

IN THE HIGH COURT OF BOMBAY AT GOA.

SECOND APPEAL NO. 105 OF 2005.

Shri Dharma Shambu Parab
Palyekar, major, s/o Shambu
Parab Palyekar, businessman,
r/o Naikwawaddo,
Calangute, Bardez, Goa.

..... Appellant.

Versus

1. Shri Raul Pinto Lobo,
major, landlord,
r/o Calangute, Bardez, Goa,
Presently residing at Rosita
Building, 1st floor, Waroda Road,
Bandra, Mumbai, represented by
his lawful attorney Shri Jose Antonio
Tito Vas, major, s/o late Albert Vas,
r/o H. No. 825, Portavaddo, Siolim,
Bardez-Goa.

2. Shri Reuben Franco,
major, s/o Vincent Franco,
unemployed, unmarried,
r/o Umtavaddo, Calangute,
Bardez, Goa.

..... Respondents.

Shri S. Shet, Advocate for the Appellant.
None for the respondents.

Coram:- PRITHVIRAJ K. CHAVAN, J.
Reserved on: 22nd August 2019.
Pronounced on:- 5th September 2019

JUDGMENT:-

This appeal came to be admitted on 20.10.2005 on the following substantial question of law:-

“Whether the findings of the First Appellate Court that the plaintiff has proved his case of undue influence and duress is perverse being contrary to law, material and evidence adduced by the parties?”

2. None appeared on behalf of the respondents.
3. Shri Shet, learned Counsel for the appellant has taken me through the judgment of trial Court as well as the lower Appellate Court. It is submitted that the learned Trial Court has correctly and properly appreciated the facts and evidence on record and reached a legal conclusion that the suit was required to be dismissed with costs. However, learned Additional Sessions Judge while dealing with an appeal by the plaintiff reversed the findings erroneously by not correctly appreciating the evidence and facts on record vis-a-vis law.
4. Briefly stated, the facts are that a suit for declaration and

cancellation of deed of declaration dated 22.10.1998 notarised on 24.10.1998 and Power of attorney dated 24.10.1998 has been filed. The plaintiff is the owner in possession of immovable property known as Aradi Ghorbhat surveyed under survey no.421/1 situated at Naikawaddo, Calangute, Bardez Goa.

5. By an agreement dated 20.10.1995, the plaintiff had agreed to sell the suit property to M/s Arlene Relators. A tenancy case was pending before the Mamlatdar which was filed by one Shri Anand Kalangutkar and others to which the father of defendant no. 1 is a party.

6. It was the contention of the plaintiff that defendant no.1 alongwith others had been making attempts to grab the suit property. On 24.10.1998 the defendant no.1 forcibly took the plaintiff to the office of notary public namely Shri P. G. Narulkar by extending threats of causing bodily injuries to the plaintiff. Defendant no.1 obtained his signature over the documents which were neither read over nor explained to him. The plaintiff was shown the places where he was asked to put his signatures by the defendant no.1. Plaintiff was also forced to sign some

register/book by the defendant no.1.

7. It is contended that defendant no.2 had also threatened the plaintiff before going to the office of Advocate Shri P. G. Narulkar by saying that if the plaintiff discloses about the threats to the notary public or if the plaintiff refuses to sign, he and his sister would be killed. The plaintiff was helpless at that time. He subsequently came to know on 28.10.1998 that the documents over which his signatures were obtained were power of attorney and a Deed of Declaration, when he visited the office of Advocate P. G. Narulkar with his lawful attorney. It is contended that though the date of declaration is dated 22.10.1998, signatures were obtained under threats/duress on 24.10.1998. One Pravin Polshet had allegedly identified the plaintiff to whom the plaintiff does not recognize.

8. A complaint came to be lodged with Mapusa police station on 28.10.1998. It is contended that the defendants were called at the police station and were questioned. The Defendants apologized and handed over the originals of the said documents. They requested the

police not to take any further action against them.

9. As the plaintiff had an apprehension that the documents could be misused and would cause serious injury to him, if are not declared as null and void and cancelled, hence the suit.

10. The defendant no.1 in his written statement denied all the allegations and contends that he is one of the tenant in succession who is in possession of the suit property besides other tenants and their family. Plaintiff was trying to oust the defendants and other tenants from the suit property.

