IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 538 OF 2022

WITH

INTERIM APPLICATION NO. 1666 OF 2022

Vimal Uttam Kharade } **..Petitioner**

V/s.

Ratan Subhash Dahiwal, through
Power of Attorney Holder, Subhash
Shankarrao Dahiwal } **..Respondent**

Mr. Abhijit Kulkarni *a/w. Mr. Chinmay Patil, for the Petitioner.*

Mr. Akshay Kulkarni, *for the Respondent.*

CORAM : SANDEEP V. MARNE, J.

Dated : 13 March 2024.

P.C. :

1) By this Appeal, the Appellant challenges the Decree dated 24 September 2021 passed by the District Court, Barshi in Regular Civil Appeal No. 11 of 2017. The first Appellate Court has reversed the Decree dated 25 March 2013 passed by the Civil Judge Senior Division, Barshi in Special Civil Suit No. 107 of 2008. The first Appellate Court has decreed the suit by directing the Defendant to execute registered

sale-deed of the suit property in favour of the Plaintiff and to deliver vacant and peaceful possession of the suit property.

2) Plaintiff filed Special Civil Suit No. 107 of 2008 seeking specific performance of the Agreement for Sale dated 25 March 2008 executed by the Defendant. The Defendant appeared in the suit. She did not deny execution of the document. However, she took a defence that the transaction agreed between the parties was one of loan and not of sale. Plaintiff's husband led evidence as her constituted attorney before the Trial Court. After considering the pleadings and the evidence, the Trial Court dismissed the suit on 25 March 2013 holding that transaction of agreement for Sale was not proved nor payment of earnest money of Rs.50,000/- by the Plaintiff to the Defendant was proved. The Trial Court further held that Plaintiff was not ready or willing to perform her part of the contract.

3) Aggrieved by the decision of the Trial Court, the Plaintiff filed Regular Civil Appeal No.11 of 2017 before the District Court, Barshi which has proceeded to allow the Appeal and while reversing the Decree passed by the Trial Court, has directed the Defendant to execute registered Sale-Deed in respect of the suit property in favour of the Plaintiff by delivering vacant possession of the suit property to the Plaintiff. Aggrieved by the decision of the first Appellate Court, the Appellant has filed the present Appeal.

4) I have heard Mr. Abhijit Kulkarni, the learned counsel appearing for the Appellant and Mr. Akshay Kulkarni, the learned counsel appearing for the Respondents.

5) From the defence adopted by the Defendant in the Written Statement, it appears that she did not deny her signature on the document in question. The execution of document is thus admitted. What the Defendant disputed was the nature of transaction. Perusal of the Agreement dated 25 March 2008 would indicate that the same is in respect of sale of the suit property. Since execution of the document is admitted, the nature of transaction will have to be ascertained from the contents of the Agreement. If Defendant pleaded a case that the transaction was not of sale. but was of loan, the burden shifted on the shoulders of the Defendant to prove that the transaction between the parties was of loan and not of sale. Apparently, the Defendant failed to lead any cogent evidence to prove that the transaction between the parties was of loan. Even otherwise, as per the provisions of Sections 91 and 92 of the Indian Evidence Act, it is not permissible to lead oral evidence contrary to the contents of the document.

6) The Trial Court proceeded to dismiss Plaintiff's suit essentially on account of Plaintiff's husband deposing on behalf of the Plaintiff as her constituted attorney. The Trial Court held that the constituted attorney of the Plaintiff did not have personal knowledge of the transactions and therefore proceeded to discard his evidence. In my view, the Trial Court committed a palpable error in doing so. In

Man Kaur (Dead) by Legal Heirs V/s. **Hartar Singh Sangha**, (2010) 10 SCC 512, the Apex Court has summarised the position as to who can give evidence with regard to matters involving personal knowledge. In para-18 of the judgment, the Apex Court has held as under :

> *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 authorized 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 `bonafide' 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 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 bonafides 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 supplied)*

7) Thus as held by the Apex Court in ***Man Kaur*** (supra) in para-18(g), a husband looking after the affairs of his spouse, is entitled to give evidence in respect of the transaction of sale especially with regard to the readiness and willingness of his wife. In the present case, perusal of the evidence of the Defendant would show that she herself asserted before the Trial Court that the entire transaction was managed by Plaintiff's husband. Thus, it is the case of the Defendant herself that Plaintiff's husband was managing the entire affairs of his wife. Thus, personal knowledge of the constituted attorney of the Plaintiff in respect of the suit transaction was clearly proved. In my view, therefore the evidence given by Plaintiff's constituted attorney could not have been ignored by the Trial Court.

8) The next is about the readiness and willingness on the Plaintiff to perform her part of the contract. It appears that before institution of the suit, Plaintiff served Notice dated 23 July 2008 on the

Defendant calling her upon to remain present before the Registrar's office for execution of the sale-deed on 25 July 2008. It appears that the Notice was not delivered on the Defendant as the Defendant was not found at the address. Plaintiff immediately instituted suit in the Trial Court. Albeit with some delay, Plaintiff showed willingness to deposit the balance amount of consideration of Rs.11,00,000/- in the Trial Court by filing application at Exhibit-42. The Trial Court however rejected the said application.

9) It appears that initially the Trial Court's decree was challenged by filing First Appeal No. 877 of 2013 in this Court. In that Appeal, this Court permitted Plaintiff to deposit the balance amount of consideration of Rs.11,00,000/-. In pursuance of the order passed by this Court on 25 June 2014 in First Appeal No. 877 of 2013, Plaintiff has deposited the amount of Rs.11,00,000/- in this Court.

10) In my view therefore, readiness and willingness on the part of the Plaintiff to perform her part of contract was clearly established.

11) I therefore do not find any patent error on the part of the first Appellate Court in reversing the order passed by the Trial Court. Plaintiff proved execution of the Agreement by the Defendant as well her readiness and willingness to perform her part of the contract. No serious error therefore can be traced in the decision of the first Appellate Court. No substantial question of law is involved in the Appeal. The Second Appeal is accordingly **rejected**.

12) The Appellant shall be at liberty to withdraw the entire deposited amount in First Appeal No. 877/2013 in this Court alongwith accrued interest.

13) With rejection of the Appeal, Interim Application does not survive. The same also stands disposed of.

SANDEEP V. MARNE, J.