

**120 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

RSA No. 5809 of 2014(O&M)

Date of decision : 17.11.2017

Naini Jain

..... Appellant

versus

Karan Singh and another

..... Respondents

CORAM : HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr.C.B.Goel, Advocate for the appellant.

AMIT RAWAL, J. (Oral)

Appellant-plaintiff is aggrieved of the concurrent finding of fact whereby his claim in a suit seeking specific performance of the agreement to sell dated 10.10.2003 allegedly executed between Naini and Karan Singh has been dismissed.

As per the facts emanating from the pleadings and the documents of the courts below, an agreement to sell dated 10.10.2003 was executed between Naini (wife of Vikas Jain) and Karan Singh to the extent of 1/30 share in the suit land comprised in Khewat No. 104, Khata No. 136, Killa Nos. 21/17/1, 23, 24, 31/3/1, 21/17/2/18, 19 Kitta 7 total measuring 50 kanals 2 marlas situated in Mouja Sarai Ahmad, Tehsil and District Rohtak.

According to the plaintiff, the entire sale consideration of ₹ 60,000/- was paid. However, the defendant No.1, fraudulently and illegally at the back of the plaintiff sold the aforementioned land to defendant No.2 vide sale deed dated 2.9.2005 and in this regard a legal notice 19.12.2005

Ex.P1 was sent calling upon defendant No.1 to perform his part of the agreement. Having failed to do so, the suit aforementioned was filed on 1.3.2006. In regard to her submissions made in the plaint, appellant-plaintiff produced on record registered notice, registered envelope, agreement to sell and General Power of Attorney.

On the contrary defendant No.1 did not appear and was proceeded ex parte. However, defendant No.2 contested the suit by taking all the objections and denied the agreement to sell between defendant No.1 and the plaintiff.

The Courts below have non-suited the plaintiff on the premise that the plaintiff has not stepped into the witness box but her attorney namely Kulbhushan Jain, her father-in-law appeared on the basis of General Power of Attorney Ex.P8.

Learned counsel for the appellant has submitted that the aforesaid GPA was conversant with the facts of the case and all other attenuating circumstances relating to the agreement to sell. Out of the two attesting witnesses, namely, Azad and Om Parkash only, Om Parkash has been examined as PW2 yet the Court did not find favour with his testimony and rejected the suit. It is submitted that General Power of Attorney amongst the relatives is acceptable and, therefore, could not have been rejected for non-appearance of the plaintiff. Accordingly, when defendant No.1 did not contest the suit, the sale deed in favour of defendant No.2 was illegal and invalid and thus urges the Court for setting aside the same.

I have heard learned counsel for the parties and perused the record and am of the view that there is no force in the arguments of learned counsel for the appellant. The law on the interpretation of the provisions of

Order 3 Rule 1 CPC is no longer res integra and the Hon'ble Supreme Court in **Man Kaur(D) by LRs v. Hartar Singh Sangha** 2010(10) SCC 512 had laid down that the principles vis-a-vis the authority being given to the attorney, who was conversant with the facts and circumstances of the case.

The relevant portion of the same is as under:-

“11. To succeed in a suit for specific performance, the plaintiff has to prove: (a) that a valid agreement of sale was entered by the defendant in his favour and the terms thereof; (b) that the defendant committed breach of the contract; and (c) that he was always ready and willing to perform his part of the obligations in terms of the contract. If a plaintiff has to prove that he was always ready and willing to perform his part of the contract, that is, to perform his obligations in terms of the contract, necessarily he should step into the witness box and give evidence that he has all along been ready and willing to perform his part of the contract and subject himself to cross examination on that issue. A plaintiff cannot obviously examine in his place, his attorney holder who did not have personal knowledge either of the transaction or of his readiness and willingness. Readiness and willingness refer to the state of mind and conduct of the purchaser, as also his capacity and preparedness on the other. One without the other is not sufficient. Therefore a third party who has no personal knowledge cannot give evidence about such readiness and willingness, even if he is an attorney holder of the person concerned.

12. 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 authorized 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 recognized 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."

Concededly the agreement to sell aforementioned was entered

into between the parties on 10.10.2003, whereas, legal notice was sent on 19.12.2005 . The General Power of Attorney between the parties was of the year 2004. The evidence of the aforesaid GPA was subjected to cross-examination who feigned ignorance with regard to the nature of land, location and even the area. He even did not know whether the defendant No.1 had appended his signatures or thumb impressions on the agreement to sell and defendant had been deprived of the right of cross-examination of the plaintiff. The view of mine is also derived from the ratio decidendi culled out by the Hon'ble Supreme Court in **Vidhyadhar v. Manikrao and another**, 1999(3) SCC 573. The relevant portion thereof (para 17) is reproduced hereunder:-

“17. Where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in [Sardar Gurbakhsh Singh v. Gurdial Singh and Anr.](#) This was followed by the Lahore High Court in [Kirpa Singh v. Ajaipal Singh and Ors.](#) AIR (1930) Lahore 1 and the Bombay High Court in [Martand Pandharinath Chaudhari v. Radhabai Krishnarao Deshmukh](#) AIR (1931) Bombay 97. The Madhya Pradesh High Court in [Gulla Kharagjit Carpenter v. Narsingh Nandkishore Rawat](#) also followed the Privy Council decision in Sardar Gurbakhsh Singh's case (supra). The Allahabad High Court in [Arjun Singh v. Virender Nath and Anr.](#) held that if a party abstains from entering the witness box, it would give rise to an adverse inference adverse against him. Similarly, a Division Bench of the Punjab & Haryana High Court in [Bhagwan Dass v. Bhishan Chand and Ors.](#) , drew a presumption under [Section 114](#) of the Evidence Act, 1872 against a party who did not enter into the witness box.”

Dismissed.

(AMIT RAWAL)
JUDGE

November 17, 2017
sunita

Whether speaking/reasoned	Yes/No
Whether Reportable	Yes/No