

**IN THE HIGH COURT OF BOMBAY AT GOA****SECOND APPEAL NO.102/2008**

- 1 Satu B. Gaonkar, s/o. Bombo Gaonkar, aged about 73 years, widower.
- 2 Fondu F. Gaonkar, s/o. Fati Gaonkar, aged about 59 years, married.
- 3 Ram V. Gaonkar, s/o. Vithoba Gaonkar, aged about 72 years, married.
- 4 Arjun Janu Gaonkar, s/o. Janu Gaonkar, aged about 68 years.
- 5 Punum B. Gaonkar, s/o. Bampto Gaonkar, aged about 67 years.
- 6 Janu B. Gaonkar (deleted) s/o. Bhiva Gaonkar, aged about 67 years, widower,
- 7 Kusta L. Gaonkar s/o Lokmu Gaonkar, aged about 67 years, married,  
All agriculturist, Indian Nationals,  
r/o. H.No. Not known, Canibag, ..... **Appellants**  
Fatorpa of Quepem Taluka.

V/s.

Mhalu Purso Gaonkar, s/o. Purso Gaonkar, aged about 60 years, married, agriculturist, r/o. H.No.18, Canibag, Morpirla of Quepem, ..... **Respondent.**  
Taluka.

Mr. Sudesh Usgaonkar and Ms. R. Pereira, Advocates for the appellants.

Mr. V. A. Lawande, and Ms. P. Kaur, Advocates for the respondent.

**CORAM :- F.M. REIS, J.**

**Date : - 5<sup>th</sup> February, 2016.**

**ORAL JUDGMENT :**

Heard Mr. Sudesh Usgaonkar with Ms. Pereira, learned Counsel appearing for the appellants, Mr. V. A. Lawande, and Ms. P. Kaur, learned Counsel appearing for the respondent.

2. The above appeal came to be admitted by an order dated 19<sup>th</sup> March, 2009 on the following substantial questions of law :

1. Whether evidence of PW. 1 could have been accepted particularly when he claims to be a holder of power of attorney and had stated that he had not read the contents of the plaint and he had got the information from his father and therefore, his evidence was hearsay?
2. Whether the First Appellate Court could have proceeded to decree the claim when plaintiff had come out with a case that properties surveyed under nos. 59/1 and 59/2 were single property and when plaintiff had failed in respect of property no. 59/2, and therefore whether the injunction could have been granted in property no. 59/1?

3. Mr. Usgaonkar, learned Counsel appearing for the appellants has pointed out that the respondent, who was the plaintiff in the suit, has not personally entered the witness box and, as such, the evidence recorded of the Power of Attorney holder, on behalf of the respondent, has no value and, as such, there was no legally admissible evidence on record for the Appellate Court to come to the conclusion that the respondent is entitled for the relief sought in the suit. The learned Counsel has, thereafter, taken me through the evidence of PW.1 to point out that such evidence has been recorded on behalf of the plaintiff and, as such, the evidence of PW.1 has to be discarded as he has no personal knowledge of the facts of the case. The learned Counsel, as such, points out that on this count alone, the appeal deserves to be allowed and the impugned Judgment passed by the learned Appellate Court deserves to be quashed and set aside.

4. On the other hand, Mr. V.A. Lawande, learned Counsel appearing for the respondent has pointed out that PW.1 is the son of the original plaintiff who was old and, as such, was well conversant with the facts of the case. The learned Counsel further submits that the dispute has been adjudicated by the Appellate Court primarily on the

basis of the documentary evidence and such documents have been duly exhibited and read in evidence. In support of his submission, the learned Counsel has relied upon a Judgment reported in **2006 (1) ALL MR 617** in the case of ***Shri Ramkrishna Bapu Kotkar vs. Shri Namdeo alias Narayan Nagesh Kotkar***.

