

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL NO.115 OF 1992
WITH
CIVIL APPLICATION NO.11602 OF 2014**

Nagnath Kishan Kondhekar

Since deceased through legal representatives -

- 1) Ram Nagnath Kondhekar,
Age 67 yrs., Occ. Pensioner,
R/o Labour Galli, Nanded,
Tq. & Dist. Nanded.
- 2) Ganesh Nagnath Kondhekar,
Age 57 yrs., Occ. Service,
R/o as above.
- 3) Kisan Nagnath Kondhekar,
Age 50 yrs., Occ. Service,
R/o as above.
- 4) Chandrakant Nagnath Kondhekar,
Age 47 yrs., Occ. Service,
R/o as above.

... Appellants

... **Versus** ...

- 1) Binduram Tuljaram Jadhav,

Since deceased through legal representatives -

1/I) Shakuntalabai w/o Binduram Jadhav (**Died**)

1/II) Parashuram Binduram Jadhav

1/III) Thakur @ Murlidhar Binduram Jadhav

Since deceased through legal representatives -

- 1/III/A) Manju w/o Murlidhar Jadhav,
Age 55 yrs., Occ. Household,
R/o Dongarkada Phata, Tq. Kalamnuri,
Dist. Hingoli.
- 1/III/B) Ravi Murlidhar Jadhav,
Age 23 yrs., Occ. Labour,
R/o Dongarkada Phata, Tq. Kalamnuri,
Dist. Hingoli.
- 1/III/C) Deepa d/o Murlidhar Jadhav,
Age 22 yrs., Occ. Household,
R/o Dongarkada Phata, Tq. Kalamnuri,
Dist. Hingoli.
- 1/III/D) Priyanka d/o Murlidhar Jadhav,
Age 20 yrs., Occ. Household,
R/o Dongarkada Phata, Tq. Kalamnuri,
Dist. Hingoli.
- 1/III/E) Renuka d/o Murlidhar Jadhav,
Age 18 yrs., Occ. Household,
R/o Dongarkada Phata, Tq. Kalamnuri,
Dist. Hingoli.
- 1/III/F) Sadhana d/o Murlidhar Jadhav,
Age 17 yrs., Occ. Household,
R/o Dongarkada Phata, Tq. Kalamnuri,
Dist. Hingoli.
- 1/III/G) Gaurav Murlidhar Jadhav,
Age 15 yrs., Occ. Labour,
R/o Dongarkada Phata, Tq. Kalamnuri,
Dist. Hingoli.

(Respondent Nos.1/III/F and 1/III/G are minor and
under Guardianship of their natural mother i.e.
respondent No.1/III/A)

1/IV) Basantabai w/o Ashokrao Jadhav (**Died**)

Since deceased through legal representatives -

1/IV/A) Sunil Ashok Jadhav,
Age 32 yrs., Occ. Business,
R/o Osmanpura, Aurangabad.

1/V) Lajubai w/o Shivajirao Jagtap

2) Babulal Tuljaram Jadhav (**Died**)

3) Chandrabhagabai w/o Bhujangrao Pinnamkar

... **Respondents**

...

Mr. P.P. Mandlik, Advocate for appellants

Mr. M.V. Ghatge, Advocate for respondent Nos.1(II), 1(III) and 1(IV)

Mr. B.N. Gadegaonkar, Advocate for the respondent No.1(V)

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CORAM : SMT. VIBHA KANKANWADI, J.

