

IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR
BEFORE
HON'BLE SHRI JUSTICE VISHAL MISHRA
ON THE 5th OF APRIL, 2022
MISC. PETITION No. 5277 of 2019

Between:-

1. **RAMESHCHANDRA, S/O LATE SHRI RAMRATAN JI SHARMA, AGED ABOUT 79 YEARS, OCCUPATION: RETIRED TEACHER VILL. VIJANWADA, TEH. PIPARIYA (MADHYA PRADESH)**
2. **RAJENDRA @ RAKESH, S/O SHRI RAMESHCHANDRA SHARMA, AGED ABOUT 57 YEARS, R/O VILLAGE BIJANWADA, TEHSIL, PIPARIYA, DISTT. HOSHANGABAD, (MADHYA PRADESH)**
3. **SHUSHEEL KUMAR, S/O SHRI RAMESHCHANDRA SHARMA, AGED ABOUT 57 YEARS, R/O VILLAGE BIJANWADA, TEHSIL, PIPARIYA, DISTT. HOSHANGABAD, (MADHYA PRADESH)**
4. **RAGHUNANDAN @ NANDKISHOR S/O SHRI RAMESHCHANDRA SHARMA, AGED ABOUT 42 YEARS, R/O VILLAGE BIJANWADA, TEHSIL, PIPARIYA, DISTT. HOSHANGABAD (MADHYA PRADESH)**

....PETITIONERS

(BY SHRI MO. AADIL USMANI - ADVOCATE)

AND

1. **RAJESH KUMAR SHARMA S/O SHRI RAMESH CHANDRA SHARMA, AGED ABOUT 55 YEARS, OCCUPATION: NOTHING BIJANWADA, TEH. PIPARIYA (MADHYA PRADESH)**
2. **THE STATE OF M.P., THROUGH COLLECTOR HOSHANGABAD (MADHYA PRADESH)**

3. **SMT. SHIVA PUROHIT D/O SHRI RAMESH CHANDRA SHARMA W/O SHRI RATAN PUROHIT, AGED ABOUT 47 YEARS, OCCUPATION: HOUSE WORK R/O ORDINANCE FACTORY BHUSAWAL (MAHARASHTRA)**

.....RESPONDENTS

(BY SHRI DAYARAM VISHWAKARMA – ADVOCATE FOR RESPONDENT NO.1)

This petition coming on for admission this day, the court passed the following:

ORDER

With the consent of the parties the matter is finally heard.

1. The present petition has been filed assailing the order dated 16.09.2019, passed in RCS No.41A/2018, by First Civil Judge Class-II, Pipariya, District Hoshangabad; whereby, the application filed by the petitioners under Order 3 Rule 1 of CPC seeking permission to record the evidence through his registered Power of Attorney i.e. his son Shusheel Kumar Sharma was rejected.
2. It is submitted that the petitioners/plaintiffs filed a civil suit for declaration of title and permanent injunction with respect to the suit property bearing Khasra No.96, Area being 8.36 Acres against the respondent no.1, which is a joint property of a Hindu Undivided Family, but the Survey No.96/1, Area being 1.529 Hectares out of the said property has wrongly been registered in the name of the

respondent no.1/defendant no.1. He has also sought the relief of permanent injunction to restrain the respondent no.1 to alienate or transfer the said property in some other names. On summons being issued, the respondent no.1/defendant no.1 appeared in the civil suit and filed the written statement denying all the averments and has further taken a plea that the plaint is not being filed within limitation and prayed for dismissal of the civil suit. During the pendency of the civil suit, the plaintiff no.1 Rameshchandra executed a registered Power of Attorney in favour of his son Shusheel Kumar Sharma pointing out that he is aware of all the aspects of the disputed land and the dispute going on between the parties and as he is his son; therefore, he is in a position to depose before the learned trial Court. On the basis of such registered Power of Attorney, an application under Order 3 Rule 1 of CPC has been filed before the trial Court praying for conducting the proceedings of the Civil Suit to the Power of Attorney holder i.e. his son and further prayed to record the evidence through his Power of Attorney to know everything about the dispute and the disputed property.

3. It is submitted that it is a registered Power of Attorney and the son of the petitioner/plaintiff is the Power of Attorney holder, who is well aware of all the aspects of the case; therefore, he can very well

depose before the trial Court in place of the plaintiff no.1. Placing reliance upon the judgment passed by the Coordinate Bench in the case of **Bashir Vs. Smt. Hussain Bano** reported in **2005 (2) M.P.L.J. 230**; wherein, it was observed that the Power of Attorney holder a member of family can depose on her behalf regarding her bonafide need. It was a case of eviction and the permission was granted to the Power of Attorney to record the evidence on behalf of principal plaintiff. Placing further reliance upon the judgment passed in the case of **Vimla Devi Vs. Dulichand** reported in **1994 (1) MPJR 144**; wherein, it was held that the husband being the Power of Attorney holder has appeared and deposed in place of his wife before the trial Court was accepted by the learned trial Court and it was observed that the non examination of the plaintiff was not fatal for the case. It is argued that as the son is aware of all the facts and circumstances of the present case and also well aware of the disputed property; therefore, he can very well depose in place of the original plaintiff, who is aged about 80 years and is very weak to approach the Court for deposition. Therefore, the order passed by the learned trial Court rejecting the application is *per se* illegal.

