

AFR

**HIGH COURT OF CHHATTISGARH, BILASPUR****F.A. No. 302 of 2016****Reserved on 09.08.2021****Pronounced on 31.08.2021**

- Smt. Sushila Tiwari W/o Shri Arjun Prasad Tiwari, Aged About 64 Years (Retired Teacher), R/o Near Mela Ground, Rajim, Tahsil Rajim, District Gariyabandh, Chhattisgarh .....Plaintiff

**---- Appellant****Versus**

1. Shri Chandra Prakash Sharma Aged About 60 Years Advocate, Son Of Late Shri Beniram Pandey, R/o Choubey Colony, Raipur, Chhattisgarh.
2. Shri Usmaan Ali S/o Late Ismail Ali, Aged About 41 Years R/o Behind Masjid, Rajim, Tahsil Rajim, District Gariyabandh, Chhattisgarh.
3. State Of Chhattisgarh, Through The Collector, District Gariyabandh, Chhattisgarh .....Defendants.

**---- Respondents**

|                            |                                                                                  |
|----------------------------|----------------------------------------------------------------------------------|
| For Appellant:             | Shri B. P. Sharma, Advocate appears along with Shri Nitesh Jain, Advocate        |
| For Respondent No.1 :      | Shri Manoj Paranjpe, Advocate appears along with Shri Shubhank Tiwari, Advocate. |
| For Respondent No.2:       | None, though served.                                                             |
| For State/Respondent No.3: | Ms. Reena Singh, Panel Lawyer.                                                   |

**Single Bench:Hon'ble Shri Sanjay S. Agrawal, J****CAV Judgment / Order**

1. This appeal has been preferred by the Plaintiff under Section 96 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC') questioning the legality and propriety of the judgment and decree dated 27.08.2016 passed in Civil Suit No.10-A/2013, whereby the learned trial Court has dismissed the suit. The parties to this appeal shall be referred hereinafter as per their description before the Court below.
2. The facts which are essential to be stated for adjudication of this

appeal are that the Plaintiff-Smt. Sushila Tiwari instituted a suit claiming declaration of title with regard to the land in question bearing Khasra No.121/7 admeasuring 0.041 hectare described in plaint Schedule "A" and also for declaration with regard to Khasra No.121/4 admeasuring 0.020 hectare described as "क" "ख" "ग" "घ" "च" in plaint Schedule "B" to the effect that defendant 1-Chandraprakash Sharma has not acquired any interest on it based upon the registered deed of sale dated 28.12.1988 purported to have been executed in his favour by one Uttam Upadhyay, with a further relief of specific performance of contract of it on the basis of compromise deed dated 17.03.2009 (wrongly mentioned in the plaint as 06.04.2009) which was entered with defendant No.2-USmaan Ali and, alternatively claimed for its possession. According to the Plaintiff, she purchased the part of Khasra No.121/2 admeasuring 0.041 hectare situated at village Rajim as shown at the time of alienation by her vendor, namely, Puniya Bai, which is adjacent to her house towards Raipur road under the registered deed of sale dated 30.01.1976 and upon its mutation, it was recorded in revenue paper as Khasra No.121/7 area 0.041 hectare. It is pleaded further that her said vendor Puniya Bai has adopted the Muslim community and got married with one Ismile Ali and upon her demise on 01.12.2007 issueless, the house and plot held by her was inherited by one Usmaan Ali, defendant No.2, who was born from her husband's first wife. It is pleaded further that when she initiated the construction work towards northern side of her plaint Schedule "A" property, a proceeding was initiated by Usmaan Ali before the Tehsildar Rajim, which was registered as Revenue Case No.8-A/121/2008-09. The said proceeding was ended with a compromise on 17.03.2009 and on the said day, an oral agreement

was made between them whereby said Usmaan Ali has agreed to alienate the same to her as shown in red colour in plaint Schedule "B" property for a consideration of Rs.50,000/-, while delivering the possession of it.