11. It is the specific contention of the defendants that the plaintiff had made a declaration on oath in respect of existing facts qua the suit property on 24.10.1998, *inter alia* executing a power of attorney voluntarily in favour of defendant no.2 to act on his behalf in his (plaintiff's) absence. It is contended that fees of Advocate P. G. Narulkar was paid by the plaintiff. The defendant no.1 contends that he was neither a party to the same nor he obtained the signatures of the plaintiff

under threats. It was the plaintiff who had collected the aforesaid documents after their due execution from the notary on the same day.

12. According to the defendants, M/s Arlene relators, a partnership firm is trying to dispossess the defendants and other tenants in defiance of law with the help of attorney of the plaintiff. The plaintiff is, therefore, trying to retract his admission made before the notary. The declaration dated 24.10.1998 is trustful, valid for all purposes which cannot be nullified by seeking its cancellation.

13. It is contended that the plaintiff could have revoked the said power of attorney if it was got executed forcibly. The defendants have theretofore prayed for dismissal of the suit.

14. Defendant no.2 in his written statement contends that there was no cause of action to file the suit. Defendant no.2 has no personal knowledge in the said declaration or any documents and, therefore, there was no question of extending threats to the plaintiff or his sister.

15. After framing necessary issues and after going through the evidence, the learned trial Court dismissed the suit with costs. The learned trial Court has discussed the definition and scope of “*undue influence*” and “*coercion*”. The trial Court disbelieved the testimony of PW1 Jose Antonio Tito Vaz, who deposed as power of attorney on behalf of the plaintiff on the ground that he did not possess any personal knowledge as he was not an eye witness to the alleged incident of forcibly obtaining the signatures of the plaintiff under threats in the office of notary public. It is *inter alia* observed that evidence of PW1 Jose Antonio Tito Vaz is not based on facts of which he was not a witness but is on the information allegedly given by the plaintiff. It is observed that neither the plaintiff nor his sister examined themselves to substantiate their claim. Even Advocate Narulkar has not been examined.

16. The learned trial Court has also considered the aspect of delay of four days in reporting the matter to the police by the plaintiff when the documents alleged to have been signed by him on 24.10.1998 before the notary public, particularly in the light of the fact that the

complaint was also not written by the plaintiff.

17. The learned Lower Appellate Court committed gross error in law and facts while evaluating the evidence on record. The finding arrived at by the learned Lower Appellate Court are against the mandate of Supreme Court in case of *Janaki Vashdeo Bhojwani and another Vs Indusind Bank Ltd. And others*¹

18. The learned Lower Appellate Court on one hand observed that PW1 Jose Antonio Tito Vaz was not personally present when deed of declaration and power of attorney EXh. PW1/B, Exh. PW1/C were executed, it being a hearsay evidence, however, on the other hand it is observed that such findings of the trial Court cannot be countenance since the very purpose of the execution of the power of attorney would be frustrated in case the challenge is offered on the ground as urged. The learned Lower Appellate Court lost sight of scope of Order 3 Rule 1 and 2, Order 18 Rule 4 and 19 as well as order 26 Rule 1 of Code of Civil Procedure. Power to depose in place of principal extends only to the

¹ (2005) 2 SCC 217

deposition in respect “acts” done by power of attorney in exercise of power granted by the instrument. The term “acts” would not include deposing in place of and instead of the principal for “acts” done by principal and not by power of attorney holder. A power of attorney holder cannot depose for principal in respect of matters of which only principal is liable to be cross examined. If principal is unable to appear in court, a commission for recording his evidence may be issued. In the case at hand, it was obligatory for the plaintiff to have entered the witness box and discharge the burden himself. Admittedly, PW1 Jose Antonio Tito Vaz does not have personal knowledge of the alleged undue influence or coercion. As such, he could not have deposed on behalf of the plaintiff nor he he could have been cross examined on such facts.

19. The learned Lower Appellate Court has further committed an error in observing that the plaintiff had explained the four days delay in lodging the complaint with the police on the premise that the documents in question were not in his possession and, therefore, he could not inform his lawyer as to what documents he had signed. Such observations are bereft of any substance for the simple reason that if the plaintiff was

really coerced and unduly influenced to sign the documents in question, he ought to have, on the very same day, informed the police about the alleged so called abduction and forcing him to sign the documents. That should have been the natural conduct of any sane man.

