

Sharayu Khot.

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

CHAMBER ORDER NO. 153 OF 2019

IN

SUIT NO. 2689 OF 1995

Alexander George Tone & Ors.

...Applicants

In the matter between

Messrs Sonal Constructions & Ors.

...Plaintiffs

Versus

Alexandra George Tone & Ors.

...Defendants

Ms. Soumya Shrikrishna a/w Mr. Sunil Patel i/b A.J. Jajal, for the Applicants in CHOL/153/2019.

Mr. Akshay Bobade i/b Mr. Y.R. Shah, for the Plaintiffs.

Mr. Sanjay Kothari a/w Sheeja John i/b *M.P. Savla & Co., for Defendant Nos. 1, 4, 8 and 9* in S/2689/1995 and Plaintiffs in S/386/1997.

CORAM : R.I. CHAGLA J.

DATE : 14 June 2019

ORDER :

1. This Chamber Order seeks a discharge of the Advocates for Defendant Nos. 1, 4, 8 and 9, as Advocates on behalf of these Defendants in the above Suit No. 2689 of 1995. A Power of Attorney had been granted in favour of one Shri. Jude Romell and Shri. Domnic Romell (for short "***the said Romells***"). The Power of Attorney was granted in respect of two Suits being Suit No. 2689 of 1995 (the present Suit) and Suit No. 386 of 1997 which had been filed by the Defendants herein in this Court. The present Suit is filed by M/s. Sonal Constructions (Plaintiff No. 1) and the other Plaintiffs for declaration that the agreement dated 4th November 1978 between the Vendors (the Defendants) herein and the said M/s. Sonal Constructions is valid, subsisting and binding upon the Vendors and the termination of the said agreement dated 4th November 1978 by notice dated 6th December 1994 published in concerned newspaper on 14th December 1994 are invalid, illegal and of no consequence whatsoever. The second Suit i.e. Suit No. 386 of 1997 is filed in this Court by the Vendors against

the Plaintiffs herein for declaration of termination of the agreement dated 4th November 1978 between the Vendors and the said M/s. Sonal Constructions. The Power of Attorney in Clause 2 confers power on the said Attorney-holders, the said Romells to appoint any advocates, solicitors or other persons and to sign and execute authority letters, Vakalatnamas and fix and pay their fees as the said Romells may deem fit and proper. Consequent powers in respect of the two suits have also been conferred upon the said Romells. It is stated in clause 8 that this Power of Attorney is irrevocable and the same shall not be revoked for any reason whatsoever. The said Romells had themselves entered into an agreement with the Defendants herein for purchase of Survey No. 26A, Hissa No. 2A, corresponding to C.T.S. Nos. 166, 166/1 to 166/23 and admeasuring about 7803.40 sq.mtrs at Village Mandpeshwar, Taluka Borivali in the Registration District and Sub-District of Mumbai City and Mumbai Suburban together with structures standing thereon (hereinafter referred to as “*the said property*”).

2. It is the case of the Applicants/Defendants herein that they have terminated the Power of Attorney by public notice dated 20th November 2018 and accordingly, do not wish to continue with the Advocates M/s. M.P. Savla & Co., Advocates and Solicitors as their advocates. It appears to be the case of the said Romells that the registered Power of Attorney dated 11th August 2008 is to be considered as a power coupled with an interest and hence irrevocable. It is their case that the agreement for sale entered into between the Applicants and the said Romells conferred interest in the said property on the said Romells and pursuant thereof, they had made certain payments to the Applicants as provided for in Clause 4 of the agreement for sale. Accordingly, they have contended that the Power of Attorney which is an irrevocable Power of Attorney cannot be revoked and has accordingly, opposed the Chamber Order.