5. I have considered the submissions of the leaned Counsel and I have also gone through the records. The substantial questions of law framed by this Court can be answered based on the Judgment of the Apex Court reported in **(2013) 12 SCC 64**, in the case of ***S. Kesari Hanuman Goud vs. Anjum Jehan and others***, wherein it has been observed at para 23, thus :

“ **23.** It is a settled legal proposition that the power-of-attorney holder cannot depose in place of the principal. The provisions of Order 3 Rules 1 and 2 CPC empower the holder of the power of attorney to “act” on behalf of the principal. The word “acts” employed therein is confined only to “acts” done by the power-of-attorney holder, in exercise of the power granted to him by virtue of the instrument. The term “acts”, would not include deposing in place and instead of the principal. In other words, if the power-of-attorney holder has preferred any “acts” in pursuance of the power of attorney, he may

depose for the principal in respect of such acts, but he cannot depose for the principal for acts done by the principal, and not by him. Similarly, he cannot depose for the principal in respect of a matter, as regards which, only the principal can have personal knowledge and in respect of which, the principal is entitled (*sic* liable) to be cross-examined. (See *Vidhyadhar v. Manikrao* (1999) 3 SCC 573, *Janki Vashdeo Bhojwani v. Indusind Bank Ltd.* (2005) 2 SCC 217, *Shankar Finance and Investments v. State of A.P.* (2008) 8 SCC 536 and *Man Kaur v. Hartar Singh Sangha*, (2010) 10 SCC 512.)

The Apex Court in an earlier Judgment reported in (2010) 10 SCC 512, in the case of *Man Kaur (Dead) by LRs. vs. Hartar Singh Sangha*, has observed at para 18, thus :

“ 18. 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 authorised 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 recognised 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.”

Taking note of the said observations and the ratio laid down therein, I find that on perusal of the evidence in the present case it is seen that PW.1 being the son of the original plaintiff has stated that he was conversant with the facts of the case and has personal knowledge of the facts. The said witness has stated the facts to his personal knowledge and, as such, the contention of Mr. Lawande, learned Counsel appearing for the appellants that his evidence deserves to be discarded, cannot be accepted. The first substantial question of law is answered accordingly.

7. On perusal of the findings of the Appellate Court, it is seen that the learned Judge has come to the conclusion that the respondent is not entitled for any relief, as far as the property bearing Survey No.59/2

of Morpilla Village is concerned, based on the material on record. The learned Judge, however, found that as far as the property bearing Survey No.59/1 Morpilla Village is concerned, the respondent has established his claim of possession over the disputed property and granted the relief of permanent injunction. The findings have been arrived at based on rent receipts and the evidence of the official of the Comunidade to come to the conclusion that the respondent was in possession of the disputed property. On perusal of the findings of possession, though the respondent has not conclusively established his right to be in possession, I find that the findings of possession which is a question of fact, cannot be reappreciated by this Court. During the course of hearing, it was pointed out that the respondent is claiming his right to the subject property surveyed under No.59/1 on the basis that he is a tenant of the Comunidade. But, however, the proceedings to seek such a declaration are stated to be still pending before the Competent Authority. But, however, Mr. Sudesh Usgaonkar learned Counsel appearing for the appellants points out that such purported application was filed in the year 1997 and the respondent is not in a position to confirm or otherwise the outcome of such an application. Hence, granting a blanket permanent injunction as obtained from the

learned Lower Appellate Court is not at all justified. A permanent injunction can be granted only if the right to remain in possession has been established by the plaintiff. In the present case, the claim of such a right is itself being adjudicated before the learned Mamlatdar. In such circumstances, unless there is specific declaration obtained from the Competent Authority, and when the relief claimed by the respondent is not traceable to his right to remain in possession, the question of granting a permanent injunction in favour of the respondent would not arise.

8. Be that as it may, in a case where such proceedings are pending, it is always open to the respondent to file an appropriate application before the Competent Authority seeking such a relief. In the present case, the appellants are not claiming an independent ownership right over the disputed property, but through a tenant of the Comunidade as admitted by Mr. Usgaonkar, the learned Counsel appearing for the appellants. This situation is clearly covered under Section 7 of the Agricultural Tenancy Act and, as such, the question of granting an injunction by the Civil Court would not arise. The learned Lower Appellate Court has failed to examine such aspect whilst

coming to the conclusion that the respondent was entitled for a permanent injunction. Reserving the right of the respondent to file such proceedings before the competent authority, if so advised, I find that the second substantial question of law, framed in the above appeal, has to be answered in favour of the appellants.

9. In view of the above, the appeal is allowed. The impugned Judgment and Decree dated 25/04/2008, passed by the District Judge -3, South Goa, Margao in Regular Civil Appeal No.27/2008 is quashed and set aside. There shall be no order as to costs.

**F.M. REIS, J.**

ssm.