

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER NO.208 OF 2015
along with
CIVIL APPLICATION NO.471 OF 2015
in
APPEAL FROM ORDER NO.208 OF 2015**

Vijay B. Sharma
through his constituted attorney
Kamalkishor B. Sharma .. Appellant
Vs.
Chetanarayan S.Singh .. Respondent

Mr.Vinay A. Rathi for the original appellant-Mr.Vijay B.Sharma.
Mr.Sunny Shah i/by Mr.Ashish Dubey for Mr.Kamalkishor Sharma.
Mr.Y.S.Bhate for the respondent.

CORAM : R.D. DHANUKA, J.
DATE : 29th February 2016

P.C.

. Mr.Kamalkishor Badriprasad Sharma has filed this appeal as alleged constituted attorney of Mr.Vijay Badriprasad Sharma who is his brother, by exercising his alleged powers under power of attorney alleged to have been attested by notary public on 10th August 2005.

2. The original plaintiff raised an objection before the learned trial Judge against the alleged constituted attorney Mr.Kamalkishor Sharma who represented Mr.Vijay B. Sharma. Learned trial Judge took cognizance of the objection raised by the original plaintiff in the impugned order and observed that there was no authenticated document with constituted attorney to prosecute the claim for and on behalf of the defendant. The learned trial Judge also placed reliance on the judgment

of this Court in the case of ***Nirav Deepak Modi Vs.Najoo Behram Bhiwandiwalla & Ors.***, reported in ***AIR 2012 Bom 50***. Notice of motion filed by the said alleged power of attorney holder came to be dismissed by the City Civil Court.

3. In view of the objection raised by the learned counsel for the respondent in this appeal from order, this Court by an order dated 3rd February 2016 directed the office to issue notice to Mr.Vijay Badriprasad Sharma with a direction to remain present and inform this Court as to whether he had executed any such power of attorney dated 10th August 2005 in favour of Mr.Kamalkishor Sharma and whether such power of attorney is in existence. He was also directed to disclose whether he had instructed Mr.Kamalkishor Sharma to file this appeal from order in this Court. This Court directed that the original of the said alleged power of attorney shall remain on record of this Court till next date. Pursuant to the said notice, Mr.Vijay B. Sharma appeared in this Court through his advocate and raised his objection contending that the said power of attorney relied upon by Mr.Kamalkishor Sharma was not genuine power of attorney and the said Mr.Kamalkishor Sharma has misled this Court. It is further stated that the said Mr.Kamalkishor Sharma has fraudulently represented him in this appeal.

4. Learned counsel for the appellant also filed a compilation of documents for perusal of this Court and strongly raised an objection against Mr.Kamalkishor Sharma who represented the appellant in this appeal and states that he never allowed Mr.Kamalkishor Sharma to represent him either before this Court or before the City Civil Court.

5. Learned counsel for the appellant -Mr.Vijay B. Sharma also invited my attention to the alleged power of attorney which is alleged to have been notarised by Dr.Satish C. Srivastava on 10th August 2005. He submits that the said General Power of Attorney could not have been acted upon by his brother Mr.Kamalkishor Sharma. He submits that the said alleged power of attorney is not even dated.

6. Learned counsel appearing for the respondent invited my attention to the observation made by the learned trial Judge about the authority of Mr.Kamalkishor Sharma to file the said notice of motion. He submits that the said power of attorney is neither dated nor alleged to have been attested in presence of the Notary Public. He submits that the signature of the Notary Public on the power of attorney clearly indicates that Notary Public at the most was alleged to have attested on the instructions of Mr.Vijay Sharma and the said Mr.Vijay Sharma had not signed before the Notary Public. He also placed reliance on the judgment of this Court in the case of *Nirav Deepak Modi (supra)* which is adverted to by the learned trial Judge in the impugned order.

