and her husband in Sub-Registrar's office and in the circumstances, observations of the trial court to the effect aforesaid appear to be too conjecturous.

17. During the course of discussion with regard to evidence

through power of attorney holder and the nature of his evidence, learned judge of the trial court has also considered not to attach importance to relationship between the power of attorney holder and the plaintiff. Thus, overall the trial court considered that readiness and willingness cannot be said to have been established for the reason that plaintiff has not entered witness box indicating her state of mind.

18. The appellate court has elaborately discussed evidence and has referred to the same quite in some detail. The appellate court has found that oral and documentary evidence compositely show that the plaintiff and her husband were ready and willing to get sale deed executed and readiness and willingness had not been an empty formality. They had got the amount of balance consideration ready and further it will have to be considered that there is no rebuttal of the evidence about the couple having been in Sub-Registrar's office, through the day on 18th February, 2008. Purchaser and her husband appear to have done the things which were in their control and power in the situation. Such an evidence has not been controverted and contradicted by the defendant. It has also been considered that being husband of the plaintiff – Gorakhnath was well aware of the entire situation and that he was in fact man in action. As such, the appellate

court considered, in the facts and circumstances it would not be proper to discard evidence as had been adduced in the capacity of power of attorney holder by the husband of the plaintiff.

19. The trial court has observed during course of its judgment the factum of readiness and willingness to perform part of contract is to be adjudged with reference to the conduct of the parties and attending circumstances, while having observed so it was incumbent to consider that the evidence sufficiently bears out, rather conclusively that it is in fact all the transactions have taken place in the presence of the power of attorney holder for and on behalf of the plaintiff. The evidence shows that he was present and had participated in the discussion before execution of agreement of sale and while settling terms. He had moved the defendant and caused him to apply for permission to sale suit land, to the government. He in fact had kept amount ready of the balance consideration for payment. He had caused notice to be issued to the defendant and he along with his wife were present on 18th February, 2008 before Sub-Registrar.

20. Evidence on record has been elaborately discussed by the appellate court. As such, this is a case where it can safely be said that it was in fact power of attorney holder, who had been

transacting business for the plaintiff and had personal knowledge of all the transactions and the events which have occurred.

21. The appellate court has further aptly referred to a decision of the Supreme Court in the case of “*Man Kaur (Dead) by LRs V/s Hartar Singh Sangha*” reported in 2010 (10) SC 565 and has reproduced paragraph No.12 (g) in the body of the judgment finding that 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 or willingness and further to that the Apex Court had considered such examples may be in the shape of husband and wife, exclusively managing the affairs or son or daughter or father and mother.

22. In the present matter, having regard to un rebutted position emerging, it was in fact power of attorney holder who had caused and dealt with entire transaction and had been a man in action on behalf of the plaintiff throughout, taking part in each and every event with regard to transactions including payment of balance consideration. As such, state of mind of the person for whom he had been acting is easily discernible, especially looking

at the facts and circumstances of this case. It would not be said that in the face of evidence coming forth about readiness and willingness in absence of plaintiff in witness box, the same has caused prejudice to the defendant in any manner. It would not be said that, it is not possible to accept evidence of power of attorney holder, who is husband of plaintiff and who had played active role throughout in the transaction had been acting for and on behalf of the plaintiff and had been exclusively managing the affairs. In the circumstances, the evidence by power of attorney being from a person of the category referred by the Apex Court in “*Man Kaur's*” case (*supra*) letting evidence by power of attorney, there does not appear to be any flaw or defect in appreciation of evidence by appellate court and it would not be said that it tends to be perverse.

23. Apart from aforesaid, one will have to advert to the position that trial court's appreciation of the situation has been cursory, may be to some extent haphazard, in the sense that while it had not been case at all by the defendant for possession of the property, yet the same had been directed to be handed over and further to that in this particular matter looking at the practice and custom, generally prevailing in the society that it is the husband who ordinarily plays an active role in such

transactions, a due consideration of this aspect ought to have been given, rather than ignoring the same, as has been observed by the learned judge.

24. In view of aforesaid, it clearly emerges that the question proposed by the learned advocate for the appellant would not be of any avail to the appellant, for, it does not appear non appearance of plaintiff in witness box had caused in any way prejudice to the appellant and evidence as adduced overwhelmingly bears out state of mind of plaintiff of readiness and willingness to perform her part of contract satisfying the statutory condition required.

25. Second appeal, as such, stands dismissed with no order as to costs.

26. In view of dismissal of the second appeal, civil application No.14995 of 2016 does not survive and stands disposed of.

[SUNIL P. DESHMUKH, J.]