

was that he was a resident of a foreign country and Sewa Singh was his duly authorized attorney and was fully conversant with the case. The defendant-appellant represented himself as owner of the suit land and made an offer to sell and on 27.03.1998 the parties entered into an agreement to sell. The price of the suit land was settled at the rate of Rs.9,00,000/- per acre and out of the total sale consideration of Rs.26,55,000/-, a sum of Rs.20,00,000/- was paid to the defendant-appellant by the plaintiff-respondent as earnest money i.e. Rs.9,00,000/- was stated to have already been paid and Rs.11,00,000/- was paid by cheque. The date of execution of the sale deed was fixed as 25.03.2000 which was later extended to 24.03.2001 with the mutual consent of the parties vide a separate endorsement (Ex.P2). It was further averred that on 24.03.2001 the plaintiff-respondent through his attorney remained present in the office of the Sub-Registrar, Phagwara along with the balance sale consideration and registration charges but the defendant-appellant did not turn up. The plaintiff-respondent got his presence marked. The plaintiff-respondent is again stated to have got his presence through his attorney marked on 26.03.2001 along with the balance sale consideration etc. but the defendant-appellant did not turn up. It was further averred that the plaintiff-respondent was always ready and willing to perform his part of the contract.

The suit was contested by the defendant-appellant stating therein that though the suit land was owned by him, he never entered into any agreement to sell dated 27.03.1998. It was further averred that the plaintiff-respondent and the defendant-appellant were cousin brothers and the plaintiff-respondent had asked the defendant-appellant for an amount of Rs.11,00,000/-. The said Rs.11,00,000/- was handed over to the plaintiff-

respondent and the plaintiff-respondent had issued a post-dated cheque for Rs.11,00,000/- dated 27.03.1998 which had wrongly been connected with the agreement to sell.

Replication was filed by the plaintiff-respondent wherein the averments made in the plaint were reiterated and those in the written statement were denied.

On the basis of the pleadings of the parties, the following issues were framed :

1. Whether the defendants executed agreement to sell dated 27.3.1998 in favour of the plaintiff and received earnest amount of Rs. 20 lacs ? OPP
2. Whether the plaintiff is still ready and willing to perform his part of the contract ? OPP
3. Whether the plaintiff has cause of action and locus standi to file the present suit ? OPP
4. Whether the suit is properly verified ? OPP
5. Whether the suit is within time ? OPP
6. Whether the suit is filed by legal and duly appointed attorney of plaintiff ? OPP
7. Whether the suit is maintainable ? OPP
8. Whether the alleged agreement to sell is forged and fabricated ? OPD
9. Whether the plaintiff is entitled for decree of specific performance of agreement to sell dated 27.3.1998 ? OPP
10. Relief.

The Trial Court, vide judgment and decree dated 25.01.2010, decreed the suit of the plaintiff-respondent. Aggrieved by the said judgment and decree, an appeal was preferred by the defendant-appellant which was dismissed by the First Appellate Court vide the judgment and decree dated 17.09.2010. Hence, the present regular second appeal.

Learned senior counsel appearing on behalf of the defendant-appellant has contended that the agreement to sell is dated 27.3.1998 and the power of attorney in favour of Sewa Singh is dated 28.02.2001 and hence a subsequent power of attorney holder would be incompetent to depose on behalf of the seller in respect of acts which pertain to the period prior to the conferment of the power of attorney. The power of attorney holder was, therefore, not competent to depose regarding readiness and willingness of the plaintiff-respondent. In support of his contentions, learned senior counsel has relied upon the judgment of the Hon'ble Supreme Court in the case of **Mohinder Kaur Vs. Sant Paul Singh [(2019) 9 Supreme Court Cases 358]** and **Man Kaur (Dead) by LRS. Vs Hartar Singh Sangha [(2021) 10 Supreme Court Cases 512]**. The learned senior counsel has further contended that on the agreement to sell (Ex.P1) there is an endorsement (Ex.P2) which is undated and not witnessed by any one and that the witnesses who stepped into the witness box on behalf of the plaintiff-respondent are totally silent regarding the endorsement (Ex.P2). PW1 - Mohinder Singh does not state that the endorsement (Ex.P2) extending the period was made in his presence and even PW2 - Avtar Singh, the scribe, is totally silent regarding the endorsement (Ex.P2) and that even PW3 - Sewa Singh does not speak of the endorsement (Ex.P2). It is submitted that the plaintiff-respondent himself did not step into the witness box and the

attorney who was not present at the time of the execution of the agreement or the alleged endorsement (Ex.P2) in any case could not have possibly have deposed qua the same. Lastly it was submitted that without admitting the execution of the agreement to sell, the defendant-appellant was willing to return the Rs.11,00,000/- to the plaintiff-respondent with nominal interest.