RESERVED ON : 28th SEPTEMBER, 2021

PRONOUNCED ON : 02nd DECEMBER, 2021

JUDGMENT :

1 Present appeal has been filed by original defendant No.1 (now the sole appellant has expired and his legal representatives are brought on record) to challenge the concurrent Judgment and Decree. Present respondent Nos.1 and 2 (both expired during the pendency of the Second

Appeal, through legal representatives) filed Regular Civil Suit No.423/1980 before Joint Civil Judge Junior Division, Nanded for declaration of title and recovery of possession of the suit property. The said suit was decreed on 29.03.1985. Both the original defendants then challenged the said Judgment and Decree by filing Regular Civil Appeal No.113/1985. The said appeal was partly allowed by 3rd Additional District Judge, Nanded on 14.01.1992. The Judgment and Decree passed by the Trial Court was partly set aside and modified. The suit was dismissed as against original defendant No.2. However, Judgment and Decree passed by the Trial Court in respect of the suit property to appellant No.1 i.e. original defendant No.1 was maintained. Hence, the original defendant No.1 has filed this Second Appeal.

2 Before proceeding further, the record reflects that by order dated 04.03.1992 the Second Appeal was admitted without formulating any substantial question of law and then by order dated 29.10.2014 this Court directed both the parties to make submissions on the point of substantial question of law. Accordingly, by order dated 02.12.2014 following substantial questions of law are framed.

(I) Whether the Courts below were justified in holding that Rupanbai was not authorized by Madanlal and Babulal to execute sale deed dated 17.03.1971 in favour of appellant No.1

Nagnath Kishan Kondhekar ?

(II) Whether the suit instituted by the plaintiffs is barred by limitation ?

(III) Whether the plaintiff is entitled to any relief in the absence of seeking declaration of cancellation of sale deed dated 17.03.1971 ?

3 Before proceeding further to decide those substantial questions of law it would be necessary to consider the facts of the case in nutshell. Original plaintiffs had come with a case that suit property is admeasuring 39' x 72' North-South bearing old House No.4-2-120 and new House Nos.4-3-58 and 4-3-59 situated at Lohar Galli, Nanded was owned by their father Tuljaram. Tuljaram expired on 28.11.1961, who was survived by widow Rupanbai and three sons i.e. plaintiff No.1 Binduram, plaintiff No.2 Babulal and one Madanlal. All the three brothers were serving and residing in the State of Andhra Pradesh along with their mother Rupanbai. It is then contended that plaintiff No.1 Binduram had filed Regular Civil Suit No.8/1966 for partition and separate possession against the two brothers and mother, which was decreed *ex-parte*. In the said suit the partition was effected in the form that mother received open space admeasuring 24' x 39' on the Northern side. On the Southern side portion the constructed house was divided into three parts. The Eastern part out of that constructed portion

went to Binduram, Madanlal was given Western part and the middle part was given to plaintiff No.2 Babulal. In the execution proceeding the respondent No.1 recovered his share in 1978. Rupanbai expired in the year 1974. It is their contention that since all the brothers were residing in Andhra Pradesh, they had given the suit house on leave and licence basis to one Tulsiram Narayan, who was their relative. He was in possession of the said property till March, 1972. It was then contended that the defendants in collusion with said Tulsiram created forged documents of sale deed purporting to show that Rupanbai as a Power of Attorney of plaintiff No.2 Babulal and Madanlal. In fact, they never executed registered sale deed nor they had authorized anyone *interse* to execute the sale deed. It is then contended that plaintiff No.1 had purchased share of Madanlal and also the property which was to the share of Rupanbai under registered sale deed dated 25.09.1978. Since the defendants are in unauthorized possession, they prayed that declaration be given in respect of their title and also for recovery of possession with mesne profits.

4 Both the defendants resisted the claim by filing written statement. At the costs of repetition, it can be said that since the First Appellate Court had modified the decree and suit was dismissed as against appellant No.2 Chandrabhagabai and the original plaintiffs have not

