

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 6932 OF 2019

Ambadas Dashrath Vyawahre

...Petitioner

vs.

Dashrath Rajaram Rajguru & Ors.

...Respondents

Mr.Rahul S.Kadam for Petitioner.

Mr.S.H. Kankal, AGP for State.

CORAM : BHARATI DANGRE, J.

DATED : 12 OCTOBER 2021

P.C. :

1. Heard Counsel for the Petitioner.

Notice issued to Respondent Nos.1 to 3 is duly served as per Bailiff's report. Similarly, affidavit filed on 18 July 2019 is also placed on record.

2. Today, when the matter is called out, the Respondent is unrepresented. Despite notice, there is no appearance of the Respondent. I deem it fit to hear learned Counsel for the Petitioner and decide it in the absence of the Respondent.

3. The Petitioner is a plaintiff, who has instituted Regular Civil Suit No.287/2011 for seeking specific performance of an agreement for sale executed between the Plaintiff and Defendant Nos.1 to 3 for consideration of Rs.11,000/-.

4. When the suit proceeded for trial, the plaintiff's witness, being

his son and the Power of Attorney holder, stepped into the witness box and his evidence was recorded. When the plaintiff sought permission to examine himself, it was objected by the defendant and the learned Judge on 25 January 2019 passed an order rejecting the request to examine the plaintiff. Reasoning, which can be reflected in the impugned order, is to the effect that that the plaintiff shall not be allowed to depose twice. The court accepted the said objection and recorded that one party cannot depose twice for the same facts again and again for the aforesaid reason and that is why the affidavit filed by the plaintiff on the basis of the same fact was rejected. When the plaintiff approached this court, he is the master of his proceedings in view of the doctrine of *dominis litis*. He can choose to examine the witness which he want to discharge the burden cast on him which would entitle him for the relief which he seek in the plaint based on the pleadings averred therein. This being so the Applicant/Petitioner permitted his son, who is the holder of Power of attorney, to depose. However, the said position of law as regards the evidence of the power of attorney has been well settled in the case of Apex Court in the case of **Janki Vashdeo Bhojwani vs. Indusind Bank**¹ wherein the scope of power to depose on behalf principal has been determined. It has been categorically held that the said authoritative pronouncement that the power to depose on behalf of principal extends only to the depositions in respect of 'acts' done by power of attorney in exercise of power granted by instrument. This would not include deposing any plea in respect of the principal for act done by the principal and not by the power of attorney holder. Further another ruling that has been made over, is that the power of attorney holder is not competent witness to depose upon facts in respect of which principal only has personal knowledge and it is only the principal who shall have to be

¹ (2005) 2 SCC 217

examined.

5. The said position of law being no longer *res integra*, in this suit, which has been filed by the plaintiff seeking specific performance and the averment contained in para 5 specifically refers to arrangement worked out between the plaintiff and defendants in a meeting, which was attended by the plaintiff and defendant no.2 and his wife in the presence of panchas where price of land was determined and which was accepted, in furtherance of which the plaint would state that amount was paid to the defendants, this is the fact which is exclusively within the knowledge of the plaintiff who has attended the meeting, his son, though is granted the power of attorney, cannot depose on the said acts.

6. In view of the above, the said impugned order dated 25 April 2019 passed by the learned Judge is set aside. Learned Judge shall now proceed with the Regular Civil Suit No.287/2011 with utmost expediency and shall proceed to examine the plaintiff as witness.

7. The writ petition is allowed in the aforesaid terms.

(SMT. BHARATI DANGRE, J.)