

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.682 of 2013

Harsha Kumar Bothra and Ors.

... .. Appellant/s

Versus

Surya Karan Bothra @ Suraj Karan Bothra and Anr.

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Jitendra Prasad Singh, Adv. Mr. Santosh Kumar Verma, Adv.
For the Respondent/s	:	Mr. Dhanesh Shankar Vidyarthi, Adv.

**CORAM: HONOURABLE MR. JUSTICE NAWNEET KUMAR
PANDEY**

ORAL ORDER

8 15-02-2024 Heard.

2. This Miscellaneous Appeal has been preferred against the order dated 19-09-2013 passed in Probate Case No. 13 of 2012 whereby the learned court below refused to proceed in the case and, dismissed the same on the sole ground that the Probate Case was filed on the basis of power of attorney, executed by the legatees of the Will-deed.

3. Brief facts of the case is that late Kanhaiya Lal Bothra executed a registered Will-deed in favour of his grand sons on 01-06-1990. The testator died on 03-09-2001. The legatees were residing in Gujarat. They executed power of attorney in favour of one Sachin Kumar Bothra, who on behalf of the legatees, filed Probate Case No. 13 of 2012. Learned court below dismissed the Probate Case on the ground that power of attorney holder does not come under the definition of an 'executor' as mentioned in Section-2(c) of the Indian



Succession Act, 1925.

4. Learned counsel for the appellants has submitted that Section 276 of the Indian Succession Act which deals with the provisions for filing a Probate Case, does not make a bar in filing of a Probate Case on behalf of the power of attorney holder. He submits that the deed of power of attorney gives the power to the holder to institute a suit on behalf of the legatees. Learned counsel has relied upon a decision of the Hon'ble Supreme Court (Suraj Lamp & Industries (P) Ltd. Tr. Dir vs State of Haryana & Anr), of which, paragraphs-13 & 15 are relevant herein as quoted below:

13. "A power of attorney is not an instrument of transfer in regard to any right, title or interest in any immovable property. The power of attorney is creation of an agency whereby the grantor authorizes the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by him (see section 1A and section 2 of the Powers of Attorney Act, 1882). It is revocable or terminable at any time unless it is made irrevocable in a manner known to law. Even an irrevocable attorney does not have the effect of transferring title to the grantee. In State of Rajasthan vs. Basant Nahata-2005(12) SCC 77, this court held:

"A grant of power of attorney is essentially governed by Chapter X of the Contract



Act. By reason of a deed of power of attorney, an agent is formally appointed to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally conferring necessary authority upon another person. A deed of power of attorney is executed by the principal in favour of the agent. The agent derives a right to use his name and all acts, deeds and things done by him and subject to the limitations contained in the said deed, the same shall be read as if done by the donor. A power of attorney is, as is well known, a document of convenience.

Execution of a power of attorney in terms of the provisions of the Contract Act as also the Powers-of-Attorney Act is valid. A power of attorney, we have noticed hereinbefore, is executed by the donor so as to enable the donee to act on his behalf. Except in cases where power of attorney is coupled with interest, it is revocable. The donee in exercise of his power under such power of attorney only acts in place of the donor subject of course to the powers granted to him by reason thereof. He cannot use the power of attorney for his own benefit. He acts in a fiduciary



capacity. Any act of infidelity or breach of trust is a matter between the donor and the donee."

An attorney holder may however execute a deed of conveyance in exercise of the power granted under the power of attorney and convey title on behalf of the grantor.

15. Therefore, a SA/GPA/WILL transaction does not convey any title nor create any interest in an immovable property. The observations by the Delhi High Court, in *Asha M. Jain v. Canara Bank-94 (2001) DLT 841*, that the "concept of power of attorney sales have been recognized as a mode of transaction" when dealing with transactions by way of SA/GPA/WILL are unwarranted and not justified, unintendedly misleading the general public into thinking that SA/GPA/WILL transactions are some kind of a recognized or accepted mode of transfer and that it can be a valid substitute for a sale deed. Such decisions to the extent they recognize or accept SA/GPA/WILL transactions as concluded transfers, as contrasted from an agreement to transfer, are not good now".

5. Learned counsel for the respondents does not oppose the submissions advanced on behalf of learned counsel for the appellants.

6. From perusal of Section 276 of the Indian Successions Act, it appears that there is no bar in filing of the suit through power of attorney. The legatees have given the power to the holder of power of attorney, also to institute a suit



on their behalf.

7. With the aforesaid observations, the impugned order dated 19-09-2013 passed in Probate Case No. 13 of 2012 is set aside.

8. The learned court below is directed to proceed further but at the sametime, the legatees must sworn in an affidavit before the court below within a period of six weeks with the recitals that they have executed power of attorney in favour of the holder of that deed.

9. Accordingly, this Misc. Appeal stands disposed of.

(Nawneet Kumar Pandey, J)

A.K.V.//-

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