

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

RSA No.2110 of 2016 (O&M)

Date of decision:21.05.2018

Mukhtiar Singh

... Appellant

Vs.

Swaran Singh and others

... Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Dr. Anmol Rattan Sidhu, Senior Advocate with
Mr. I.P.S.Kohli, Advocate and
Mr. Shiv Sharma, Advocate
for the appellant.

AMIT RAWAL J. (Oral)

The appellant-plaintiff is in Regular Second Appeal against the judgments and decrees of both the Courts below, whereby, suit for possession by way of specific performance of the agreement to sell dated 22.5.2006, has been dismissed by the trial Court and affirmed by the Lower Appellate Court.

The appellant-plaintiff instituted the suit in respect of suit property measuring, i.e., two pieces of land 38 kanals 5 marlas agreed to be sold @ Rs.9 lacs per acre, i.e., Rs.43,03,125/-. The entire sale consideration was stated to have been paid, whereas, the stipulated date for execution and registration of the sale deed was 25.11.2007. It was averred that breach at the instance of the defendant occurred when two sale deeds dated 10.07.2006 and 22.01.2007 were executed giving cause of action to file

the suit on 14.02.2007 before expiry of the stipulated date and sought the discretionary relief, for, the plaintiff had always been ready and willing to perform his part of the contract.

Defendant No.1/vendor was proceeded against ex parte. The subsequent vendees, i.e., defendants No.2, 4 and 7 filed separate written statement. The plea of maintainability of suit as per the provision of Order 2 Rule 2 CPC was raised.

The trial Court on the basis of pleadings framed as many as six issues including the issue of Relief. However, the claim of the plaintiff was rejected on the following grounds:-

- i) plaintiff did not put in appearance;
- ii) concededly, agreement to sell had not been proved, for, handwriting expert had admitted the signatures of the vendor/defendant No.1 from the photocopy;
- iii) there was no signature of the co-vendee/co-purchaser.

The appeal laid before the Lower Appellate Court also met with the same fate.

Dr. Anmol Rattan Sidhu, Senior counsel assisted by Mr. I.P.S.Kohli, Advocate and Mr. Shiv Sharma, Advocate for the appellant submits that judgments and decrees of the Courts below are not sustainable in the eyes of law, for, not only readiness and willingness but the execution of the agreement to sell had been proved to the hilt. Non-appearance of the plaintiff was not fatal to the adjudication of the suit, for, handwriting expert had taken the signature of Sawaran Singh from the

certified copy of power of attorney from the Court record only. The findings of the Courts below are liable to be set aside. As per the settled law, signatures of a co-vendee would not be ground for negating the discretionary relief and thus, urges this Court for setting aside the findings under challenge.

I have heard the learned counsel for the appellant-plaintiff, appraised the judgments and decrees of the Courts below and of the view that there is no force and merit in the submissions of Dr. Sidhu, for, appellant-plaintiff had failed to appear. No explanation has come forward of non-examination. Even if he was suffering from illness, could have availed the services of Local Commissioner or other mode and means which have been permitted as per the amendment in the Indian Evidence Act. Non-examination of the plaintiff is one of the most fatal ground for not granting the discretionary relief.

The aforementioned view of mine is derived from para 10 of the judgment rendered by the Hon'ble Supreme Court in **Man Kaur (dead) by Lrs Vs. Hartar Singh Sangha 2011(1) RCR (Civil) 189**. Para 10 of the aforementioned judgment reads thus:-

“10. We may next refer to two decisions of this Court which considered the evidentiary value of the depositions of attorney holders. This Court in [Janki Vashdeo Bhojwani vs. Indusind Bank Ltd.](#) - 2005 (2) SCC 217, held as follows:

"Order III, Rules 1 and 2 CPC, empowers the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order III, Rules 1 and 2 CPC, confines only in respect of "acts" done by the power of attorney holder in exercise of power granted by 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 rendered some "acts" in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.

....In the case of [Shambhu Dutt Shastri v. State of Rajasthan](#), 1986 2 WLN 713 (Raj) it was held that a general power of attorney holder can appear, plead and act on behalf of the party but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in witness box on behalf of himself. To appear in a witness box is altogether a different act. A general power of attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff.

The aforesaid judgment was quoted with the approval in the case of [Ram Prasad v. Hari Narain](#) - AIR 1998 Raj 185. It was held that the word "acts" used in Rule 2 of Order III of the CPC does not include the act of power of attorney holder to appear as a witness on behalf of a party. Power of attorney holder of a party can appear only as a witness in his personal capacity and whatever knowledge he has about the case he can state on oath but he cannot appear as a witness on behalf of the party in the capacity of that party. If the plaintiff is unable to appear in the court, a commission for recording his evidence may be issued under the relevant provisions of the CPC.

We hold that the view taken by the Rajasthan High Court in the case of Shambhu Dutt Shastri followed and reiterated in the case of Ramprasad is the correct view."

[In Shankar Finance & Investments vs. State of AP](#) - (2008) 8 SCC 536, this Court explained in what circumstances, the evidence of an attorney holder would be relevant, while dealing with a complaint under [section 138](#) of the Negotiable Instruments Act, 1881 signed by the attorney holder of the payee. This Court held :

"A power of attorney holder of the complainant, who does not have personal knowledge, cannot be examined. But where the attorney holder of the complainant is in charge of the business of the complainant and the attorney holder alone is personally

aware of the transactions, and the complaint is signed by the attorney holder on behalf of the complainant payee, there is no reason why the attorney holder cannot be examined as the complainant.....In regard to business transactions of companies, partnerships or proprietary concerns, many a time the authorized agent or attorney holder may be the only person having personal knowledge of the particular transaction; and if the authorized agent or attorney-holder has signed the complaint, it will be absurd to say that he should not be examined under section 200 of the Code, and only the Secretary of the company or the partner of the firm or the proprietor of a concern, who did not have personal knowledge of the transaction, should be examined."

As far as finding of the Courts below vis-a-vis for want of signature of co-vendee is concerned, I am in agreement with the submissions of Mr. Sidhu as it is not mandatory requirement of law. The aforementioned finding, in my view, is obiter but still would not help the plaintiff, for, agreement to sell, much less continuous readiness and willingness had not been proved. Once the onus, as enshrined under Section 101 of Indian Evidence Act, has not been discharged, the Court below had no other choice but to decline the relief as sought.

As regards granting of alternative relief, a plea of refund of earnest money has also been negated, for, non-proving the agreement to sell.

As an upshot of my findings, I do not find any illegality and perversity in the judgments and decrees of the Courts below which are based upon the appreciation of oral and documentary evidence, much no substantial question of law arises for adjudication of the present appeal.

No other argument has been raised.

Accordingly, the appeal stands dismissed.

(AMIT RAWAL)
JUDGE

May 21, 2018
savita

Whether Speaking/Reasoned	Yes/No
Whether Reportable	Yes/No