



**IN THE HIGH COURT OF MADHYA PRADESH  
AT GWALIOR**

**BEFORE**

**HON'BLE SHRI JUSTICE G. S. AHLUWALIA**

**ON THE 14<sup>th</sup> OF JULY, 2025**

**FIRST APPEAL No. 66 of 2014**

***SMT. SHAKUNTALA SHRIVASTAVA (DEAD) THROUGH L.R.s***

***Versus***

***VIJAY MATHUR (DEAD) THROUGH L.R.s AND OTHERS***

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**Appearance:**

Shri N.K. Gupta, Senior Advocate with Shri Saket Sharma, Advocate for appellants.

Shri V.K. Bhardwaj Senior Advocate with Shri Rohit Batham, Advocate for Legal Representatives of respondent no.1

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**JUDGMENT**

1. This First Appeal, under Section 96 of CPC, has been filed against the Judgment and decree dated 12-3-2014 passed by 10<sup>th</sup> Additional District Judge, Gwalior in Civil Suit No. 65A/11.
2. The Appellants are the legal representatives of the original defendant Smt. Shakuntala Shrivastava who died during the pendency of civil suit. Similarly,



the original Plaintiff Shri Vijay Mathur has also expired during the pendency of this appeal and respondents no. 1(1), (2), (3) and (4) are his legal representatives.

3. The present appeal has been filed by the defendants who have lost their case before the Trial Court.

4. The facts necessary for disposal of present appeal, in short, are that the original plaintiff was the tenant of Late Shri Ambika Prasad Shrivastava. The original defendant was the widow of late Shri Ambika Prasad Shrivastava.

5. The original plaintiff filed a suit for declaration of title and permanent injunction claiming *inter alia* that he is the owner and in possession of House No. M-57, Darpan Colony, Gwalior. The said house was purchased by original plaintiff in the year 1985 and since then he is residing continuously along with his family members. The disputed house was allotted by M.P. Housing Board to Late Shri Ambika Prasad Shrivastava in the year 1976 and a lease deed was also executed by M.P. Housing Board in favor of Late Shri Ambika Prasad Shrivastava. Since, Late Ambika Prasad Shrivastava was in need of money during his life time, therefore, he sold the disputed house to the original plaintiff. Accordingly, a joint affidavit of Late Shri Ambika Prasad Shrivastava and the original plaintiff was presented before the M.P. Housing Board on 13-3-1998 and accordingly, Late Ambika Prasad Shrivastava gave his consent for transfer of lease deed in favor of original plaintiff as well as for mutation of his name. Accordingly, a public notice was issued by the M.P. Housing Board which was published on 7-9-1998 and accordingly on 21-1-1999, mutated the name of original plaintiff in place of name of Late Shri Ambika Prasad Shrivastava. On 3-4-1999, a lease deed was also executed by M.P. Housing Board in favor of original plaintiff. On 6-5-2000, NOC was also issued by M.P. Housing Board.



After all proceedings were completed, in the year 2001, the original plaintiff requested Late Ambika Prasad Shrivastava to execute the sale deed, however, Late Ambika Prasad Shrivastava assured to execute the sale deed after some time. On 1-9-2002, Late Shri Ambika Prasad Shrivastava expired but sale deed could not be executed. Accordingly, the original plaintiff requested Smt Shakuntala and her family members to execute the sale deed, but they did not do so. After 5 years of death of Late Shri Ambika Prasad Shrivastava, Smt. Shakuntala Shrivastava made an application to M.P. Housing Board for mutation of her name and also for execution of lease deed in her favor, however, the Estate Officer, M.P. Housing Board informed Smt. Shakuntala that since, the name of original plaintiff has already been mutated, therefore, mutation proceedings would be possible only after sale deed is executed in favor of original plaintiff.