Per contra, learned senior counsel appearing on behalf of the plaintiff-respondent has contended that the endorsement (Ex.P2) is signed by the parties and that the agreement to sell itself stood proved since no handwriting expert was produced by the defendant-appellant despite denying the signatures on the agreement to sell. It is further the contention of learned senior counsel that the cheque for Rs.11,00,000/- was proved to have been encashed and the stand taken by the defendant-appellant denying the agreement to sell stood falsified. Hence, the suit for specific performance has rightly been decreed in favour of the plaintiff-respondent.

I have heard the learned senior counsel for the parties and with their able assistance also been through the Trial Court record.

Taking up the first argument of the learned senior counsel for the defendant-appellant that the attorney holder of the plaintiff-respondent was not competent to depose in the present case as the power of attorney was executed on 28.02.2001 and the agreement to sell in the present case is dated 27.03.1998, it is to be noted that the attorney Sewa Singh appeared as PW-3 and stated that the agreement to sell was executed in his presence. However, in his cross-examination he stated that the amount of Rs.9 lacs was not paid to the defendant-appellant in his presence but was paid by his uncle, the plaintiff-respondent, about six months prior to the execution of the agreement to sell Ex.P1. Sewa Singh PW-3 does not state anywhere in his

statement that the endorsement Ex.P2 extending the date for execution of the sale deed was made in his presence. Interestingly, both PW-1 Mohinder Singh, one of the attesting witness of the agreement to sell Ex.P1, and PW-2 Avtar Singh, the Deed Writer, both do not state that the cash amount of Rs.9 lakhs was paid in their presence nor speak of the endorsement Ex.P2 extending the date for execution of the sale deed. The Supreme Court in a case of specific performance in the case of Mohinder Kaur (*supra*) held as under

“7. In Janki Vashdeo [Janki Vashdeo Bhojwani v. Indusind Bank Ltd., (2005) 2 SCC 217], it was held that a power-of-attorney holder, who has acted in pursuance of the said power, may depose on behalf of the principal in respect of such acts but cannot depose for the principal for the acts done by the principal and not by the power-of-attorney holder. Likewise, the power-of-attorney holder cannot depose for the principal in respect of matters of which the principal alone can have personal knowledge and in respect of which the principal is entitled to be cross-examined. In our opinion, the failure of the respondent to appear in the witness box can well be considered to raise an adverse presumption against him as further observed therein as follows : (SCC p. 223, para 15)

“15. Apart from what has been stated, this Court in Vidhyadhar v. Manikrao [Vidhyadhar v. Manikr

ao, (1999) 3 SCC 573] observed at SCC pp. 583-84, para 17 that:

‘17. Where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct....’ ”

In the case of Man Kaur (*supra*), another case of specific performance, the Supreme Court held as under :

“17. To succeed in a suit for specific performance, the plaintiff has to prove: (a) that a valid agreement of sale was entered into by the defendant in his favour and the terms thereof; (b) that the defendant committed breach of the contract; and (c) that he was always ready and willing to perform his part of the obligations in terms of the contract. If a plaintiff has to prove that he was always ready and willing to perform his part of the contract, that is, to perform his obligations in terms of the contract, necessarily he should step into the witness box and give evidence that he has all along been ready and willing to perform his part of the contract and subject himself to cross-examination on that issue. A plaintiff cannot obviously examine in his place, his attorney-holder who did not have personal knowledge either of the transaction or of his readiness and

willingness. Readiness and willingness refer to the state of mind and conduct of the purchaser, as also his capacity and preparedness on the other. One without the other is not sufficient. Therefore a third party who has no personal knowledge cannot give evidence about such readiness and willingness, even if he is an attorney-holder of the person concerned.

