

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

928 WRIT PETITION NO. 1362 OF 2015
WITH WP/10042/2010 WITH CA/1720/2015 IN WP/10042/2010

VENUBAI EKNATH TUWAR THROUGH GPA BHAUSAHEB EKNATH
TUWAR

VERSUS

BHIMA PARASRAM TUWAR, L.RS. NAMDEV AND OTHERS

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Advocate for Petitioner : Pathan Zafar M
Advocate for Respondents 1 to 5 & 7 : C.K. Shinde

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CORAM : T.V. NALAWADE, J.
DATED : 29th November, 2016.

ORDER :

1. Writ Petition No. 1362/2015 is filed to challenge the orders made by Civil Judge, Junior Division, Newasa on Exhs. 62 and 80 in Regular Civil Suit No. 270/2006. Both the sides are heard.

2. Both the applications were filed by the petitioner, power of attorney holder of plaintiff, for granting him permission to give evidence as the power of attorney holder of plaintiff. The first application was rejected by the Trial Court on 19.7.2011. It appears that after that amendment was made in the suit and the suit, which was initially filed for relief of injunction was converted to make it for relief of possession on the basis of title. After that the second application came to be filed for the same relief and

this application is also rejected. Initially the present proceeding was filed to challenge only the order made on Exh. 80, but then with the permission of the Court prayer was added to quash and set aside the order made on Exh. 62 also.

3. The learned counsel for petitioner submitted that the suit itself was filed on behalf of plaintiff by the power of attorney holder and the contents were verified by the power of attorney holder and affidavits in support of the contentions were also filed by the power of attorney holder of plaintiff. He submitted that in view of the nature of suit, the evidence of the power of attorney holder of the plaintiff will be of formal nature as execution of the sale deed in favour of plaintiff is not disputed by the defendants in written statement. He submitted that nature of transaction is disputed and for that burden will be on defendants to prove the said contention. There is force in this submission. Though the power of attorney holder of the plaintiff was not the witness to any transactions including the transaction of sale, the sale deed is not required to be proved by plaintiff in view of the nature of defence taken by the defendants. Almost entire burden will be on the defendants to prove their case which can be found in the written statement.

4. The learned counsel for petitioner placed reliance on the observations made by the Apex Court in the case reported as **2013 (3) ALL MR 916 (S.C.) [S. Kesari Hanuman Goud Vs. Anjum Jehan & Ors.]** and observations made by this Court in the case reported as **2014 (5) Mh.L.J. 815 [Punjabrao s/o. Ramrao Ingle and Ors. Vs. Himmatrao s/o. Devrao Dhondge and Ors.]**. This Court has considered the observations made by the Apex Court in the case reported as **(2008) 8 SCC 536 [Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and ors.]** and various instances in which the power of attorney holder can give evidence and cannot give evidence are discussed. Relevant facts of the present matter are already quoted and it can be said that the fate of the matter will not depend on the personal knowledge of the power of attorney holder with regard to the reliefs claimed. Though the first order made in the year 2011 was challenged in the year 2015, there are circumstances like inability of the plaintiff to come to the Court and the record is also produced in that regard showing that she is suffering from hearing impairments. She is old and there are aforesaid circumstances. This Court holds that in view of the facts and circumstances of the present matter, the Trial Court ought to have allowed the power of attorney holder of the plaintiff to give evidence on aforesaid circumstances. This

submission needs to be accepted.

5. In the result, Writ Petition No. 1362/2015 is allowed. The orders made by the Trial Court on aforesaid exhibits are hereby set aside. The applications filed by the power of attorney holder of the plaintiff are hereby allowed. In those terms the petition is disposed of.

6. Writ petition No. 10042/2010 is to be listed separately on 5.1.2017 in urgent category.

[T.V. NALAWADE, J.]

SSC/