3. Further contention of the plaintiff is that when she initiated the construction work after obtaining the possession of the aforesaid suit lands (Schedule "A" and "B"), a proceeding was initiated by defendant No.1- Chandraprakash Sharma under Section 250 of the Chhattisgarh Land Revenue Code, 1959 (hereinafter referred to as 'the Code, 1959) for removal of her possession before the Court of Tehsildar, Rajim, which was registered as Revenue Case No.2-A/70/2010-11. The said proceeding was decided *ex parte* by the said authority vide order dated 06.02.2012 and the plaintiff was directed to handover the possession of the suit lands to said defendant-Chandraprakash Sharma. The said order of the Tehsildar was affirmed further by Sub-Divisional Officer, Gariyabandh vide its order dated 29.06.2012 in Revenue Appeal No.10-A/70-2011-12 and, the revision preferred thereagainst was dismissed by the Collector vide its order dated 29.11.2012 holding it to be barred by its jurisdiction and thereafter the Revision Petition has been preferred before the Court of Commissioner, Raipur.

4. It is pleaded further by the Plaintiff that the vendor of said Chandraprakash, namely, Uttam Upadhyay had obtained the alleged suit land, i.e, Khasra No.121/4 as described in plaint Schedule "B" under an oral and/or unregistered deed of gift from Puniya Bai, therefore, he had no alienable interest to alienate the same to defendant No.1 by virtue of the alleged registered deed of sale dated 28.12.1988. It is pleaded further that since the said defendant based upon the aforesaid order of the Tehsildar,

Rajim has questioned the ownership of her, therefore, she has been constrained to institute the suit in the instant nature.

5. While denying the aforesaid claim, it is pleaded by defendant No.1-Chandraprakash Sharma that he acquired his valid right, title and interest with regard to the land in question, i.e., Khasra No.121/4 admeasuring 0.020 hectare under the registered deed of sale dated 28.12.1988 and which has never been questioned by its erstwhile owner, namely, Puniya Bai during her lifetime and, the Plaintiff being a stranger has no locus to question the validity of the same. The claim as made is, therefore, liable to be dismissed with costs.

6. Defendant No.2 has supported the Plaintiff's claim.

7. The trial Court, after considering the evidence led by the parties, arrived at a conclusion that defendant No.2-USmaan Ali being a stepson of said Puniya Bai was not her legal heir and was, therefore, not competent to alienate the property in question bearing Khasra No.121/4 admeasuring 0.020 hectare to the Plaintiff. It held further that by virtue of the registered deed of sale dated 28.12.1988, the alleged suit property was purchased by defendant No.1-Chandraprakash Sharma from one Uttam Upadhyay and in absence of questioning the alleged sale either by its erstwhile owner Puniya Bai or by his said vendor Uttam Upadhyay, it cannot be held to be invalid. It held further that the Plaintiff, being a stranger to the alleged sale, has no right to assail the same and observed further that as defendant No.1 was neither the party to the alleged compromise deed nor the property in question was agreed to be sold under it, therefore, the suit for specific performance of contract cannot be held to be maintainable. In consequence, the trial Court has dismissed the claim.

8. Learned counsel appearing for the Appellant/Plaintiff submits that the finding of the Court below holding that defendant No.2-USmaan Ali is neither the heir of said Puniya Bai nor is competent to alienate the property in question, is apparently contrary to law. It is contended further that in a suit for specific performance of contract, the Court below ought to have framed the issue regarding readiness and willingness of the Plaintiff and having failed to do so, the Court below has erred in dismissing the Plaintiff's claim.

9. On the other hand, learned counsel appearing for Respondent No.1/defendant No.1, while placing his reliance upon the decisions rendered by the Supreme Court in the matters of ***Vishwambhar and others vs. Laxminarayan (DEAD) THROUGH LRS. and another and Janki Vashdeo Bhojwani and another vs. Indusind Bank Ltd. and others*** reported in **(2001) 6 SCC 163** and **(2005) 2 SCC 217**, respectively, has supported the impugned judgment and decree as passed by the trial Court.

10. I have heard learned counsel for the parties and perused the entire record carefully.

11. The questions which arise for determination in this appeal are:-

“A. Whether the Plaintiff is entitled to question the ownership of defendant No.1-Chandraprakash Sharma even without assailing the registered deed of sale dated 28.12.1988 executed in his favour by one Uttam Upadhyay with regard to the land in question bearing Khasra No.121/4 admeasuring 0.020 hectare?