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 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 case of principals carrying on business through authorised 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 recognised 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.”

In the present case the plaintiff-respondent did not step into the witness box. Sewa Singh PW-3 did not hold a power of attorney when the agreement to sell dated 27.03.1998 (Ex.P1) was executed. The said witness being power of attorney of the plaintiff-respondent was not competent to depose qua readiness and willingness of the plaintiff-respondent as he had

no personal knowledge. Even if it is accepted for the sake of arguments that the said witness had knowledge of the execution of the agreement to sell dated 27.03.1998 the same having allegedly been executed in his presence, Sewa Singh PW-3 categorically stated that the amount of Rs.9 lakhs was paid six months prior to the execution of the agreement to sell and does not say that the same was in his presence. Further, there is not a whisper by him about the endorsement Ex.P2 having been made in his presence. That being so, Sewa Singh PW-3 possibly could not have deposed qua facts not in his personal knowledge as the attorney holder of the plaintiff-respondent. The only person competent to have deposed qua the readiness and willingness could have been the plaintiff-respondent who preferred not to step into the witness box. In the absence of evidence qua readiness and willingness, the suit for specific performance could not have been decreed. The power of attorney holder who stepped into the witness box on behalf of the plaintiff-appellant was not competent to depose qua acts done by the principal.

Further, the agreement to sell stipulated 25.03.2000 as the target date. There is no evidence on the record to show that on the said target date i.e. 25.03.2000 mentioned in the agreement to sell, the plaintiff-respondent was ready and willing to perform his part of the contract. Learned senior counsel for the defendant-appellant has also referred to the endorsement Ex.P2 to contend that neither any date has been appended to the said endorsement nor the same has been proved in accordance with law. The entire evidence led by the plaintiff-respondent was to show his readiness and willingness as on 24.03.2001 i.e. the extended target date, however, the endorsement (Ex.P2) itself remaining unproven the readiness and willingness on the extended date is meaningless. Neither any date is

forthcoming nor any of the witnesses produced by the plaintiff-respondent has stated that the endorsement Ex.P2 was made in their presence. On a pointed query by this Court as to the date of the endorsement Ex.P2 and as to which of the witness had stated regarding the endorsement Ex.P2 and in whose presence the endorsement Ex.P2 was made, learned senior counsel for the plaintiff-respondent has candidly admitted that no date is forthcoming on the endorsement Ex.P2. Learned senior counsel has also not been able to point out to the testimony of any of the witnesses of the plaintiff-respondent who may have stated that the endorsement Ex.P2 was made in their presence.

In the present case the suit was filed by the power of attorney holder of the plaintiff-respondent and the power of attorney holder stepped into the witness box to depose. However, neither the act of entering into the agreement to sell nor the alleged endorsement Ex-P-2 was by the power of attorney holder. It has been held by the Hon'ble Supreme Court in the case of **Mohinder Kaur** (supra) and **Man Kaur** (supra) that a power of attorney holder who has acted in pursuance of the power of attorney may depose on behalf of the principal in respect of such acts, but cannot depose for the principal for the acts done by the principal and not by the power of attorney holder.

In view of the discussion above, the suit for specific performance could not have been decreed by the Courts below. The judgments and decrees of the Courts below are erroneous being contrary to the settled provisions of law as laid down by the Apex Court. Thus, the suit of the plaintiff-respondent for specific performance of agreement to sell dated 27.03.1998 is dismissed. Since it has come on the record that an

amount of Rs.11,00,000/- was paid by cheque to the defendant-appellant, which was encashed, and the defendant-appellant has expressed his willingness to return the same, to do justice between the parties, this Court deems it appropriate to direct the defendant-appellant to refund Rs.11,00,000/- along with interest @ 6% per annum to the plaintiff-respondent from the date of the agreement to sell i.e. 27.03.1998 till payment. The judgments and decrees passed by both the Courts below are modified to the extent stated above. The present appeal is partly allowed. Pending applications, if any, also stand disposed off.

(ALKA SARIN)
JUDGE

11.04.2023
Yogesh Sharma

NOTE : Whether speaking/non-speaking: Speaking
Whether reportable: YES/NO