

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

SECOND APPEAL NO.426/2005

Shekhar s/o Shridharrao Deshmukh,
aged 43 years, Occ. Private Service,
r/o Ramnagar Road, Wardha, Tq.
Dist. Wardha.

.....APPELLANT

...V E R S U S...

Vyankatesh Shankarrao Deshmukh
(Since deceased) by Legal Representatives

1. Smt. Archana wd/o Anand Bhadwamkar,
aged 60 years, Occ. Service, r/o Row House
No.3, V.S.V. Enclave, D. P. Road, Aundh – Pune.
2. Sau. Geeta w/o Waudeo Soman, aged 55 years,
Occ. Service, r/o Vishweshwar Sadan,
2nd Floor, Khare Town, Dharampeth, Nagpur.
3. Sau. Neeta Shende
aged 49 years, Occ. Household, r/o Lakhecha
Wada, Wanjari Nagar, Nagpur.

...RESPONDENTS

Mr. A. S. Manohar, Advocate for appellant.
Mr. K. J. Topale, Advocate for respondents.

CORAM:- ANIL L. PANSARE, J.
ARGUMENTS WERE HEARD ON :- 27.07.2023
ORDER PRONOUNCED ON :- 31.07.2023

J U D G M E N T

The appellant/original defendant has assailed the judgment and decree dated 07.09.2004 passed by Second Ad hoc Additional District Judge, Wardha in Regular Civil Appeal

No.69/2002, whereby the first appellate court has confirmed the judgment and decree dated 26.03.2002 passed by Jt. Civil Judge Senior Division, Wardha in Special Civil Suit No.29/1997. The trial Court was pleased to decree the suit for specific performance of the contract. The defendant was directed to execute the sale deed of the suit property by receiving the balance consideration. The parties will be hereinafter referred to as per their original status before the trial Court.

2. Thus, both the courts below have rendered concurrent finding that the plaintiff was ready and willing to perform his part of contract and therefore decreed the suit for specific performance of contract.

3. The appeal has been admitted, on the following substantial questions of law.

“[I] In view of admitted position that the plaintiff pleaded in para 3 of the plaint that he entered into contract with the defendant and his having failed to step into the witness box to involve General Power of Attorney to have acted for plaintiff, how, the evidence of power of attorney would be a legal evidence to prove the contract?”

[II] Whether the Courts below erred in correctly applying the provisions of Section 2 of Power of Attorney Act, 1892 and Section 118 of the Evidence Act, in the facts of the present case?"

4. The facts in brief, are as under:

The defendant owned land bearing survey No.136/1, admeasuring 2.30 HR, situated at village Sawal (hereinafter referred to as, "the suit land"). He was in need of money to construct his house and for further necessities. The plaintiff being interested in purchasing the suit land, negotiated with the defendant and thereafter agreed to purchase the suit land for consideration of Rs.1,20,000/-. The plaintiff, on 17.12.1995, paid Rs.60,000/- as earnest amount. The balance consideration amount was to be paid on or before 31.12.1996.

5. There occurred dispute and, therefore, the plaintiff filed suit for specific performance of contract being Special Civil Suit No.29/1997. The suit was decreed. The defendant has challenged the trial Court's judgment and decree, but in vain. Both the Courts below have held that the plaintiff was always ready and willing to perform his part of contract and, accordingly, decreed the suit.

6. The plaintiff has examined in all two witnesses viz. his daughter Sau. Geeta at Exh.-25. She has deposed on the strength of power of attorney at Exh.-26. The second witness is Notram Kinkar at Exh.39, the attesting witness to the agreement.

7. The defendant has examined four witnesses viz. defendant himself at Exh.-42, one Vinayak Bobade at Exh.-51, his wife Sau. Sandhya at Exh.-52 and Suryakant at Exh.-53, to show that the suit transaction was a loan transaction.

8. Learned counsel for the defendant submits, which appears to be the fact as well, that both the courts below have relied upon the evidence of PW1 Sau. Geeta, the plaintiff's daughter to hold that the plaintiff was always ready and willing to perform his part of contract. She has deposed on behalf of the plaintiff as his power of attorney.

9. My attention has been invited to paragraph 21 of the first appellate Court's judgment, which reads thus:

“21. Plaintiff himself has issued notices to the defendant, he himself has filed suit and conducted the matter till execution of power of attorney. All these

acts go to show readiness and willingness of the plaintiff to perform the part of his contract. PW1 Geeta is daughter of plaintiff. Undoubtedly, she married before 30 years and she is residing at her matrimonial house, and therefore, certainly she does not know about the transaction. However on the day of execution of power of attorney, according to her, all the facts of case were narrated to her by the plaintiff and on that basis she has given her evidence. Therefore, it can safely be said that the power of attorney holder is a competent witness in view of Section 118 of the Indian Evidence Act. She can state for the plaintiff and not as a plaintiff.”