6. Thereafter, the M.P. Housing Board by order dated 15-4-2010 , cancelled the mutation done in favor of original plaintiff. No notice was given to the original plaintiff prior to cancellation of his mutation. Accordingly, the original plaintiff filed a writ petition no. 3379/2010 before the High Court, thereby challenging the cancellation of his mutation order. Although an interim order was passed, but in spite of that the M.P. Housing Board executed a lease deed in favor of Smt. Shakuntala Shrivastava. It was claimed that the lease deed executed in favor of original plaintiff is still in existence and has not been cancelled by the M.P. Housing Board. Thereafter, Smt. Shakuntala Shrivastava, executed a registered sale deed on 20-8-2010 in favor of Sunil Rajoria. On 14-4-2011, Sunil Rajoria and his Counsel, namely Shri K.K. Mishra tried to forcibly enter inside the disputed house. Accordingly, the suit was filed for declaration of



title and permanent injunction. The suit was subsequently amended and relief for specific performance of contract was also prayed.

7. The defendants no. 1 to 4 filed their written statement and denied plaintiff averments. It was pleaded that no document has been filed to show that when the disputed house was sold by Late Shri Ambika Prasad Shrivastava. The mutation of name of original plaintiff was not denied, but it was pleaded that no right or title stands transferred on the basis of mutation. After an application was filed by Smt. Shakuntala Shrivastava for mutation of her name, a notice was issued by M.P. Housing Board to the original plaintiff to produce sale deed, however, the original plaintiff could not produce the sale deed. Thereafter, proceedings were initiated for cancellation of mutation in the name of original plaintiff. The record was sent to Commissioner, Bhopal. Later on, the mutation of name of original plaintiff was cancelled and after inviting objections from general public, the name of Smt. Shakuntala was mutated. It was specifically pleaded that Late Shri Ambika Prasad Shrivastava had never transferred his title in the disputed house to the original plaintiff.

8. Defendant no. 5 filed her written statement along with counter claim. It was specifically pleaded that Late Shri Ambika Prasad Shrivastava had never sold his right or title to the original plaintiff. All the plaintiff averments were denied. By counter claim, arrears of rent to the tune of Rs. 72,000/- were prayed.

9. Defendant no. 6 also filed his written statement and denied the plaintiff averments and pleaded that Smt. Shakuntala Shrivastava, has sold the disputed house to him by registered sale deed dated 20-8-2010.

10. The Trial Court after framing issues and recording evidence, decreed the suit and directed the M.P. Housing Board to execute lease agreement in favor of



original plaintiff. Similarly, the defendants no. 5(a),(b) and 6 were directed to execute sale deed in favor of original plaintiff within a period 1 month and it was also held that original plaintiff would bear the expenses. It was also held that the original plaintiff is in possession of disputed house by virtue of oral agreement to sell, therefore, the defendants shall not interfere with the peaceful possession of the original plaintiff.

11. Challenging the judgment and decree passed by the Trial Court, the Counsel for appellants submitted that the Trial Court has failed to see that according to the original plaintiff, a joint affidavit was filed by original plaintiff and Late Shri Ambika Prasad Shrivastava on 13-3-1998. The copy of the said joint affidavit has been filed as Exhibit P-8. The stamp paper for preparation of joint affidavit was purchased on 24-3-1998 and the joint affidavit was got notarized on 15-5-1998. When the joint affidavit, Ex. P.6 was not in existence on 13-3-1998, then how such a joint affidavit could have been filed on 13-3-1998. Furthermore, admittedly, there was no sale deed by Late Shri Ambika Prasad Shrivastava in favor of Original plaintiff, therefore, the M.P. Housing Board could not have mutated the name of the original plaintiff and thereafter, could not have executed a lease deed in his favor. It is further submitted that the original plaintiff did not enter in the witness box, and in his place his power of attorney had appeared as a witness. It is further submitted that the holder of power of attorney can depose only in respect of act done by him and he cannot appear and depose for and on behalf of Principal in respect of acts done by Principal. Receipts Ex. P.2 to P.4 have not been proved by the original plaintiff. It is further submitted that there is no pleading regarding oral agreement to sell. The Power of Attorney in favor of Rohit Mathur, Ex. P.1 has not been proved. To



buttress his contentions, the Counsel for the appellants has relied upon the judgments passed by Supreme Court in the cases of **Nandkishore Lalbhai Mehta v. New Era Fabrics (P) Ltd** reported in **(2015) 9 SCC 755**, and judgments passed by this Court in the case of **Avinash Kumar Ray Vs. Dr. Ku. Chhaya Ray** reported in **2023(1) MPLJ 515**, and **Rameshchandra and others Vs. Rajesh Kumar Sharma 2022 (3) MPLJ 441**.