challenged that decree either in this appeal or by filing a separate appeal, therefore, we are concerned with the portion which is in possession of defendant No.1 and, therefore, relevant recitals would be taken. Defendant No.1 in his written statement contended that plaintiff No.2 had lost his title to the suit house in view of registered sale deed executed by Rupanbai in his favour as Power of Attorney of plaintiff No.2. In fact, she had sold out her own share as well as share of plaintiff No.2 under Power of Attorney as well as that of Madanlal by executing registered sale deed on 17.03.1971. That property was purchased by him for a consideration of Rs.5,000/-. In fact, the said premises as well as that open land was already in possession of defendant No.1 as tenant. Thereafter, after the execution of sale deed his possession is that of owner. He had paid the amount to Rupanbai in presence of Sub-Registrar. It has been denied by the defendant that the said sale deeds were got fraudulently executed from the mother of the plaintiffs. The sale deeds dated 17.03.1971 and 10.11.1971 in favour of defendants is perfectly legal and valid. When Rupanbai was not having open space of her ownership, there is no question of plaintiff No.1 getting that property of Rupanbai in his favour. It was then contended that the original Power of Attorney of Babulal and Madanlal executed in favour of Rupanbai are with plaintiff No.1, as after death of Rupanbai he took the entire management in his hand. Since the plaintiffs are not the owners and possessors, the suit was

liable to be dismissed.

5 As aforesaid, the Trial Court held that the plaintiffs are the owners of the suit property and the sale deeds executed by Rupanbai as the Power of Attorney of plaintiff No.2 Babulal and Madanlal in respect of their share in favour of defendant No.1 are forged. Defendant No.1 failed to prove that Rupanbai was General Power of Attorney holder. The sale deeds in favour of the defendant No.1 are illegal and they have not created any title in favour of him. He is not bona fide purchaser for value without notice and, therefore, as aforesaid, the suit was decreed, however, the learned First Appellate Court held that the sale deed in favour of Chandrabhagabai-original defendant No.2 is legal and valid, however, that of present appellant-original defendant No.1 is invalid. The defendant No.1 had failed to prove the execution of the Power of Attorney and, therefore, as aforesaid, the decree was modified by partly allowing the appeal.

6 Heard learned Advocate Mr. P.P. Mandlik for appellants, learned Advocate Mr. M.V. Ghatge for respondent Nos.1(II), 1(III) and 1(IV) and learned Advocate Mr. B.N. Gadegaonkar for the respondent No.1(V).

7 It has been vehemently submitted on behalf of the appellants that the Courts below have not appreciated the evidence properly in respect

of property, that is, purchased by the defendant No.1. The first and the foremost point is that if we consider the plaint, then there was absolutely no prayer of setting aside the sale deeds and also the General Power of Attorney in favour of Rupanbai. In absence of which the declaration as prayed that the plaintiffs are the owners of the suit property could not have been given. The plaint itself was defective and, therefore, it could not have been decreed even as against the original defendant No.1. Only plaintiff No.1 entered the witness box and plaintiff No.2 did not step into the witness box and many admissions have been given by him. Those admissions have not been considered. It is an admitted fact that though the property was situated in Nanded, all the family members including the plaintiffs were residing at Hyderabad. Then definitely somebody would be looking after their property and it is then stated that one Tulsiram, who was inducted as licensee in 1948, was looking after the property till March, 1972. That person has not been examined. It is to be noted that though PW 1 Binduram is stated to have instituted suit for partition in the year 1966 and the decree was passed on 04.02.1968, he had not got possession of the respective portions till 1978. Therefore, it can be said that whatever portions the plaintiffs are contending were as per their own convenience and then PW 1 Binduram says that he purchased the share of Madanlal on 25.09.1978. It is also to be noted from the cross-examination that all the heirs in between there were tenants in the

suit property. In fact, in his cross-examination he has claimed ignorance, as to whether the share of Madanlal and plaintiff No.2 from the house was transferred in the name of defendant No.1. He does not know about the proceedings taken before the Municipal Corporation for getting the names mutated and thereafter the defendant No.1 was paying the taxes. There is no question of playing fraud by the defendant No.1. He then admits that he had seen the original Power of Attorney executed by Madanlal and Babulal in favour of their mother. He says that in view of the said Power of Attorney their mother Rupanbai had executed registered sale deed in favour of defendant No.1. One M.G. Bapurao had signed the said sale deed as attesting witness. He then admits that he had also seen the original sale deed. In spite of these clear admissions both the Courts have come to the conclusion that the plaintiffs are having title over the property and it is stated that still the defendant No.1 ought to have proved the Power of Attorney given to Rupanbai and under that character Rupanbai had executed sale deeds in favour of defendant No.1.