B. Whether the Plaintiff is entitled to obtain the decree of specific performance of contract with regard to the land in question bearing Khasra No.121/4 admeasuring 0.020 hectare from defendant No.2-USmaan Ali based upon the compromise deed dated 17.03.2009 (Ex.P.12)?

12. **Reference to question 'A'-**

According to the averments made in the plaint, it has been alleged by the Plaintiff that defendant No.1-Chandraprakash Sharma has not acquired any right, title or interest over the property in question bearing Khasra No.121/4 admeasuring 0.020 hectare as shown in “क” “ख” “ग” “घ” “च” in plaint Schedule “B” on the basis of the registered deed of sale dated 28.12.1988 as his vendor, namely, Uttam Upadhyay had no right to alienate the same and, therefore, the mutation as done in his favour would not confer any right or title upon him is, however, noted to be rejected. It is to be noted at this juncture that the allegation as made by the Plaintiff with regard to the question of the alleged sale cannot be held to be sustainable in the eye of law or even could be looked into as the Plaintiff was admittedly not the owner of it and being a stranger, she has no right to assail the same, as such. That apart, the execution of the alleged sale has neither been questioned by its erstwhile owner, namely, Puniya Bai during her lifetime nor by the vendor of said defendant, namely, Uttam Upadhyay, and therefore, the Plaintiff has no locus to assail the same.

13. Be that as it may, it appears from a bare perusal of the averments made in the plaint, the Plaintiff is seeking declaration to the effect that the defendant No.1-Chandraprakash Sharma has not acquired his ownership with regard to the property in question on the basis of mutation done in his favour on the strength of the registered deed of sale dated 28.12.1988, but the Plaintiff has failed to question the authenticity of it and therefore in absence thereof, the said relief cannot be claimed by her in view of the principles laid down by the Supreme Court in the matter of ***Vishwambhar***

***and others vs. Laxminarayan (DEAD) THROUGH LRS. and another***

(supra). As in the said matter, a suit was instituted without questioning the registered deed of sale in time, though claimed after the expiry of limitation, which was made by natural guardian without obtaining the Court's sanction and without the legal necessity in contravention of the provisions prescribed under sub-section (3) of Section 8 of Hindu Minority and Guardianship Act, 1956. In that factual scenario and particularly when the alleged alienation was not questioned in time, it was held therein at paragraph 9 as under:-

“9. ....The question is, in such circumstances, are the alienations void or voidable? In Section 8(2) of the Hindu Minority and Guardianship Act, 1956, it is laid down, inter alia, that the natural guardian shall not, without previous permission of the court, transfer by sale any part of the immovable property of the minor. In sub-section (3) of the said section, it is specifically provided that any disposal of immovable property by a natural guardian, in contravention of sub-section (2) is voidable at the instance of the minor or any person claiming under him. There is, therefore, little scope for doubt that the alienations made by Laxmibai which are under challenge in the suit were voidable at the instance of the plaintiffs and the plaintiffs were required to get the alienations set aside if they wanted to avoid the transfers and regain the properties from the purchasers. As noted earlier in the plaint as it stood before the amendment the prayer for setting aside the sale deeds was not there, such a prayer appears to have been introduced by amendment during hearing of the suit and the trial court considered the amended prayer and decided the suit on that basis. If in law the plaintiffs were required to have the sale deeds set aside before making any claim in respect of the properties sold, then a suit without such a prayer was of no avail to the plaintiffs..... Regarding the suit filed by Vishwambhar, it was filed within the prescribed period of limitation but without the prayer for setting aside the sale deeds. Since the claim for recovery of possession of the properties alienated could not have been made without setting aside the sale deeds the suit as initially filed was not maintainable.....”

14. In the light of the aforesaid principles, the ownership of defendant No.1 Chandraprakash Sharma cannot be questioned by the Plaintiff without seeking the relief of cancellation of his sale executed on 28.12.1988.