12. *Per contra*, it is submitted by Counsel for respondents no. 1(1) to (4) that the name of original plaintiff was cancelled without issuing any notice to the original plaintiff. The Counter-claim filed by the defendant no. 6/ Smt. Shakuntala Shrivastava was dismissed, but no appeal has been filed against the dismissal of counter claim, therefore, the present appeal is not maintainable.

13. Heard the learned Counsel for the parties.

Whether joint affidavit of Late Shri Ambika Prasad Shrivastava and original plaintiff was filed in the office of M.P. Housing Board on 13-3-1998 or 15-5-1998?

14. Rohit Mathur (P.W. 1) has stated in para 4 of his examination in chief that joint affidavit, Ex. P. 6 was filed in the office of M.P. Housing Board on 15-5-1998. **There is an over writing on originally typed date and by overwriting date 15-5-1998 has been written in hand writing. This overwriting does not contain any short signature.**

15. Accordingly, the Counsel for the respondents no. 1(1) to (4) was directed to clarify that why overwriting in para 4 of affidavit filed under Order 18 Rule 4 CPC does not contain short signature of the person who did the correction? It was also questioned that if date 15-5-1998 as mentioned in affidavit filed under Order 18 Rule 4 CPC is disbelieved on account of overwriting, then how the



respondents no. 1(1) to (4) would justify their stand that joint affidavit was filed in the office of M.P. Housing Board on 13-3-1998, as mentioned in the plaint?

16. Rohit Mathur, (P.W.1) in para 25 of his cross examination has stated that wherever, the corrections were made in his affidavit filed under Order 18 Rule 4 CPC, short signatures were put by his Counsel and not by this witness. The short signatures (initials) were made by his Counsel in his presence.

17. If the affidavit of Rohit Mathur (P.W.1) filed under Order 18 Rule 4 CPC is considered in the light of above mentioned evidence of Rohit Mathur (P.W.1), then it is clear that it contains multiple corrections but only few corrections bear the initials of the person carrying out the corrections. If all the corrections with initials of person carrying out the correction were done prior to filing of affidavit under Order 18 Rule 4 CPC, then it is clear that remaining corrections which do not bear the initials of persons carrying out corrections, were done while the affidavit was in the custody of the Court. It is not the case of the respondents no. 1(1) to (4) that such corrections were carried out after obtaining permission from the Court. At the cost of repetition, the correction of date 15-5-1998 does not bear any initial of person carrying out correction. Thus, it is clear that originally typed date was un-authorizedly corrected by the original plaintiff while the affidavit was in *custodia legis*. Therefore, the stand of Rohit Mathur (P.W.1) that joint affidavit was filed in the office of M.P. Housing Board on 15-5-1998 cannot be accepted specifically when the plaintiff has pleaded in his plaint that joint affidavit was filed in the office of M.P. Housing Board on 13-3-1998.

18. Rahul Mathur (P.W.3) is another son of original plaintiff. He has stated in para 2 of his affidavit filed under Order 18 Rule 4 CPC that joint affidavit was executed on 15-5-1998 and it was notarized by Dhanesh Gupta, Notary. This



witness has not stated that joint affidavit was filed in his office of M.P. Housing Board on 15-5-1998. In para 8 of his cross examination, he could not disclose the name of Stamp Vendor from whom the stamp paper was purchased.

19. Rajeev Mathur has not stated about the date of submission of joint affidavit in the office of M.P. Housing Board.

20. Thus, it is clear that the plaintiff has failed to clarify the situation that when the affidavit Ex. P.6 was notarized on 15-5-1998 and stamp paper was purchased on 24-3-1998, then how the joint affidavit could have been filed in the office M.P. Housing Board on 13-3-1998 as claimed by plaintiff in para 3 of the plaint. Although the Counsel for the respondents no.1(1) to (4) tried to wriggle out of the position by submitting that date 13-3-1998 might be a typing mistake, but this Court cannot accept the said contention without there being any explanation from the witnesses. Further date 13-3-1998 is written in words also.