8 It has been further submitted on behalf of the appellants that in fact, at the time of suit the original General Power of Attorney was not produced but true copies were produced at Exhs.68 and 69, by giving notice to produce to the plaintiffs as per Section 66 of the Indian Evidence Act.

Thereafter the permission was taken to lead secondary evidence and after DW 3 Baburao Ubale was examined, they were exhibited as Exhs.68 and 69. At that time, the true copy of the carbon copy was produced and then the secondary evidence has been led. However, now, by Civil Application No.11602 of 2014 original General Power of Attorney has been produced and permission has been sought under Order 41 Rule 27 of the Code of Civil Procedure. The explanation, the appellants want to give for belated submission of the original, is that in the third week of November, 2014 when the applicants had taken cleanliness drive of their house, then they found some papers and in that they found the original General Power of Attorney dated 16.03.1971. It is to be noted that this application has been given by the legal representatives of the defendant No.1 who were unaware about the pendency of the Second Appeal filed by their father. Therefore, there was no occasion for them to produce those documents at any earlier stage. Under the said circumstance, now when the original Power of Attorney has been produced, it can be taken that under those documents Rupanbai had authority to sell the portion of the house, which had gone to the share of Madanlal and Babulal. Again at the costs of repetition, it has been submitted on behalf of the appellants that as plaintiff No.2 Babulal had not at all entered the witness box but now the original General Power of Attorney is coming on record, adverse inference is required to be drawn against him.

9 Further submissions have been made on behalf of the appellants that both the Courts below failed to consider the point of limitation. When they were seeking declaration of their title then the suit ought to have been filed within period of three years. The admissions on record given by PW 1 Binduram would make it clear that he as well as his brothers were having knowledge about the execution of the sale deeds. The suit was hopelessly barred and, therefore, ought not to have been entertained. Further, when the plaintiffs were coming with a case that the sale deeds which are in favour of original defendant No.1 having got executed by playing fraud on Rupanbai, then the details of the fraud ought to have been given as per Order VI Rule 4 of the Code of Civil Procedure. In absence of those details it cannot be said that those sale deeds were got executed by playing fraud. Both the Courts below have wrongly held that educated persons will not give General Power of Attorney to an illiterate lady. In fact, contents of General Power of Attorney would show that in view of the fact that the sons were preoccupied with their services; one was in Military and another was in S.T. Department, they were unable to come to Nanded. Question of educated and uneducated was not involved, but that of convenience was involved. The First Appellate Court protected the transaction between Rupanbai and defendant No.2 on the ground that she herself was the executant of the documents and she was present. But then, First Appellate Court failed to consider that Rupanbai had

every knowledge about what amounts to sale and how the negotiations were to be held. All those details had come on record in the evidence. The First Appellate Court ought to have protected the transaction between the defendant No.1 and the plaintiffs through General Power of Attorney Rupanbai. The substantial questions of law are, therefore, required to be answered in favour of the appellants.

10 In support of his contention, the learned Advocate for the appellants has relied on the decision in **Smt. Dayawati and others vs. Madan Lal Varma and others, AIR 2003 ALLAHABAD 276**, wherein it has been held that when the suit is for declaration of sale deed as null and void, then the limitation is as per Article 58 of the Limitation Act and the suit has to be filed within three years of the date of the accrual of the cause of action. The suit filed after the lapse of 13 years from the date of execution of the sale deed was held to be barred by limitation.