7. Learned counsel appearing for Mr.Kamalkishor Sharma tried to justify the action of his client on the ground that power of attorney was executed in favour of Mr.Kamalkishor Sharma. He submits that the said Mr.Vijay Sharma had executed a release deed in favour of Mr.Kamalkishor Sharma. In that release deed, there was a reference to the pending suit filed by the respondent herein before the City Civil Court. He submits that under the release deed, Mr.Vijay Sharma had specifically given the authority in favour of Mr.Kamalkishor Sharma to represent him in the said pending suit before the City Civil Court. He

submits that the Power of attorney was also executed by Mr.Vijay Sharma in favour of Mr.Kamalkishor Sharma on the same date. A copy of the said alleged deed of release was tendered across the bar. The dates on the said release deed and on the power of attorney are 10th August 2005. He submits that an interest was created in favour of Mr.Kamalkishor Sharma by Mr.Vijay Sharma in respect of the suit property and in respect of such interest, a power of attorney was executed in favour of Mr.Kamalkishor Sharma. The said power of attorney was irrevocable power of attorney and was coupled with interest and thus could be exercised by Mr.Vijay Sharma. He submits that Mr.Kamalkishor Sharma has already filed a suit in the City Civil Court bearing No.2844 of 2013 inter alia praying for specific performance of release deed as well as power of attorney. The said suit is pending.

8. Reliance is placed on Section 202 of the Indian Contract Act, 1872 in support of his submission that since irrevocable power of attorney has been executed thereby creating interest in favour of Mr.Kamalkishor Sharma, the same could not be revoked.

9. Without going into the issue as to whether such power of attorney and deed of release had been at all executed by Mr.Vijay Sharma in favour of Mr.Kamalkishor Sharma or not, a perusal of the documents produced by Mr.Kamalkishor Sharma including the deed of release clearly indicates that both the documents are undated.

10. A perusal of the alleged attestation of Dr.Satish C.Srivastava, Notary Public clearly indicates that signatures on the documents were

not affixed before the Notary Public. The Notary Public appears to have attested the signature which is not in compliance with the principles laid down by this Court in the case of *Nirav Deepak Modi (supra)*.

11. In so far as the submission of the learned counsel for Mr.Kamalkishor Sharma that the power of attorney is coupled with interest is concerned, I have perused deed of release as well as power of attorney relied upon by Mr.Kamalkishor Sharma and I am of the prima facie view that no interest of whatsoever nature is created by Mr.Vijay Sharma in favour of Mr.Kamalkishor Sharma in respect of the suit property. In my view, Section 202 of the Indian Contract Act, 1872 does not apply to the facts of this case and would not support the case of Mr.Kamalkishor Sharma. Be that as it may, the said Mr.Kamalkishor Sharma has already filed a suit in the City Civil Court, Dindoshi bearing No.2844 of 2013 inter alia praying for specific performance of the said release deed and also power of attorney.

12. Learned counsel appearing for Mr.Kamalkishor Sharma upon clarification has informed this Court that the said suit is pending and no adjudication so far is made in favour of Mr.Kamalkishor Sharma on the issue whether such power of attorney was executed in favour of Mr.Kamalkishor Sharma or not, or whether he can be allowed to act upon the said power of attorney. In my view, in view of pendency of the said suit, even otherwise Mr.Kamalkishor Sharma cannot represent Mr.Vijay Sharma in view of his objection that he has not authorised Mr.Kamalkishor Sharma to represent him before this Court as well as the City Civil Court and also not authorised to file this appeal. It is for the

said Mr.Vijay Sharma to file appropriate proceedings against Mr.Kamalkishor Sharma for representing him in the Court without authority.

13. Since the original defendant who was made a party to the suit in the City Civil Court and has come before this Court and states that Mr.Kamalkishor Sharma is not an authorised person to file this appeal, this appeal cannot be entertained at the instance of Mr.Kamalkishor Sharma, the alleged constituted attorney of Mr.Vijay Sharma. The appeal is accordingly dismissed. Original power of attorney on which Mr.Kamalkishor Sharma is relying upon shall be transmitted to the Registrar of the City Civil Court for safe custody. Mr.Kamalkishor Sharma is directed to pay cost of Rs.25,000/- to Mr.Vijay Sharma within one week from today. In view of dismissal of the appeal from order, civil application does not survive and is accordingly dismissed.

R.D. DHANUKA, J.