21. Thus, it is clear that although the joint affidavit, Ex. P.6 was got notarized on 15-5-1998, but it was specifically pleaded by plaintiff in para 3 of his plaint that said joint affidavit was filed in the office of M.P. Housing Board on 13-3-1998 i.e., much prior to execution of joint affidavit.

22. Even otherwise, if the evidence of Rohit Mathur (P.W.1) is considered that joint affidavit was filed in the office of M.P. Housing Board on 15-5-1998, then it is clear that such evidence is at variance with pleading. No attempt was made by the plaintiff to amend the plaint. Any evidence which is at variance with pleading cannot be relied upon, unless and until the pleadings are amended. The Supreme Court in the case of **Nandkishore Lalbhai Mehta v. New Era Fabrics (P) Ltd.**, reported in **(2015) 9 SCC 755** has held as under :

**39.** It may be mentioned that in the plaint filed by the appellant, the plea set up was that at the instigation of the defendants and in





collusion with them, the Mill Mazdoor Sabha has refused to give its permission to the sale of the mill premises of Defendant 1 to the plaintiff. It was not a case set up by the appellant that the Mill Mazdoor Sabha had agreed to the proposed sale on certain conditions offered by the respondents. In view of the settled position of law, fresh pleadings and evidence which is in variation to the original pleadings cannot be taken unless the pleadings are incorporated by way of amendment of the pleadings. In our considered opinion, the Division Bench of the High Court was perfectly justified in holding that unless the plaint is amended and a specific plea is taken that the Mill Mazdoor Sabha had agreed for the proposed sale on certain terms and conditions offered by the respondents herein, the two letters viz. Exts. P-27 and P-28 could not have been taken into consideration at all.

23. Thus, it is held that the pleading in plaint is that joint affidavit was filed in the office of M.P. Housing Board on 13-3-1998, whereas the said affidavit, Ex. P.6 was notarized on 15-5-1998 i.e., much after the affidavit was alleged to have been filed in the office of M.P. Housing Board.

Whether the M.P. Housing Board could have mutated the name of original plaintiff and could have executed a lease deed in favor of original plaintiff, specifically when there was no sale deed in favor of the original plaintiff.

24. Section 54 of Transfer of Property Act defines Sale. Section 54 of Transfer of Property Act reads as under :

**54. “Sale” defined.**—“Sale” is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

**Sale how made.**—Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.



Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

**Contract for sale.**—A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties.

It does not, of itself, create any interest in or charge on such property.

25. From plain reading of Section 54 of Transfer of Property Act, it is clear that a sale is a transfer of ownership and if the value of the property is more than Rs. 100/- then sale can be made only by a registered document.

26. Admittedly, no sale deed was ever executed by Late Ambika Prasad Shrivastava in favor of original plaintiff. S.K. Dubey (D.W.2) on cross examination by plaintiff has stated in para 6 of his cross examination that lease agreement is executed only after lease deed is executed in favor of the beneficiary. Therefore, it is clear that M.P. Housing Board committed a material illegality by not only mutating the name of original plaintiff but also by executing a lease deed in favor of original plaintiff.

Whether the M.P. Housing Board committed any illegality by cancelling the lease deed without issuing any notice to the original plaintiff or not?

27. It is the stand of the plaintiff that no notice was ever given to him before cancelling his lease deed. The parties have not filed any document to show that any show cause notice was given to the plaintiff before cancellation of his lease deed.

28. Now the only question for consideration is that what would the effect of violation of principle of Natural Justice.

29. As already pointed out, the affidavit, Ex. P.6 was got notarized on 15-5-1998 but as per plaint averments in para 3, the said affidavit was submitted in the