10.1 The reliance has also been placed on the decision in **Sanjay Kaushish vs. D.C. Kaushish and others, AIR 1992 DELHI 118(1)**, wherein it has been held that -

“In case, from bare reading of the plaint and the admitted documents and the facts coming out in the statement of the plaintiff under Order X of the Code of Civil Procedure, the Court could come to the

conclusion that the plaint does not disclose cause of action or the suit is barred by limitation or is not maintainable, the Court can decide the said points even without recording the said evidence.”

10.2 Further reliance has been placed on **Syed Abdul Khader vs. Rami Reddy and others, AIR 1979 SC 553**, wherein it is held that the Power of Attorney is not a compulsorily registrable document. This decision is also relied in respect of application for adducing additional evidence and it is stated that when this Court would come to the conclusion that the Judgment cannot be pronounced without the production of that document and it is now produced, then its production be permitted. It has been held in this case that

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“It is well established that Order 41, Rule 27, C.P.C. does not confer a right on the party to produce additional evidence. But if the Court hearing the action requires any document so as to enable it to pronounce judgment, it has the jurisdiction to permit additional evidence to be produced. The High Court has given cogent reasons why it felt impelled to permit production of registered sale deeds so as to enable it to pronounce judgment in the matter. If the High Court considered the production of registered sale deeds essential so as to enable it to pronounce judgment, there is no reason why the Supreme Court should interfere with the discretionary power properly exercised by the High Court in the interest of Justice. Even otherwise, the High Court was justified in permitting additional evidence to be produced when it consisted of registered sale deed. Such additional evidence has to be read as part of the record.”

10.3 On the same line regarding the registration of the Power of Attorney, reliance has been placed on the decision in **T.V. Kochuvareed and another vs. P. Mariappa Gounder and other**, AIR 1954 TRAVANCORE-COCHIN 10, wherein it has been held thus -

“Where the effect of a power of attorney was only to constitute a person as the duly authorized agent of its grantor, to do all acts, as specified therein, on his behalf, in respect of his properties it cannot be said that it has the effect of creating a right, title or interest, whether vested or contingent, in favour of the power of attorney holder in respect of immovable properties of the grantor and hence does not fall either within S. 17 or S. 18. Mere fact that such document is registered and has not been cancelled cannot attract operation of S. 50 so as to render ineffective and inoperative a subsequent unregistered lease in favour of the power of attorney holder. With the execution of the lease, position of the power of attorney holder as an agent ceases and the power of attorney cannot be held to have any operative force thereafter.”

11 Lastly, the learned Advocate appearing for the appellants submitted that both the Courts below have not considered that Madanlal was necessary party to the proceeding, as it was alleged that he had executed the Power of Attorney in favour of Rupanbai and then Rupanbai has sold his portion to defendant No.1. In spite of that it appears that even Madanlal had later on sold the same property to plaintiff No.1. Madanlal has not even been examined as a witness. Thus, both the brothers, who had given Power of

Attorney to their mother have not entered the witness box and denied the said document and, therefore, the suit ought to have been dismissed, so also, the appeal ought to have been allowed, when the lacunas were pointed out by the First Appellate Court. Now, the Second Appeal deserves to be allowed by setting aside both the Judgment and Decree and also the application needs to be allowed for adducing additional evidence.

12 Per contra, the learned Advocate Mr. M.V. Ghatge appearing for respondent Nos.1(II), 1(III) and 1(IV) submitted that both the Courts have appreciated the evidence properly and come to a proper conclusion as regards the claim of the plaintiffs against the defendant No.1 is concerned. The first and the foremost fact is that the original General Power of Attorney was never produced before the Trial Court. In fact, in the written statement it was specifically stated that the defendant No.1 is not having custody of that document, rather it is with plaintiff No.1. On the production of said reason even permission was sought to lead secondary evidence. In fact, the Trial Court had wrongly allowed that application allowing the defendants to produce secondary evidence and lead evidence to support those documents. Neither in the testimony of DW 1 Nagnath nor in the testimony of DW 3 Baburao it had come on record, as to when the true copy of the General Power of Attorney was prepared. What was produced was the true copy of