15. **Reference to question 'B'-**

It appears that the Plaintiff's entire claim seeking specific performance of contract is based upon the deed of compromise (Ex.P.12) executed in her favour on 17.03.2009 by defendant No.2-Usmaan Ali and according to her, the alleged suit land bearing Khasra No.121/4 admeasuring 0.020 hectare as shown in red colour in plaint Schedule "B" was to be sold by him. It is, however, to be noted at this juncture that in order to establish the terms and conditions mentioned therein, the Plaintiff- Smt. Sushila Tiwari had to enter into the witness box as it was the exclusive knowledge of her, but instead her power of attorney, namely, Vikas Tiwari had deposed everything regarding the execution of alleged compromise, and therefore, the evidence led by him cannot be relied upon. It is true that by virtue of a power of attorney (Ex.P.1), executed on 30.03.2012, he was authorised by the Plaintiff to adduce the evidence on her behalf but since it was not within his personal knowledge, therefore, he cannot depose with regard to the alleged transactions made in the alleged compromise deed.

16. What is the power of attorney holder is provided under Order 3 Rules 1 & 2 of CPC and while considering the said provision, the "act" of the power of attorney has been interpreted by the Supreme Court in the matter of ***Janki Vashdeo Bhojwani and another vs. Indusind Bank Ltd. and others*** (supra), wherein it has been held at paragraphs 13, 15, 17 and

18 as under:-

**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 to 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 of which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.

**15.** Apart from what has been stated, this Court in the case of *Vidhyadhar v. Manikrao* (1999) 3 SCC 573 observed at SCC pp. 583-84, para 17 that:

"17. Where a party to the suit does not appear in 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....."

**17.** On the question of power of attorney, the High Courts have divergent views. 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 the 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.

**18.** The aforesaid judgment was quoted with 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 3 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 CPC.

17. In the light of the aforesaid principles, it is thus clear that although the said power of attorney holder can act of his principal, but he cannot depose for his principal Smt. Sushila Tiwari with regard to the alleged transactions made in the said compromise deed. Therefore, in absence of the examination of the Plaintiff, the alleged deed of compromise cannot be held to be duly proved and the Plaintiff cannot get the decree for specific performance of contract based upon it.

18. Moreover, it appears that said Usmaan Ali with whom the alleged compromise letter was executed with the Plaintiff was admittedly not the son of erstwhile owner, namely, Punia Bai as he was born from her husband's first wife. In view thereof, it cannot be said that he was the natural heir of said Punia Bai as the Muslim Law did not recognise any heir through husband as such and admittedly he (Usmaan Ali) was not in blood relation with her. The Muslim Law, however, recognises another category, i.e., Acknowledged Kinsman, which has been defined by D. P. Mulla in his book of Mohammadan Law Nineteenth Edition at page 80 as under:-

**“Section 81. *Acknowledged Kinsman.*** - Next in succession is the 'acknowledged kinsman' that is, a person of unknown descent in whose favour the deceased has made an acknowledgement of kinship, not through himself, but through another.

Such an acknowledgement confers upon the 'Acknowledged Kinsman' the right of succession to the property of the deceased, subject to bequests to the extent of the bequeathable third, but it does not invest the person acknowledged with all the rights of an actual kinsman.”

19. However, in absence of the plea of acknowledgement of Kinship made by deceased Punia Bai, said Usmaan Ali would, therefore, not come even within the purview of Acknowledged Kinsman as well. Thus, from any angle, it could not be said that he is the heir of erstwhile owner Punia Bai and/or could make any agreement like Ex.P.-12 for the alienation of her property.

20. Be that as it may, the property in question, as reflected from the plaint averments, was already purchased by defendant No.1 under the registered deed of sale dated 28.12.1988, and therefore, when it was acquired by said defendant as such and whose name has also been mutated in revenue papers, it could not be agreed to be sold as such by defendant No.2-Usmaan Ali. That apart, there is no documentary evidence placed on record so as to hold that said Usman Ali was competent enough to enter into such a compromise and a bare perusal of it (Ex.P.12) would reveal the fact that the property in question, i.e., Khasra No.121/4 was not agreed to be sold as alleged by the Plaintiff nor defendant No.1 was the party to it. In view of the said background, no claim as such could even be made against him. The trial Court has, therefore, upon due and proper appreciation of the evidence led by the parties, rightly dismissed the suit and, I do not find any legal infirmity in the same so as to call for any interference in this appeal

21. The appeal being devoid of merits is accordingly dismissed. No order as to costs.

22. A decree be drawn accordingly.

Sd/-

(Sanjay S. Agrawal)  
**JUDGE**