office of M.P. Housing Board on 13-3-1998. How a document can be submitted in the office of M.P. Housing Board on 13-3-1998 specifically when it was not in existence at all. If the pleading of the plaintiff is accepted that joint affidavit was filed on 13-3-1998, then it is clear that some other affidavit other than joint affidavit, Ex. P.6 must have been filed before the office of M.P. Housing Board. This observation is further fortified from the fact that from Affidavit Ex. P.6, it is clear that the said affidavit was notarized by Dhanesh Chand Gupta. The plaintiff has not examined Dhanesh Chand Gupta, to prove the execution of affidavit, Ex. P.6. The plaintiff has failed to clarify the aforesaid situation. Be that whatever it may be. Since, the mutation of name of plaintiff was done by the M.P. Housing Board on 21-1-1999 (As claimed in para 3 of plaint), therefore, it is clear that the mutation of name of plaintiff was done on the basis of document which was not in existence on 13-3-1998. Furthermore, the plaintiff could not explain as to how, the M.P. Housing Board could have mutated the name of plaintiff specifically when there was no sale deed in his favor. For the same reasons, no lease deed could have been executed in favor of plaintiff. Thus, it is clear that fraud was played by the original plaintiff with the connivance of the officers of M.P. Housing Board.

30. Fraud vitiates every solemn act. The Supreme Court in the case of **State of Chhattisgarh v. Dhirjo Kumar Sengar**, reported in (2009) 13 SCC 600 has held as under :

17. It is in the aforementioned premise, the contention in regard to the breach of audi alteram partem doctrine must be considered. The principle of natural justice although is required to be complied with, it, as is well known, has exceptions. (See *Banaras Hindu University v. Shrikant*.) One of the exceptions has also been laid down in *S.L. Kapoor v. Jagmohan* wherein it was held: (SCC p. 395, para 24)



“24. ... In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced. As we said earlier where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, *not because it is not necessary to observe natural justice but because courts do not issue futile writs.*”

(emphasis supplied)

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**19.** The respondent keeping in view the constitutional scheme has not only committed a fraud on the Department but also committed a fraud on the Constitution. As commission of fraud by him has categorically been proved, in our opinion, the principles of natural justice were not required to be complied with.

**20.** Mr Gupta has relied upon a large number of decisions of this Court viz. *Inderpreet Singh Kahlon v. State of Punjab*, *Mohd. Sartaj v. State of U.P.*, *Jaswant Singh v. State of M.P.* and *State of M.P. v. Shyama Pardhi* to contend that audi alteram partem doctrine should have been complied with.

**21.** In these cases, requirement to comply with the principles of natural justice has been emphasised. The legal principles carved out therein are unexceptional. But, in this case, we are concerned with a case of fraud. Fraud, as is well known, vitiates all solemn acts. (See *Ram Chandra Singh v. Savitri Devi*, *Tanna & Modi v. CIT* and *Rani Aloka Dudhoria v. Goutam Dudhoria*.) The High Court, therefore, must be held to have committed a serious error in passing the impugned judgment.

31. Thus, it is clear that if no notice was given to the original plaintiff before cancelling his lease deed, still it would not vitiate the act, because this Court has already come to a conclusion that fraud was played by original plaintiff, and even



in absence of any sale deed and on the basis of affidavit, which itself came in existence much after the same was submitted before the M.P. Housing Board, not only the name of original plaintiff was mutated in the records, but even lease deed was also executed. Therefore, non compliance of principle of natural justice would not vitiate the cancellation of lease deed.

Whether execution of Power of Attorney in favor of Rohit Mathur has been duly proved by the plaintiff or not?


32. In para 15 of his cross examination, Rohit Mathur (P.W.1) has stated that Power of Attorney was notarized by Surendra Singh Chauhan, Notary. In the same paragraph he has further admitted that the Power of Attorney neither contains the signature nor seal of Surendra Singh Chauhan, Notary. It is clear from Power of Attorney, Ex. P.1, that it was notarized by Shri S.S. Tomar, Notary. The plaintiff has not examined Shri S.S. Tomar, Notary to overcome the admission made by Rohit Mathur (P.W.1) in para 15 of his cross-examination.

33. Thus, it is clear that Plaintiff has failed to prove the execution of Power of Attorney by original plaintiff in favor of Rohit Mathur (P.W.1). Admittedly, original plaintiff did not enter in the witness box, and since, the plaintiff has failed to prove that Power of Attorney, Ex. P.1 was duly executed by original plaintiff in favor of Rohit Mathur (P.W.1), therefore, it is clear that the evidence led by Rohit Mathur (P.W.1) cannot be read as an evidence on and on behalf of original plaintiff.