the carbon copy and without that explanation when the Court had permitted the defendant to adduce the evidence, then at the end of appreciation of evidence the Court has taken a proper view that, that authority itself has not been properly proved. When the document authorizing Rupanbai to execute the sale deed was never proved, those sale deeds could not have given title to the defendant No.1. Interestingly now, after so many years the original has been produced, that too, by the legal representatives of the defendant No.1 with some fictitious reason. This creates cloud of doubts over the documents, taking into consideration the fact now coming that the original appear to be in the possession of defendant No.1 where was the occasion for PW 1 Binduram to see the document of Power of Attorney, the admissions extracted from him cannot be taken in isolation. They were the too general questions and no specific question was put, as to exactly when he had seen that document. Another fact to be noted is that those documents i.e. the General Power of Attorney Exhs.68 and 69 were stated to have been attested by one M.G. Bapurao. He is, in fact, the main person, who had created these documents. Even when the testimony of the DW 1 Nagnath was going on, said M.G. Bapurao was present in the Court hall. Still he was not examined for the reasons best known to the defendant No.1. According to DW 1 Nagnath, he was inducted in the suit property by one Laxmibai. She is neither owner nor real possessor. She was not authorized by the plaintiffs.

Under such circumstance, the induction, which has not been proved at all prior to the alleged date of sale deed, cannot be considered to be a legal entry of the defendant No.1 in the suit premises. In fact, the Article 65 of the Limitation Act would be applicable here, as the plaintiffs are claiming possession based upon their title and in order to put on the safer side they have sought declaration regarding their title. Under such circumstance, it was not even necessary to challenge the sale deeds because the plaintiffs had come with a case that the title of Madanlal and Babulal was never got transferred. Substantial questions of law as framed by this Court will have to be answered in favour of the plaintiffs.

13 **Substantial question of law Nos.I and III :**

At the outset, it is to be noted that the plaintiffs had specifically pleaded that in the civil suit the partition and separate possession was prayed by plaintiff No.1 and accordingly the suit was decreed on 18.02.1969. As per the said decree four portions were divided, but according to the plaintiff, after the said decree their mother got the possession of the open land as per the decree but the shares of the sons remained joint. Plaintiff No.1, therefore, filed execution petition in the year 1976 and obtained possession. However, according to them, defendants colluding with one Tulsiram and Bapurao Ganpatrao created forged deeds purporting to have been executed

by one Rupanbai, Babulal and Madanlal, which they had never executed and then brought into force the registered sale deeds dated 17.03.1971 and 10.11.1971. We are concerned with sale deed dated 17.03.1971 only, as the suit against original defendant No.2 has been dismissed in appeal and there is no further appeal by the plaintiffs. When they were claiming that still the title is with them, it was for both the Courts below to scan the evidence and accordingly after scanning the evidence they have contended that the defendants have failed to prove the execution of Power of Attorney by Babulal and Madanlal in favour of Rupanbai and, therefore, Rupanbai had no authority to execute the sale deed in favour of present appellant. In order to substantiate and protect his title defendant No.1 produced true copy of carbon copy of the two separate Power of Attorneys. In his written statement, he had come with a case that the Power of Attorney is in possession of plaintiff No.1. In his testimony DW 1 Nagnath has said that the original Power of Attorney is in possession of Rupanbai. She is not alive. The original papers might be with plaintiffs or Madanlal after death of Rupanbai. He then stated that one copy of the Power of Attorney, which is in his possession, is attested by one Mr. R.S. Patil. He produced the same. As aforesaid, those documents, which are at Exhs.68 and 69, are the true copies of carbon copy. DW 1 Nagnath has not stated as to when the said true copy was prepared and for what purpose. DW 5 Mr. R.S. Patil was the Dean of