3. The learned Counsel for the Applicants has submitted that merely describing the Power of Attorney on the face of it as an irrevocable Power of Attorney does not make it

irrevocable. She has stated that from the tenor of the Power of Attorney, it is apparent that the Power of Attorney is a specific Power of Attorney, in respect of two suits being Suit No. 2689 of 1995 and Suit No. 386 of 1997 filed in this Court. She has stated that there is no interest conferred upon the said Romells by virtue of this Power of Attorney. The only power conferred being to represent the Applicants in the two suits including appointment of the Advocates to represent them. She has stated that the agreement of sale entered into between the Applicants and the said Romells was dependent upon the outcome of the present Suit filed by the Plaintiff No. 1 and that if the Suit was decreed in favour of the Plaintiff No. 1, then the agreement for sale cannot stand. Hence, any interest which the said Romells would have in the said property can only be a subsequent interest, arising upon the Applicants succeeding in the present Suit. She has referred to the judgment of the Supreme Court in *Seth Loon Karan Sethiya Vs. Ivan E. John & Ors.*¹, where the Supreme Court was concerned with the issue as to whether the Power of Attorney in question is a power coupled with interest

¹ AIR 1969 SC 73

and if it is so, whether the same is revocable. She has stated that in the facts of that case the power given to the Bank was to realise the special fund which comprised of the amount under the decree and earmarked for discharge of its debts. This was considered by the Supreme Court to amount in equity to an assignment of the decree in favour of the Bank. In that context the Supreme Court held the Power of Attorney to be a power coupled with interest and hence irrevocable.

4. She has also relied upon the judgment of the Andhra Pradesh High Court in *M. John Kotaiah Vs. A. Divakar & Ors.*² in support of her contention that whether the agent/Power of Attorney-holder subsequently acquires an interest in the property, is irrelevant for declaring the Power of Attorney to be irrevocable. She has submitted that in the present case, the interest would arise only subsequently in favour of the said Romells upon the present Suit being dismissed. Hence, the Power of Attorney is a revocable Power of Attorney and that the Applicants have correctly revoked the Power of Attorney and

² AIR 1985 AP 30

accordingly, the Chamber Order be made absolute.

5. The learned Counsel appearing for *Defendants No. 1, 4, 8 and 9* has submitted that under Section 202 of the Indian Contract Act, 1872, the interest of an agent in the subject matter is to be widely construed and that the interest could also be where the agent had entered into an agreement for purchase of the subject property. He has submitted that in part performance of the agreement for sale, the said Romells have paid consideration set out in clause 4 of the agreement to the Applicants and hence, an interest has arisen in the subject property.

6. He has relied upon the decision of the Delhi High Court in *Shri Harbans Singh Vs. Smt. Shanti Devi*³ in support of his contention that the agreement for sale is also treated as an interest in the subject property and that there is no real difference between a general and special Power of Attorney in that respect. He has also relied upon the judgment of the

3 1977 SCC OnLine Del 102

Madras High Court in *Bommisetti Vasundhara Vs. Pachipulusu Subrahmanyam & Ors.*⁴ in support of his contention that the Application for revocation of the Vakalatnama executed in favour of the advocate by the holder of the irrevocable general Power of Attorney cannot be granted and accordingly, the Chamber Order is required to be not granted.

7. Having considered the submissions, it is apparent from the tenor of the Power of Attorney that it is a specific Power of Attorney only in respect of the two suits. The Power of Attorney includes the power to appoint advocates, solicitors, etc. in respect of the two suits and to prosecute these two suits. It is well settled that merely describing the Power of Attorney on the face of it as irrevocable does not make it irrevocable. The revocability has to be tested. There is merit in the contention of the learned Counsel for the Applicant that the tenor of the Power of Attorney makes it clear that there is no interest conferred upon the said Romells by virtue of the Power of

⁴ 1992 SCC OnLine Mad 23

Attorney. The interest claimed by the said Romells in the said property is a subsequent interest and can only arise if the present Suit is dismissed and the Suit filed by the Applicants is allowed.

