

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

SECOND APPEAL NO. 268 OF 2017

1. Shri Ismail Rasul Teli,
Age 49 years, Occ. Labour.

2. Shri Zakir Rasul Teli,
Age 43 yeas, Occ. Labour.

Both r/o. Chopda (near Swastik
Cinema House) Tq. Chopda,
Dist. Jalgaon.

.... Appellants
[Ori. defendants]

Versus

1. Shri Laxman Manilal Mochi,
Age 43 yrs. Occ. Labourer,
R/o/ Chopda, Tq. Chopda, Dist. Jalgaon.

2. Smt. Gangabai d/o. Manilal Mochi,
Age 53 yrs. Occ. Household,
R/o. Shahada, Dist. Nandurbar,
Through their General Power of Attorney,
Shri Narayan Jurakhandas Chandre,
Age 68 years, Occ. Nil,
R/o. Near Swastik Cinema House,
Chopda, Tq. Chopda, Dist. Jalgaon.

3. Smt. Kamalbai w/o. Mahadeo Mochi,
Age 53 years, Occ. Household,
r/o. Bhusawal (Jam Mohalla),
Tq. Bhusawal, Dist. Jalgaon,
[deleted as per order passed
below Exh.1 dt. 27.9.2013.]

.... Respondents
[Ori. Plaintiffs]

Advocate for Appellant : Mr. Patel Shaikh Ashpak Taher
Advocate for Respondent Nos. 1 and 2 : Mr. M.S. Kulkarni

CORAM : RAJESH S. PATIL,J.

DATE : 22nd November, 2022

ORDER :-

1] This second appeal is filed by the original defendants challenging the judgment and decree passed by the appellate court.

2] The respondent Nos. 1 and 2 herein had filed a suit for possession on the ground of encroachment by the defendants before the Civil Judge (Junior Division) Chopda, Dist. Jalgaon bearing R.C.S. No.9 of 2001. The Trial Court, by its judgment and decree dated 9.12.2011 concluded that Plaintiff is the owner of suit land alongwith other heirs. It was further held that defendants were not able to prove that they are tenants of plaintiff, and were not able to prove that they were paying rent to plaintiff. It was also concluded that the defendants have encroached upon the suit land. However, the issue about suit being bad for non-joinder of necessary parties, was answered against the plaintiffs. Hence, the plaintiffs filed Regular Civil Appeal No. 13 of 2012 before the District Court Amalner. The defendants did not prayer any cross-objection in the said appeal. The said appeal was filed on merits and the appeal was answered in favour of the plaintiffs and the defendants were directed to hand over vacant and peaceful possession after removing the structure on it within two months, by judgment and order dated 4.2.2016. The present Second Appeal is filed against the said judgment and decree passed by the trial court.

3] It has been argued by the learned advocate for the appellants (original defendants) that the substantial questions of law have been framed as ground Nos. XVII, XVIII and XIX. All the three grounds pertain to the issue, as to whether, a General Power of Attorney (GPA) Holder can depose on behalf of the principal. The learned advocate for the appellants relied upon the judgment in the matter of ***Janki Vashdeo Bhojwani and another vs. Indus Ind Bank Limited***, reported in ***2005(1) Mh.L.J. 1170***, wherein it has been held that Order 3 Rule 1 and 2 of C.P.C. empowers the holder of power of attorney to act on behalf of the principal. The word “acts” employed in order 3 Rules 1 and 2, C.P.C., 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. 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 the party. It is contended on behalf of the appellants that the plaintiffs have not stepped into the witness box and laid evidence only through their power of attorney. Hence, suit should have failed.

5] To counter the submissions, the learned advocate for the defendants relied upon the judgment in the matter of ***Vishwanath Hiralal Joshi Vs. Vimalbai Maganlal Joshi*** and others reported in ***2014(5) Bom.C.R. 353***. If one goes through the judgment in the matter of ***Vishwanath Joshi (supra)*** in para.11, it refers to the Supreme Court judgment in Ramkubai ***AIR 1999 Supreme Court 3089***, wherein, it was held that even a son of the landlady can give evidence as general power of attorney holder, in a Rent Act suit of bonafide requirement. So also,

the judgment in the matter Nathulal is considered, wherein, the landlord has not entered the witness box. In para.12 of the said judgment, it has been held that, not in each and every case, it is necessary for the plaintiff to step into the witness box to prove the case.

6] As far as the present case is concerned, the ratio in the matter Janki Vashdeo (supra) does not help the case of the appellants since the evidence of PW-1 is clear. PW-1 has stated that he is acquainted with the facts of the present case as he resides adjacent to the suit property and in the entire cross-examination, he has not avoided any question and he has given reply to all the questions put forth by the advocate for the appellants/defendants.

7] The defendants have not disputed the ownership of the plaintiff to the suit property. Hence, the onus is shifted on the defendants to establish that they are occupying the suit property in the capacity of tenants. The defendants tried to establish that they were paying rent to one Mr. Maikulal. However, nothing has been placed on record to indicate the relationship of Maikulal with the plaintiff.

8] So, in sum and substance, the defendants were not able to prove that they are the tenants of the suit premises. Neither did the defendants (appellants herein) filed any kind of appeal before the District Appellate Court, challenging the findings recorded therein. Once the defendants are not able to establish that they are the tenants, they can only called as encroachers over the suit property.

9] It is settled law that any one amongst the owners can be plaintiff for filing a suit. It does not lie in the mouth of an encroacher to

say that only if all the owners are joined as plaintiffs, the suit will be maintainable. This position of law was fairly conceded before the lower appellate court by the advocate for the defendants. Hence, in my view, no substantial question of law arises, and hence, the second appeal deserves to be dismissed. Same is accordingly dismissed.

[RAJESH S. PATIL]
JUDGE

grt/-