

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 634 OF 2014

SHRI. UMESH RAGHUNATH SINAI BORKAR
REP. ATTORNEY ANANDRAO SHENVI
BORKAR. AND 4 ORS.

... Petitioners

Versus

SHRI SADANAND DHARMU NAIK 24 ORS.

... Respondents

Mr. Ashwin D. Bhobe, Advocate for the petitioners.
Mr. Gaurish N. Agni, Advocate for the respondent nos.1& 2.

Coram:- M. S. SONAK, J.

Date:- 25th April, 2017

ORAL ORDER

Heard Mr. A. Bhobe, learned Advocate for the petitioners and Mr. G. Agni, learned Advocate for the respondent nos.1 and 2.

2. Mr. Bhobe, points out that all the remaining respondents except the legal representatives of respondent no. 6 have been served. He points out that the respondent no.6 was also and consequently his legal representatives are formal parties. He also points out that none of the legal representatives of the respondent no.6 had opposed the petitioner's application upon which the impugned order dated 19.8.2014 came to be made. The opposition was only by the respondent nos.1 and 2 who are now represented by Advocate Mr. G. Agni. In this view of the matter, leave is granted to delete the legal heirs of respondent no.6 as

their presence is not necessary for the purpose of deciding the issue in this petition. Necessary amendment to be carried out forthwith. Considering the issue involved, the petition is taken up for final disposal at this stage itself.

3. The challenge in this petition is to the order dated 19.8.2014 by which the petitioners who are the original plaintiffs have not been permitted to depose through Power of Attorney Mr. Haren Anandrao Shenvi Borkar. Mr. Bhole, learned Counsel for the petitioners submits that there can be no blanket bar to its deposition through power of attorney holder. The question of evidentiary value is to be decided at later stage and the threshold deposition through power of attorney cannot be prevented. He submits that certain observations in the impugned order are pre-mature and on the basis of such observations made to examine the power of attorney for and on behalf of the plaintiffs not to have been denied.

4. Mr. Agni, learned Counsel for the respondent nos.1 and 2 relied upon the decision of the Apex Court in the case of Janki Vashdeo Bhojwani and another vs. Indusind Bank Ltd and others, AIR 2005 SC 439 and Man Kaur(dead) by Lrs. Vs. Hartar Singh Sangha, (2010) 10 SCC 512 to submit that power of attorney cannot depose in place of and instead of the principal, since, deposition is mainly about the facts which are to the personal knowledge of the deponent. He submits that if parties to the suit do not enter the witness box and set out their own case

on oath or do not offer themselves for cross examination, a presumption would arise that case set out by them is not correct. For this reason Mr. Agni submits that there is no reason to fault the view taken by the learned Trial Judge in the impugned order.

5. The learned Trial Judge has basically held that petitioners/plaintiffs who themselves are fit enough to depose in the matter. The learned Trial Judge further assuming that one of the plaintiff is not well, remaining plaintiffs are competent to depose in the matter. Further the learned trial Judge has held that power of attorney holder cannot depose in the matter about which he does not have personal knowledge. In such circumstances, the learned Trial Judge has reasoned in case examination of the power of attorney is permitted, same will be wastage of judicial time and cause inconvenience and hardship to the defendants in the suit.

6. Reasoning of the learned Trial Judge cannot be appreciated in its entirety. It is true that witness has to depose all the facts within his personal knowledge. At this stage it is too pre-mature to fathom what the power of attorney will depose. In case the power of attorney seeks to depose upon the matter which are not within his personal knowledge, then, such deposition will hardly have any evidentiary value. However, at this stage it is too pre-mature to say that power of attorney ought not to be permitted even to step into the box for or on behalf of the

petitioners/plaintiffs.

7. The decision upon which Mr. Agni, has placed reliance will be relevant depending upon the deposition of the witness/power of attorney holder. If the deposition falls foul in the principle laid down by the Supreme Court to that extent, evidence of the power of attorney may have to be excluded or overlooked. However, it is too pre-mature to say that because this might happen, leave to examine the power of attorney should be declined. On this short ground the impugned order warrants interference.

8. Accordingly, plaintiff nos.2 to 5 have constituted the plaintiff no.1 as their power of attorney and the plaintiff no.1 in pursuance thereof has sub delegated powers to his attorney Mr. Haren Borkar. This means that attorney seeks to depose on behalf of all the plaintiffs. There is no reason not to permit power of attorney to depose. Evidentiary value of his deposition shall however be determined by the Court in accordance with law and the principle laid down by the Hon'ble Supreme Court in various decision holding the field.

9. The impugned order is accordingly set aside. The petitioners are granted leave to examine Mr. Haren Anandrao Shenvi Borkar as power of attorney holder. The issue of evidentiary value as such is left open to be examined by the trial Judge in accordance with law and on its own merits.

10. Since, the suit is pending since the year 2009, the same is

expedited. The learned Trial Judge to endeavor to dispose of the suit itself in accordance with law on its own merits expeditiously and in any event within a period of one year. Interim order, if any, stands vacated.

11. Petition stands disposed off accordingly with no order as to costs.

M. S. SONAK, J.

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