

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.2927 OF 2025**

Baban Shamshuddin Pathan ... Petitioner
versus
Ruksana Sikandar Pathan and Ors. ... Respondents

Mr. Rahul Kadam with Mr. Shardul Diwan, Mr. Vedant Babar, for Petitioner.
Mr. Bhalchandra Shinde, for Respondents.

CORAM: N.J.JAMADAR, J.

DATE : 3 MARCH 2025

ORDER :

1. Rule. Rule made returnable forthwith. With the consent of the parties, heard finally.

2. This Petition under Article 227 of the Constitution of India assails the legality, propriety and correctness of an order dated 24 November 2023 passed by the learned Civil Judge, Jr. Division, Indapur, Pune, whereby the application preferred by the Petitioner-Plaintiff to examine himself as a witness in a suit instituted by him for specific performance of the contract, came to be rejected.

3. The background facts can be stated, in brief, as under :

3.1 The Petitioner instituted a suit seeking specific performance of a contract to purchase the suit property contained in an Agreement for Sale dated 18 November 2003. The Plaintiff asserted that the Plaintiff was put in

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possession of the suit property in part performance of the contract.

3.2 During the pendency of the suit, the Plaintiff had executed a Power of Attorney in favour of his son as on account of an accident, the Plaintiff was persistently unwell. On the strength of the said Power of Attorney, the Plaintiff's son prosecuted the suit and also adduced evidence. Eventually, the Plaintiff examined 12 witnesses and closed his evidence. The Defendants filed an affidavit in lieu of examination in chief of Defendant No.2.

3.3 When the matter was posted for further evidence of the Defendant's witness, the Plaintiff preferred an application seeking permission to examine himself as a witness, asserting that few material facts of which only the Plaintiff had knowledge, were not brought on record in the evidence hither to adduce by the Plaintiff and it was, therefore, necessary to examine the Plaintiff.

3.4 The Defendants resisted the application. It was, inter alia, contended that the Plaintiff intended to examine himself as a witness to wipe out the admissions, which have been elicited in the cross-examination of the Plaintiff's witness and to further delay the disposal of the suit, as the Plaintiff has obtained an order of interim injunction against the Defendants.

3.5 By the impugned order, the learned Civil Judge was persuaded to reject the application observing, inter alia, that the application did not appear to be bonafide. The Plaintiff had not divulged the points on which the Plaintiff

intended to adduce further evidence. Since the power of attorney of the Plaintiff is none other than the son of the Plaintiff, it was not conceivable that the power of attorney holder was not aware of the facts, which the Plaintiff now professed to depose to.

4. I have heard Mr. Kadam, learned Counsel for the Petitioner, and, Mr. Shinde, learned Counsel for Respondents, at some length. With the assistance of the learned Counsel, I have perused the material on record.

5. Mr. Kadam, learned Counsel for the Petitioner, submitted that the Plaintiff cannot be deprived of the opportunity to adduce evidence in support of his case. Since the suit has been instituted for specific performance of the contract, the person who is a party to the contract is better equipped to depose to the facts which bear upon the exercise of the discretionary jurisdiction by the Court. The learned Civil Judge approached the matter from an incorrect perspective that the intent of the Petitioner did not appear to be bonafide. The application was preferred before the Defendant No.2 was cross-examined. Thus, even if the Plaintiff adduces his evidence, the Defendants would have an efficacious opportunity to adduce evidence in the rebuttal. Thus, the learned Civil Judge could not have rejected the application.

6. To buttress these submissions, Mr. Kadam placed reliance on a judgment of the Supreme Court in the case of Janki Vashdeo Bhojwani V/s.

Indusind Bank Ltd. and Ors.¹ and an order passed by this Court in the case of Ambadas Dashrath Vyawahre and Dashrath Rajaram Rajguru and Ors.²

7. In opposition to this, Mr. Shinde, learned Counsel for the Respondents would urge that the endeavour of the Petitioner is to fill in the lacuna in his case. Taking the Court through the depositions of the witnesses for the Plaintiff, especially the cross-examination of Hussain Baban Pathan, son of the Plaintiff and the power of attorney, it was urged that the application was preferred with a view to wriggle out of the admissions elicited in the cross-examination of the Plaintiff's witness.

8. I have perused the power of attorney executed by the Plaintiff in favour of his son. The reason of the illness of the Plaintiff on account of the accident which the Plaintiff had met, is specifically mentioned therein. The Plaintiff's son has prosecuted the suit in the said capacity, and has also deposed before the Court. However, the fact remains that the Agreement for Sale of which specific performance has been sought, was executed in favour of the Petitioner. Thus, the Petitioner being privy to the contract, cannot be said to be a person whose evidence is not material for the adjudication of the dispute between the parties.

9. The examination of the power of attorney of the Plaintiff cannot be a substitute for the evidence of the Plaintiff. A power of attorney can only

1 (2005) 2 SCC 217

2 WP No.6932 of 2019 dt. 12 Oct. 2021.

depose with regard to the facts which are in his personal knowledge. In view of the decision of the Supreme Court in the case of Janki Vashdeo Bhojwani V/s. Indusind Bank Ltd. and Ors. (supra), it is well settled that a power of attorney cannot depose for the principal in respect of the matter of which the only principal can have personal knowledge and in respect of which the principal is entitled to be cross-examined.

10. Moreover, in view of the judgment of the Supreme Court in the case of Vidhyadhar v/s. Manikrao and Anr.³ a party to the suit who does not appear into the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, exposes himself to the risk of an inference that the case set up by him is not correct.

11. It is true, in the instant case, the Plaintiff had closed his evidence. However, despite the deletion of the provisions contained in Rule 17-A of Order XVIII of the Code of Civil Procedure, 1908, the Court has inherent power to permit a party to adduce evidence at any stage of the proceedings, if a justifiable case is made out.

12. In the case at hand, the Plaintiff's son prosecuted the suit and also deposed before the Court, as a power of attorney was executed in his favour on account of the illness of the Plaintiff. As the relevancy and the necessity of the evidence of the Plaintiff cannot be contested, in my considered view, the

³ (1999) 3 SCC 573

Plaintiff who is a party to the suit, cannot be deprived of the opportunity to adduce evidence. The apprehension on the part of the Defendants that the Plaintiff would avail the opportunity to make an endeavour to wipe out the admissions elicited during the course of the cross-examination of the Plaintiff's witness, does not furnish a sustainable ground to deprive the opportunity to adduce evidence. It can only be clarified that the Plaintiff cannot be permitted to lead evidence beyond his pleadings. Thus, the Writ Petition deserves to be allowed.

13. Hence, the following order :

ORDER

- (i) The Writ Petition stands allowed.
- (ii) The impugned order dated 24 November 2023 stands quashed and set aside.
- (iii) The application (Exhibit 165) seeking permission to adduce Plaintiff's evidence stands allowed, subject to following conditions :
 - (a) The Plaintiff shall not seek adjournments for adducing his evidence.
 - (b) The Plaintiff shall not seek adjournments for subjecting himself to cross-examination.
 - (c) The Plaintiff shall pay total costs of Rs.10,000/- to the Defendants within a period of three weeks from the date of

uploading of this order.

- (iv) Rule made absolute in the aforesaid terms.

(N.J.JAMADAR, J.)