

Andreza

**IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO. 297 OF 2021 (FILING)**

1. M/s. Nagesh Trivikram Naik,
Through its proprietor Shri
Mahabaleshwar Naik, through
constituted Power of Attorney Mr.
Ratish Naik, Having shop on ground
floor of Parsekar building No. 259-A
Angod, Mapusa, Goa. ...Petitioner

Versus

Smt. Kalindi V. Parsekar,
r/o. Parsekar Building, having No.
259-A, Angod, Mapusa-Goa. ...Respondent

**Mr. S. D. Lotlikar, Senior Advocate with Ms. Sailee Kenny,
Advocate for the Petitioner.**

**Mr. R. G. Ramani, Senior Advocate with Mr. Pranav Shenvi
Kakodkar, Advocate for the Respondent.**

**CORAM : MANISH PITALE, J
Reserved on : 4th October 2021
Pronounced on : 8th October 2021**

ORDER

1. The Petitioner is the original defendant and he is aggrieved by an order dated 06.04.2021 passed by the Court of Civil Judge, Junior Division, Mapusa, whereby an affidavit in evidence filed on behalf of the Petitioner by his Power of Attorney holder has been discarded. The Power of Attorney holder is the son of the Petitioner. The Court below has held that the Power of Attorney holder cannot depose in place of the principal because he has no personal knowledge about the facts, in respect of which statements have been made in the affidavit.

2. The Respondent has filed Regular Civil Suit No. 61/2010/D, against the Petitioner for eviction from the suit shop. The Petitioner has a proprietary concern and the business is carried out from the said shop.

3. In the said proceedings, the Petitioner through his Power of Attorney holder i.e. his own son, placed on record an affidavit in evidence of DW-1 dated 03.07.2019. The Respondent filed an application for discarding the said affidavit on the ground that the statements made in the affidavit could not be said to be in the personal knowledge of the Power of Attorney holder and that as per settled law, the affidavit did not deserve to be taken on record. The application was opposed on behalf of the Petitioner and as noted above, by the impugned order, the affidavit has been discarded.

4. Mr. S. D. Lotlikar, the learned Senior Counsel appearing for the Petitioner submitted that even if the entire affidavit of the Power of Attorney holder could not have been accepted, certain parts thereof could certainly be taken on record and that, in any case, the Respondent could discredit the said witness in cross-examination. It was submitted that the position of law as laid down by the Hon'ble Supreme Court in the case of *Janki Vashdeo Bhojwani & Ors. vs. Indusind Bank Ltd. & Ors.*¹ was not appreciated in the correct perspective by the Court below. Reliance was also placed on a Judgment of the Delhi High Court in the case of *Durga Dass Banka vs. Ajit Singh & Ors.*²

1 (2005) 2 SCC 217

2 2012 ILR IDelhi 607

5. It was further submitted that the Petitioner himself is a Senior Citizen aged about 88 years and, in such circumstances, the affidavit in evidence of his Power of Attorney holder ought not to have been discarded.

6. Mr. Ramani, the learned Senior Counsel appearing for the Respondent, submitted that the Court below had correctly applied the position of law, as laid down by the Hon'ble Supreme Court in the case of *Janki Vashdeo Bhojwani* (supra) and reiterated thereafter in the case of *Man Kaur (Dead) by Lrs. vs. Hartar Singh Sangha*³. It was submitted that in the present case, the Power of Attorney was executed on 03.07.2019, only for the purpose of the son of the Petitioner to take necessary steps in respect of the litigation. The Power of Attorney holder had no personal knowledge of statements made in his affidavit in evidence and, therefore, as per the settled position of law, the affidavit could not have been looked into and that the Court below was justified in discarding the same.

7. Before considering the facts of the present case and examining the correctness or otherwise of the impugned order, it would be appropriate to refer to the position of law as regards the extent to which a Power of Attorney holder can depose or lead evidence on behalf of the principal in Court proceedings.

8. In the case of *Janki Vashdeo Bhojwani & Ors.* (supra), the Hon'ble Supreme Court considered the question as to what acts the Power of Attorney holder could undertake on behalf of

3 (2010) 10 SCC 512

the principal in the context of legal proceedings. In that context, it was held at paras 13 and 14, as follows:

“13. 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 to 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.