Government Ayurvedic College, Nanded, who says that DW 1 Nagnathrao's son was serving with Ayurvedic College, Nanded and he had brought two documents on 07.03.1971. Those documents are the copies of original document and then he signed those documents as true copies by tallying the contents. He was then a Gazetted Officer, who could have endorsed the documents as true copies. In his cross-examination, he has admitted that Exhs.68 and 69 are not original typewritten copies. Under this circumstance, when there is absolutely no explanation as to where the original typed copy which was prepared on the basis of the original Power of Attorney is, it cannot be stated that Exhs.68 and 69 were legally admissible documents. The position as it stood before both the Courts below was the documents at Exhs.68 and 69 were relied as the basis, of which Rupanbai got authority to sell the suit property to defendant No.1. The above said reasons and evidence would show that Exhs.68 and 69 cannot be said to be the legal documents. Under such circumstance, when basic authority itself is not proved; both the Courts below were justified in holding that there was no necessity for the plaintiffs to either prove that fraud was committed on Rupanbai or plaintiffs ought to have asked for declaration of cancellation of sale deed dated 17.03.1971. It was utmost necessity for the defendant No.1 to produce and prove that Rupanbai had the authority. Plaintiffs could not have been asked to place on record any negative evidence when they were

denying that any such authority was given. Another fact to be noted from the record is DW 1 in his cross-examination has deposed that he had seen the original General Power of Attorney in the year 1968-69 and not afterwards at any time. When according to him, the said Power of Attorney came into existence in the year 1971, there was no occasion for him to see the same in the year 1968-69. According to him, one Mr. M.G. Bapurao was the witness to Exhs.68 and 69. It can be seen from the cross-examination of DW 1 Nagnath that this person Mr. M.G. Bapurao was present in the Court on that day, however, he was never examined on behalf of the defendants. Best possible evidence, therefore, has been withheld leading to the adverse inference against the defendant No.1.

14 Now, turning towards the application under Order 41 Rule 27 of the Code of Civil Procedure, learned Advocate for the respondents has rightly relied on the decision in **Union of India vs. Ibrahim Uddin and another, (2012) 8 SCC 148**, wherein the law has been summarized in paragraph 48 thus -

“To sum up on the issue, it may be held that an application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The court can consider such an application with circumspection, provided it is covered under either of the prerequisite conditions incorporated in the statutory provisions itself. The

discretion is to be exercised by the court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the court below and as to whether the applicant had prosecuted his case before the court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate court. In case the court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the court must record reasons as on what basis such an application has been allowed. However, the application should not be moved at a belated stage.”

Interesting to note that in the application for production of original deed of General Power of Attorney the applicants are coming with a case that they had taken cleanliness drive of the home in the third week of November, 2014 and then discovered the documents. They contend that they were never aware about filing of Second Appeal by their father. It is to be noted that all the applicants are residing at the same place. Legal representatives of original defendant No.1 are now aged 67, 57, 50 and 47 respectively having occupation pensioner and service respectively. It is hard to believe that defendant No.1 would not have shared that he is fighting for the house since long. Further, it is also hard to believe that since 1980 till 2014 there was no cleanliness drive in the house of the applicants. Further, in the application they are not disclosing the exact place from where the

documents were discovered, whether they were in a bag or polythene etc. If we see the condition of the two documents, they do not appear to have been kept in an isolated, congested, untidy position. It is not even the case of the applicants that these papers were wrapped in any envelope or paper and, therefore, they could not notice the existence of the documents. That wrapper has not been produced at all. Therefore, taking into consideration the reasons in the application it cannot be stated that a case is made out to take them on record, as contemplated under Order 41 Rule 27 of the Code of Civil Procedure. Unless the conditions enumerated in Order 41 Rule 27 of CPC are fulfilled, the application cannot be considered at all. This is the position of law, recently reiterated by Hon'ble Supreme Court in **H.S. Goutham vs. Rama Murthy and another** with companion matter, (2021) 5 SCC 241. Even in **Syed Abdul Khader** (supra) the same ratio has been laid down. This application can also be considered from another angle also. When at the outset the defendant had come with a case that the possession of the document is with the opposite party and then he issues the notice to him to produce that document, when the other party fails to produce it, the defendant takes advantage of leading the secondary evidence, then now he cannot come with a case that the possession of the document is with him. The permission to lead secondary evidence was then obtained by the defendant No.1 by suppressing the possession of the original with him. On

that count also documents Exhs.68 and 69 are inadmissible. The Civil Application, therefore, deserves to be rejected.