8. Further, I do not accept the submission of the learned Counsel appearing for ***Defendants No. 1, 4, 8 and 9*** that merely because certain payments were made under agreement for sale under clause 4 of the said agreement, ***Defendants No. 1, 4, 8 and 9*** had acquired an interest in the subject property. These payments were to be made on execution of the said agreement for sale and did not confer any interest in the said property title upon ***Defendants No. 1, 4, 8 and 9*** merely by making such payments. Further, under clause 3 of the said agreement, the Vendors were to transfer and assign to the purchaser the undivided share, right, title and interest in the said property at lumpsum consideration of Rs. 3.00 Crores, which could only be subsequently enforced. This would necessarily be after the Suit of M/s. Sonal Constructions

(Plaintiff No. 1) claiming specific performance of their agreement with the Vendors to purchase the said property ultimately being dismissed by this Court. It would therefore, necessarily require to be disposed of for prayer to the said Romells claiming any rights in the subject property.

9. Section 202 of the Indian Contract Act, 1872 reads thus:-

“Termination of agency, where agent has an interest in subject-matter.—Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.”

10. It is thus, necessary for the agent to have an interest in the property which forms the subject matter of the agency for the agency to be an irrevocable agency/Power of Attorney and which cannot be terminated to the prejudice of such interest. In the decision of the Supreme Court in ***Seth Loon***

Karan Sethiya (supra), the Supreme Court has expressly held that it is necessary from the tenor of the Power of Attorney that it must be a Power coupled with an interest. In that case, the Power of Attorney was an acknowledgment to pay the due debt to the bank from a special fund created for that purpose comprising of the amount under the decree and hence, the Supreme Court observed that it was an equitable assignment of the amount due under the decree for discharging the debts due to it. Hence, it was a Power of Attorney coupled with interest. In present case from the tenor of the Power of Attorney, there is no interest conferred on the said Romells and they have only being given the power to prosecute the two suits. Further, the decision of the Andhra Pradesh High Court in **M. John Kotaiah** (supra) also holds that an agent/Power of Attorney-holder having subsequently acquired the interest in the property, is irrelevant for the Power of Attorney to be irrevocable. The Power of Attorney must confer an interest upon the agent/Power of Attorney-holder. In the present case at the highest, the said Romells would have a subsequent interest in the said property

which forms the subject matter of the two suits and hence, this subsequent interest cannot be considered whilst determining whether the Power of Attorney is irrevocable.

11. The decision of the Delhi High Court in ***Shri Harbans Singh*** (supra) relied upon by the learned Counsel appearing for ***Defendants No. 1, 4, 8 and 9*** is clearly distinguishable on facts as in that case there was a Power of Attorney authorising the attorney to sell the subject property to the purchaser which in that case was his wife and get the Sale Deed executed, registered and receive an acknowledgment receipt of the consideration and to get the property mutated in favour of the purchaser. In that case, the Power of Attorney-holder being the husband of the purchaser of the subject property had an interest in the subject property and was given the power to effect its sale. It is in that context that the Delhi High Court held that there is no difference between the general and special Power of Attorney (i.e. to pay Government dues) in this respect. The decision of the Madras High Court in

Bommisetti Vasundhara (supra) is also the case of an irrevocable general Power of Attorney and in that context, the Madras High Court held that the Application for revocation of Vakalatnama executed in favour of an advocate by holder of such irrevocable general Power of Attorney cannot be granted.

12. Accordingly, the Chamber Order is required to be granted.

13. Advocates M/s. M.P. Savla & Co. are discharged as Advocates for Defendant Nos. 1, 4, 8 and 9 in the above Suit. The office is directed to take Vakalatnama of the newly appointed Advocates on record. The present Advocates appointed by the Applicants shall act as Advocates on behalf of Defendant Nos. 1, 4, 8 and 9. The Chamber Order is accordingly passed in the above terms. The learned Counsel appearing for the said Romells has applied for stay of this order. In view of the above findings, the Application is rejected.

[R.I. CHAGLA J.]

This order is corrected/modified as per speaking to the minutes of the order dated 05.08.2019.