14. Having regard to the directions in the order of remand by which this Court placed the burden of proving on the appellants that they have a share in the property, it was obligatory on the part of the appellants to have entered the box and discharged the burden. Instead, they allowed Mr. Bhojwani to represent them and the Tribunal erred in allowing the power of attorney holder to enter the box and depose instead of the

appellants. Thus, the appellants have failed to establish that they have any independent source of income and they had contributed for the purchase of the property from their own independent income. We accordingly hold that the Tribunal has erred in holding that they have a share and are co-owners of the property in question. The finding recorded by the Tribunal in this respect is set aside.”

9. In the case of ***Man Kaur*** (supra), the Hon'ble Supreme Court took into consideration the judgments pertaining to the extent to which a Power of Attorney holder could depose on behalf of the principal and summarised the position as follows:

“18. We may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:

(a) An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.

(b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions

and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved.

(c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which the principal alone has personal knowledge.

(d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney holder, necessarily the attorney holder alone can give evidence in regard to the transaction. This frequently happens in the case of principals carrying on business through authorized managers/attorney holders or persons residing abroad managing their affairs through their attorney holders.

(e) Where the entire transaction has been conducted through a particular attorney holder, the principal has to examine that attorney holder to prove the transaction, and not a different or subsequent attorney holder.

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his 'state of mind' or 'conduct', normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his tenant, on the ground of his 'bona fide' need and a purchaser seeking specific performance who has to show his 'readiness and willingness' fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or 'readiness and willingness'. Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad."

10. A perusal of the above-quoted portions of the judgments of the Hon'ble Supreme Court shows that a Power of Attorney holder can only give formal evidence about the validity of the Power of Attorney and filing of a legal proceeding when he has no personal knowledge of the transactions of the principal. It is clearly held that the Power of Attorney holder cannot depose or give evidence in place of the principal for the acts done or transactions undertaken by the principal, as the principal alone would have personal knowledge of such acts. Even in the only exception recognized to the aforesaid Rule, it has been held that a family member as Power of Attorney holder, may depose about the facts only if such family member/Power of Attorney holder is exclusively managing the affairs of the principal or old and infirm parent.

11. In this light, when the facts of the present case are appreciated, it is found that the Petitioner himself claims to be in possession and running business in the tenanted suit shop, although he is 88 years old. Even in the Power of Attorney dated 03.07.2019, it is nowhere stated that the business in the tenanted suit shop premises is being exclusively managed by the son. There is no statement in the Power of Attorney executed in favour of the son that the father and son have been in possession and running the business of the proprietary concern from the tenanted suit shop. The Power of Attorney is itself executed on 03.07.2019, while the suit for eviction was filed by the Respondent way back in the year 2010.

12. In the affidavit in evidence dated 03.07.2019 also, there is no statement by the Power of Attorney holder that he along with

his father have been running the proprietary concern and the business from the tenanted suit hop. All the statements of facts made in the affidavit cannot be said to be in the personal knowledge of the Power of Attorney holder. This is because reference is made to the Lease Deed dated 04.01.1966, when the Power of Attorney holder was not even born. All other statements are also those which were in the personal knowledge of the principal.

13. Therefore, applying the position of law as laid down by the Hon'ble Supreme Court, in the facts of the present case, the Power of Attorney holder could only give formal evidence about the validity of the Power of Attorney and such other facts that could be attributed to his personal knowledge. No such statements are found in the affidavit in evidence. Hence, it is found that the Court below was justified in discarding the entire evidence of the Power of Attorney holder. The Court below is also justified in referring to the aspect of the possibility of appointing a Commissioner for recording evidence of the Petitioner himself.

14. In this context, reliance placed on the judgment of the Delhi High Court in the case of *Durga Dass Banka* (supra) can be of no assistance to the Petitioner for the reason that in the said case, the Power of Attorney holder was deposing on behalf of his father in respect of an order passed by a Division Bench of a Court and not in respect of any private acts of his own father. Therefore, the said judgment is distinguishable and not applicable to the facts of the present case.

15. In view of the above, it is found that the present Writ Petition is devoid of any merit.

16. Accordingly, the Writ Petition is dismissed.

MANISH PITALE, J.