15 Both the Courts below have properly appreciated the evidence. They were justified in drawing inference that in ordinary course the educated sons will not give General Power of Attorney in favour of their old and illiterate mother. DW 4 Devandas Gangaram Ranganani is the attesting witness to the sale deed of defendant No.1. As per Nagnath i.e. defendant No.1, the sale deed was executed for a consideration of Rs.2,000/-, however, the attesting witness says that DW 1 Nagnath paid amount of Rs.500/- only in his presence. The question then arises when the remaining amount was paid. DW 1 Nagnath has not come with a case that the amount was paid in parts at different times. He then says in cross that Rupanbai was selling her own land under that sale deed Exh.66, which is a wrong belief. Even if we consider that as an attesting witness his role was limited, but the fact is that he has not given reason as to why he was knowing Rupanbai. In cross-examination he has stated that he had no transaction with Rupanbai but at the first time, Nagnath has introduced a lady as Rupanbai to him. He says that a lady who impressed thumb mark was Rupanbai. There was no attempt by defendant No.1 to get the thumb mark of the Rupanbai tallied with the admitted. Anyway, when the document authorizing her to execute sale deed

was itself not proved. As aforesaid, the question of the details of fraud and getting the sale deed cancelled will not arise at all. A person, who is not authorized to execute the sale deed, cannot create title in favour of the persons in whose favour the document is executed. Both the questions are, therefore, answered in the affirmative.

16 **Substantial question of law No.II :**

Now, as regards the limitation is concerned, first and the foremost thing is that in the written statement no such contention was raised and, therefore, both the Courts have not framed the issue and point of limitation respectively. Even if for the sake of argument we accept that the said point can be raised for the first time in the Second Appeal, taking into consideration that it is a mixed question of law and fact and sometimes it is pure question of law; the alleged sale deed is executed on 17.03.1971. The declaration has been prayed in respect of their own title by the plaintiff and possession was sought. The suit was filed on 29.09.1980 and, therefore, Article 65 of the Limitation Act would be applicable and not Article 54 or 58, as canvassed. The suit is not limited for declaration only. In fact, on the basis of the title, possession has been prayed. The ratio in **AIR 2003 ALLAHABAD 276** will not be helpful to the appellants, as in that case it was only the suit for declaration of sale deed as null and void. Here, basically the

suit is for possession. Other factual aspects, as to how the evidence adduced by the defendant is unbelievable, have been dealt with by both the Courts below, which need not be considered by this Court, in view of the fact that the substantial questions of law arising are limited. Therefore, this substantial question of law is answered in the negative.

17 The suit was within limitation, Rupanbai had no authority given by either Madanlal or Babulal to execute sale deed dated 17.03.1971 in favour of appellant Nagnath and the suit filed by the plaintiffs was legal even in absence of seeking declaration of cancellation of sale deed, there is no necessity to disturb the concurrent findings of the Courts below. Substantial questions of law are answered accordingly and following order is passed.

ORDER

1 Second Appeal stands dismissed.

2 Civil Application No.11602 of 2014 stands dismissed.

(Smt. Vibha Kankanwadi, J.)

Date : 02.12.2021.

Later on :

1 Learned Advocate appearing for the appellants, after pronouncement of the Judgment, prays for continuation of the interim relief. It is to be noted that all the three Courts, including this Court, have not accepted the defence that has been taken by the present appellants. The suit was filed in the year 1980 and the fruits of the decree are yet to be enjoyed by the original plaintiffs. Under such circumstance, oral request stands rejected.

(Smt. Vibha Kankanwadi, J.)

agd