20. Delay has not at all been explained, rather it creates a reasonable doubt about the case of the plaintiff as regards undue influence. No sane man will believe the plaintiff who is a grown up matured person and the owner of the suit property could be unduly influenced by the defendants who were tenants and would succumb to their pressure by signing the documents in question. The position could be other way round so as to say being the owner of the property the plaintiff could have been in a position to dominate the will of his tenants. The entire burden was upon the plaintiff who has come with a specific case of undue influence and coercion. However, he failed to discharge by not entering into the witness box. The learned Lower Appellate Court has erroneously shifted the onus upon the defendants which is against the provisions of law of evidence.

21. The learned Lower Appellate Court has not only failed in appreciating Sections 101,102 and 106 of the Evidence Act but also failed to appreciate the true scope of term “*undue influence and coercion*” as provided in the the Indian Contract Act. An adverse inference is required to be drawn against the plaintiff for not stepping into the witness box as well as not examining his sister who could have been the best witness. No satisfactory explanation has been tendered for withholding the best evidence. The Lower Appellate Court has drawn wrong inference from proved facts by applying the law erroneously.

22. The Supreme Court in the case of ***Janaki Vashdeo Bhojwani and another*** (supra) held at paragraphs 11,12,13 and 17 thus:-

11. *Dr. Singhvi, learned senior counsel appearing for the respondent-bank vehemently contended that the appellants did not grace the box to lead evidence but authorised Mr. V.R. Bhojwani (power of attorney holder) to appear on behalf of the appellants. Learned counsel contended that Mr. Bhojwani was not an independent person to the litigation but was a judgment debtor in the suit and a co-owner of the property and there was a clash of interest between the husband and wife and as such he could not have been permitted to grace the box on behalf of the appellants. He further contended that under Order 3 Rules 1 & 2 CPC a power of*

attorney holder can appear, apply or act in any court but such act cannot be extended to depose in the witness box. He further submitted that in the present case a power of attorney holder is not acting as a witness on behalf of the principal but he is representing the principal himself. He further contended that deposing in a witness box and being cross-examined is a personal act and cannot be done through an agent/power of attorney holder.

12. *In the context of the directions given by this Court, shifting the burden of proving on the appellants that they have a share in the property, it was obligatory on the appellants to have entered the box and discharged the burden by themselves. The question whether the appellants have any independent source of income and have contributed towards the purchase of the property from their own independent income can be only answered by the appellants themselves and not by a mere holder of power of attorney from them. The power of attorney holder does not have the personal knowledge of the matter of the appellants and therefore he can neither depose on his personal knowledge nor can he be cross-examined on those facts which are to the personal knowledge of the principal.*
13. *Order 3, Rules 1 and 2 CPC, empower the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order 3, 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.”

17. *On the question of power of attorney, the High Courts have divergent views. In the case of Shambhu Dutt Shastri Vs. State of Rajasthan, 1986 2WLL 713 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.”*

23. The ratio is squarely applicable to the present set of facts.

24. The learned Lower Appellate Court has laid more emphasis in considering the irrelevant facts rather than considering relevant facts which has given rise to the substantial question of law. The learned Lower Appellate Court has misread the evidence on record.

25. Reversal of the finding on facts arrived at by the learned Lower Appellate Court ignoring the principles of Indian Evidence Act

and the Contract Act has resulted in miscarriage of justice, more particularly in the light of the law laid down by the Supreme Court in the case of *Janaki Vashdeo Bhojwani and another*(supra).

26. Corollary of the aforesaid discussions would obviously result in setting aside the impugned judgment and decree of the Lower Appellate Court.

27. As such, appeal is allowed. The impugned Judgment and decree dated 27.1.2005 passed by the Lower Appellate Court in Regular Civil Appeal No.40/2004 is quashed and set aside. The judgment and decree dated 13.2.2004 passed by the trial Court in Regular Civil Suit No.207/2001/E stands restored.

28. Appeal stands disposed of in the aforesaid terms.

PRITHVIRAJ K. CHAVAN, J.

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