Whether Power of Attorney holder can depose for and on behalf of Principal ?

34. The Supreme Court in the case of **Janki Vashdeo Bhojwani v. Indusind Bank Ltd.**, reported in (2005) 2 SCC 217 has held as under :



**14.** Having regard to the directions in the order of remand by which this Court placed the burden of proving on the appellants that they have a share in the property, it was obligatory on the part of the appellants to have entered the box and discharged the burden. Instead, they allowed Mr Bhojwani to represent them and the Tribunal erred in allowing the power-of-attorney  holder to enter the box and depose instead of the appellants. Thus, the appellants have failed to establish that they have any independent source of income and they had contributed for the purchase of the property from their own independent income. We accordingly hold that the Tribunal has erred in holding that they have a share and are co-owners of the property in question. The finding recorded by the Tribunal in this respect is set aside.

**15.** Apart from what has been stated, this Court in the case of *Vidhyadhar v. Manikrao* 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....”

**16.** In civil dispute the conduct of the parties is material. The appellants have not approached the Court with clean hands. From the conduct of the parties it is apparent that it was a ploy to salvage the property from sale in the execution of decree.

**17.** On the question of power of attorney, the High Courts have divergent views. In the case of *Shambhu Dutt Shastri v. State of Rajasthan* it was held that a general power-of-attorney holder can appear, plead and act on behalf of the party but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in the witness box on behalf of himself. To appear in a witness box is altogether a different act. A general power-of-attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff.

**18.** The aforesaid judgment was quoted with approval in the case of *Ram Prasad v. Hari Narain*. It was held that the word “acts” used in Rule 2 of Order 3 CPC does not include the act of power-of-attorney holder to appear as a witness on behalf of a party. Power-of-attorney



holder of a party can appear only as a witness in his personal capacity and whatever knowledge he has about the case he can state on oath but he cannot appear as a witness on behalf of the party in the capacity of that party. If the plaintiff is unable to appear in the court, a commission for recording his evidence may be issued under the relevant provisions of CPC.

**19.** In the case of *Pradeep Mohanbay (Dr.) v. Minguel Carlos Dias* the Goa Bench of the Bombay High Court held that a power of attorney can file a complaint under Section 138 but cannot depose on behalf of the complainant. He can only appear as a witness.

**20.** However, in the case of *Humberto Luis v. Floriano Armando Luis*<sup>6</sup> on which reliance has been placed by the Tribunal in the present case, the High Court took a dissenting view and held that the provisions contained in Order 3 Rule 2 CPC cannot be construed to disentitle the power-of-attorney holder to depose on behalf of his principal. The High Court further held that the word “act” appearing in Order 3 Rule 2 CPC takes within its sweep “depose”. We are unable to agree with this view taken by the Bombay High Court in *Floriano Armando*.

**21.** We hold that the view taken by the Rajasthan High Court in the case of *Shambhu Dutt Shastri* followed and reiterated in the case of *Ram Prasad* is the correct view. The view taken in the case of *Floriano Armando Luis* cannot be said to have laid down a correct law and is accordingly overruled.

35. If the evidence of Rohit Mathur (P.W.1) is read in its entirety, it is clear that he has not specifically stated that the facts deposed by him either in Examination in Chief or cross examination are/were in his personal knowledge. Merely because Rohit Mathur (P.W.1) is the son of original plaintiff, he cannot depose for and on behalf of Principal. He can appear as a witness. He can depose only with regard to the acts done by him by virtue of power of attorney. Since, the original plaintiff did not enter in the witness box, therefore, the defendants also could not get an opportunity to cross examine him. Since, the



original plaintiff did not offer himself for cross-examination, therefore, an adverse inference is also drawn against him.

Whether any oral agreement had taken place between Late Shri Ambika Prasad Shrivastava and original plaintiff for sale of disputed house.

