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Uday S. Jagtap

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

**FIRST APPEAL NO. 8 OF 2021
WITH
INTERIM APPLICATION NO. 2614 OF 2022
IN
FIRST APPEAL NO. 8 OF 2021**

Shaukat Ali Khan, Through his POA
Mr. Liyakat Ali Khan .. Appellant

Vs.

Iqbal Hussain Shaikh .. Respondent

.....
Mr. Vishal Kanade a/w Mr. Abbas Zaidy i/b Zohair & Co. for the
appellant
None for the respondent

.....

CORAM : PRITHVIRAJ K. CHAVAN, J.

DATED : 24th APRIL, 2023

P.C.

1. Heard Mr. Kanade, learned Counsel for the appellant.
2. The appellant's suit for specific performance of contract came to be dismissed by the trial Court on 23rd November 2019 mainly on the ground that the appellant failed to prove oral contract between him and the defendant for transfer of

defendant's 33% share in the appellant favour. It is the contention of the appellant that he had paid an amount of Rs.26,50,000/- to the respondent through cheque being 33% of the market value of the suit flat.

3. Despite service, none for the respondent.

4. Mr. Kanade, learned Counsel for the appellant would argue that the plaintiff's constituted attorney had entered into the witness box on the basis of POA wherein, in fact, the plaintiff-appellant could have entered into the witness box to substantiate his claim. However, the deposition of the plaintiff's brother ought not to have been rejected as there was no cross-examination to the same. Moreover, the appellant has filed an application in the present appeal under Order 41, Rule 27 of the Code of Civil Procedure, 1908 to bring on record the sale deed pursuant to which the suit flat was purchased. In this application, the appellant has produced a communication indicating that the said sale deed remained with the concerned bank and, therefore, could not be produced at the stage of trial. He submitted that, even otherwise, this is a fit case for remand for considering *inter*

alia the said sale deed. He submits that even in view of the ratio laid down by the Supreme Court in the case of ***Janki Vashdeo Bhojwani and Anr. Vs. Indusind Bank Ltd. & Ors. AIR 2005 SC 439***, the power of attorney holder cannot depose in place and instead of the principal. He also submits that the appellant and the respondent being close relatives, something possibly can be worked out if respondent / original defendant appears on remand of the suit and, therefore, in view of all the aforesaid contentions he prayed for remand of the case.

5. Having perused the impugned judgment as well as the submissions made across the bar, the impugned judgment is set aside and the matter is remanded back to the trial Court.

6. The Trial Court shall re-admit the suit under its original number in the Registry of Civil Suit and proceed to determine the same in accordance with law.

7. The parties shall appear before the trial Court on 7th June, 2023.

8. The appeal stands disposed of.
9. In view of the disposal of the appeal, Interim Application does not survive and the same is also disposed of.

(PRITHVIRAJ K. CHAVAN, J.)