(Emphasis now)

10. Learned counsel for the appellant is right in contending that the plaintiff was active till only filing of the suit and at this stage, without evidence, no court will be in a position to hold that the plaintiff was always ready and willing to perform his part of contract. Such an inference can only be drawn, once the parties to the suit lead evidence. The plaintiff, admittedly, has not led any evidence to show readiness and willingness to perform his part of contract. His daughter entered the witness box. The first appellate court observed that she was married long back viz. 30 years and was residing at her matrimonial house. The first

appellate court has also noted that she does not know about the transaction and that she has given evidence on the basis of the facts narrated to her by the plaintiff. Thus, it is clear that PW1 Sau. Geeta's evidence is an hearsay evidence. The first appellate Court has erroneously placed reliance upon Section 118 of the Indian Evidence Act, 1872, which deals with the competence of a person to testify. The use of the word 'competence' in the provision is in the context of the understanding of the witness to a question put to him, giving rational answers to those questions, tender age, extreme old age, disease, etc. Section 18 provides that all persons are competent to testify unless are prevented by the aforesaid causes. This competence has nothing to do with the competence of power of attorney to depose on behalf of the executant.

11. The learned counsel for the plaintiff contends that the plaintiff was suffering from ailment and therefore was not in a position to travel to the Court. If this is true, then the remedy available to the plaintiff was to apply for appointment of Commissioner for recording his evidence. Instead, he chose to execute power of attorney in favour of his daughter who, admittedly, was not aware of the transaction under question.

12. The plaintiff's counsel has relied upon the judgment of this Court in the case of *Tousif Ahmed s/o Abdul Aaheman Vs. Ferozkhan s/o Sarfarzkhan and anr.*¹ While dealing with similar such issue, this Court has referred to the judgment of the Supreme Court in the case of *Man Kaur (Dead) by LRs Vs. Hartar Singh Sangha*,² wherein the Apex Court, while considering the evidence of power of attorney holder, has summarized the position as to who should give evidence in regard to the matter involving personal knowledge. The Supreme Court in paragraph 18 of *Man Kaur (Dead) by LRs.* (supra), held thus:

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

(a) to (e)

(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

1 2019(1) Mh.L.J. 914

2 2011 (2) Mh.L.J. (S.C.) 436

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."

(Emphasis now)

13. Thus, the Apex Court has observed that to establish or prove something, with reference to the "state of mind" or "conduct", normally the person concerned alone has to give evidence and not an attorney holder. It is then held that the person seeking specific performance of contract who has to show his "readiness and willingness" would fall under this category. The exception is 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).

14. The plaintiff is trying to get benefit of the bracketed portion above. The daughter being family member of the plaintiff.

However, mere fact of someone belonging to a family, will not lead to an inference that such a family member is managing the transactions and looking after the affairs of the family. Rather, the first appellate court noted that the PW1 Sau. Geeta was not aware of the transaction under question as she was married 30 years ago and was residing in her matrimonial house. This being the position, the judgments relied upon by the defendant will itself render the evidence of PW1 Sau. Geeta, inadmissible.

15. The counsel for the plaintiff has relied upon judgment in the case of *Janki Vashdeo Bhojwani and anr. vs. Indusind Bank Ltd. and Ors.*³ and *Man Kaur (Dead) by LRs.* (supra) to contend that the power of attorney, in such a situation, cannot depose in place and instead the principal. I find substance in the contentions of the plaintiff.

16. As regards Section 2 of the Powers of Attorney Act, 1882, it provides that the donee of power of attorney may execute or do any instrument, thing in and with his own name and signature by the authority of the donor of the power and the things so done shall be binding upon the donor.

3 AIR 2005 SC 439

17. This provision permits the donee only to perform certain acts subsequent to the execution of the power of attorney. It does not permit or entitle the donee to testify on behalf of the donor of the acts done by him prior to the execution of the power of attorney. The attorney, in the present case, doesn't fall under exception as envisaged in paragraph 18 (g) of Man Kaur (Dead) by LRs. (supra).

18. In the facts and circumstances of the case, since the plaintiff failed to step into the witness box and since the evidence of PW1 Sau. Geeta – power of attorney holder, is inadmissible to prove the contract, the plaintiff failed to prove his case. The courts below have committed error in applying the provisions of Section 2 of the Powers of Attorney Act, 1892 and Section 118 of the Indian Evidence Act, 1882, to the facts of the case. The substantial questions of law are answered accordingly.

19. At this stage, learned counsel for the plaintiff submits that admittedly, the plaintiff on 17.12.1995 has paid Rs.60,000/- as an earnest amount. The alternative prayer is/was to direct the defendant to repay the amount with interest. Accordingly,

requested to consider the same. To my mind, the plaintiff is entitled to the prayer so made. Hence, the following order is passed.

ORDER

- (i) The appeal is partly allowed.
- (ii) Judgment and decree dated 26.03.2002, passed by Jt. Civil Judge Senior Division, Wardha in Special Civil Suit No. 29/1997 so also judgment dated 07.09.2004, passed by 2nd Ad hoc Additional District Judge, Wardha in Regular Civil Appeal No.69/2002, are hereby quashed and set aside.
- (iii) The suit is partly allowed.
- (iv) The defendant shall, within twelve weeks from today, refund the earnest amount of Rs.60,000/- paid by the plaintiff on 17.12.1995, along with interest at the rate of 6% per annum from 17.12.1995 till its realization. Costs in cause.

(Anil L. Pansare, J.)

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