36. There is no pleading in the plaint with regard to any oral agreement to sell the disputed house. No evidence in absence of pleading can be accepted. The Supreme Court in the case of **Rajasthan SRTC v. Bajrang Lal**, reported in (2014) 4 SCC 693 has held as under :

14. It is a settled proposition of law that a party has to plead the case and produce/adduce sufficient evidence to substantiate his submissions made in the plaint and in case the pleadings are not complete, the court is under no obligation to entertain the pleas. (Vide *Larsen & Toubro Ltd. v. State of Gujarat*; *National Buildings Construction Corpn. v. S. Raghunathan*; *Ram Narain Arora v. Asha Rani*; *Chitra Kumari v. Union of India* and *State of U.P. v. Chandra Prakash Pandey*.)

15. In *Atul Castings Ltd. v. Bawa Gurvachan Singh* this Court observed as under : (SCC p. 140, para 12)

“12. ... The findings in the absence of necessary pleading and supporting evidence cannot be sustained in law.”

(See also *Vithal N. Shetti v. Prakash N. Rudrakar*; *Devasahayam v. P. Savithramma*; *Sait Nagjee Purushotham & Co. Ltd. v. Vimalabai Prabhulal*; *Rajasthan Pradesh Vaidya Samiti v. Union of India* (SCC p. 617, para 17); *Ritesh Tewari v. State of U.P.* and *Union of India v. Ibrahim Uddin*.)

37. Further, Rohit Mathur (P.W.1) has not stated that oral agreement took place in his presence. He has not claimed any personal knowledge of oral agreement to sell. The plaintiff has also failed to prove that on what date oral agreement to sell was arrived at. Thus, it is clear that the plaintiff has failed to





prove that any oral agreement to sell was ever arrived at between him and Late Shri Ambika Prasad Shrivastava.

Whether Plaintiff was ready and willing to perform his part of oral agreement and whether the prayer for specific performance of contract was within the period of limitation.

38. Although it is the case of the plaintiff that entire consideration amount was paid to Late Shri Ambika Prasad Shrivastava, but that by itself is not sufficient to hold that nothing more was required to be done by the original plaintiff. The original plaintiff should have pleaded and proved that he was in possession of stamp duty and registration charges and other allied expenses for execution of sale deed. He did not issue any notice either to Late Shri Ambika Prasad Shrivastava or to Smt. Shakuntala Shrivastava. It is not known that whether time was the essence of contract or not? If time was not the essence then what was the date when the defendants had refused to execute the sale deed has also not been explained. Thus, the plaintiff has not only failed to prove the existence of any oral agreement to sell, but has also failed to prove that he was ever ready and willing to perform his part of contract. The plaintiff has also failed to prove that on what date the cause of action for specific performance of contract arose. Thus, even the plaintiff has failed to prove that his prayer for specific performance of contract was within the period of limitation.

39. So far as the submission made by Counsel for respondents no. 1 (1) to (4) that since no separate appeal has been filed against the dismissal of counter claim, therefore, the present appeal is not maintainable is concerned, the same is misconceived and is hereby rejected. The suit was filed by respondents no. 1 (1) to (4) thereby claiming execution of lease deed and specific performance of



Contract, whereas the Counter claim was filed on the ground that although the real lease holder is Smt. Shankuntala Shrivastava, but rent has not been paid. Therefore, the controversy involved in the suit filed by original plaintiff is independent and the Counter claim is not dependent. It is true, that counter claim is a separate suit and a separate appeal should have been filed against the decree of dismissal of counter claim, but since, no separate appeal has been filed against the dismissal of counter claim, therefore, it is clear that the appellants are not entitled for the relief which they had sought in their counter claim. But merely because, an appeal against the dismissal of counter claim has not been filed, would not make the present appeal filed against the decree passed in favor of plaintiff, not maintainable.

40. Considering the totality of the facts and circumstances of the case, this Court is of the considered opinion, that the original plaintiff has failed to prove his case.

41. Accordingly, the judgment and decree dated 12-3-2014 passed by 10<sup>th</sup> Additional District Judge, Gwalior in Civil Suit No. 65A/11 is hereby set aside.

42. The suit filed by the plaintiff who is being represented by his legal representatives i.e., respondents no. 1(1) to (4) is hereby dismissed.

43. The appeal succeeds and is hereby allowed.

44. No order as to cost.

45. Decree be drawn accordingly

**(G.S. Ahluwalia)**  
**Judge**