4. Per contra, counsel appearing for the respondents have vehemently opposed the contention and supported the impugned

order stating therein that the learned trial Court has passed a well reasoned and a justified order rejecting the application. It is submitted that under Order 3 Rules 1 and 2 of CPC which empowers the Power of Attorney holder to act on behalf of the principal plaintiff is only with respect to the act or proceedings which have to be carried out before the learned trial Court but as far as deposition or entering into the witness box is concerned the same is different act and can only be done by the principal plaintiff. It is argued that he can only depose for the act which he has done and not for the act which the principal has done. Therefore, he cannot depose for the principal in respect of the matter which only the principal can have personal knowledge and in respect of which the principal is entitled to be cross examined. The learned trial Court has rightly rejected the application. The deposition of the principal can also be recorded by way of commission for which appropriate application should have been filed before the trial Court. There is no illegality in the impugned order placing reliance upon the judgment passed by the Supreme Court in the case of **Janki Vashdeo Bhojwani and another Vs. Indusind Bank Ltd. and others** reported in **AIR 2005 SC 239**, he has prayed for dismissal of the writ petition.

5. Heard the learned counsels for the parties and perused the record.

6. From the perusal of the record, it is not disputed that the Civil Suit has been filed for declaration of title and permanent injunction with respect to the property in question. The registered Power of Attorney was executed by the plaintiff no.1 Rameshchandra in favour of his son Shusheel Kumar Sharma stating there that he is known to the facts and circumstances of the case and can depose on his behalf before the trial Court and also conduct the proceedings of the Civil Suit. As far as conduction of the proceedings before the trial Court is concerned, the same are always permissible. The proceedings of the Civil Suit can also be conducted by the Power of Attorney on behalf of the principal, but as far as deposition or entering into the witness box is concerned, the same is not permissible in view of the law laid down by the Supreme Court in the case of **Janki Vashdeo Bhojwani and another (supra)**; wherein, the Hon'ble Supreme Court has considered the provisions of Order 3 Rules 1 and 2 of CPC and Power of Attorney at Section 2 and has held that the word 'act' employed in Order 3 Rules 1 and 2 of CPC is confined only with respect to the act done by the Power of Attorney holder in exercise of the powers granted by the instrument.

It would not include deposition in place and instead of the principal. It was further held that the Power of Attorney holder can appear as a witness in his personal capacity only and not on behalf of the principal. The Hon'ble Supreme Court has considered various judgments passed by the Courts and has held that the judgment passed by the Rajasthan High Court in the case of **Shambhu Dutt Shastri Vs. State of Rajasthan**, 1986 (2) WLL 713 and in the case of **Ram Prasad Vs. Hari Narain and ors.** reported in AIR 1998 Raj 185 were held to be the correct laws and the judgment passed by the Bombay High Court in the case of **Shri Humberto Luis and anr. Vs. Floriano Armando Luis and anr.** reported in 2000 (1) Mh.L.J. 690 was held to be not a good law and was overruled. The Hon'ble Supreme Court while considering the aforesaid has observed as under:-

13. Order III, Rules 1 and 2 CPC, empowers the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order III, Rules 1 and 2 CPC, confines only in respect of "acts" done by the power of attorney holder in exercise of power granted by the instrument. The term "acts" would not include depositing in place and instead of the principal. In other words, if the power of attorney holder has rendered some "acts" in pursuance to power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in

respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.

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 vs. Manikrao and Another, (1999) 3 SCC 573 observed at page 583 SCC that "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 Vs. State of Rajasthan, 1986 2 WLL 713 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 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 the approval in the case of Ram Prasad Vs. Hari Narain & Ors. AIR 1998 Raj. 185. It was held that the word "acts" used in Rule 2 of Order III of the 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 the CPC.

19. In the case of Dr. Pradeep Mohanbay Vs. Minguel Carlos Dias reported in 2000 Vol.102 (1) Bom.L.R. 908, 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 & Anr. Vs. Floriano Armando Luis & Anr. reported in 2002 (2) Bom.C.R.754 on which the 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 III Rule 2 of 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 III Rule 2 of CPC takes within its sweep "depose". We are unable to agree with this

view taken by the Bombay High Court in Floriano Armando (supra).

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

7. From the perusal of the aforesaid, it is apparently clear that the Power of Attorney holder can appear in the witness box in his personal capacity and not on behalf of the principal. It is the principal who has to depose and to be cross-examined before the trial Court and if he is not in a position to appear before the trial Court a commission for recording his evidence may be issued under the relevant provisions of the CPC. The Coordinate Bench of this Court in the case of **Jethanand and Company Vs. Mohan and Company** (2007) 3 M.P.L.J. 584 has considered the similar question and placing reliance upon the judgment in the case of **Janki Vasudev Bhojwani (supra)** and other judgments of the Supreme Court in the case of **Chandradhar Goswami and Ors. Vs. Gauhati Bank Ltd.** reported in AIR 1967 SC 1058 and in the case of **Central Bureau of Investigation Vs. V.C. Shukla and Ors.** reported in AIR 1998 SC 1406 and has held as under:-

“13. By inviting my attention to the evidence of Vishnu Kumar Jaiswal (P.W. 1), it has been argued that as per this witness he was not having any personal knowledge about the transaction that the goods were sold to defendant and the plaintiff-firm did not examine any of its partner having personal knowledge about the transaction and delivery of goods to the defendant and its non-payment and, therefore, an adverse inference should have been drawn against the plaintiff. By placing reliance on the decision of Supreme Court Janki Vashdeo Bhojwani and Anr. v. Indusind Bank Ltd. and Ors. 2005(1) MPLJ 421, it has been submitted that Vishnu Kumar Jaiswal is only the power of attorney holder of plaintiff- firm, but he cannot appear as a witness on behalf of the party in the capacity of that party. By inviting the attention of this Court to Section 34 of the Evidence Act, it has been contended that plaintiff-firm was obliged to produce and prove the accounts but the accounts are not filed and proved, therefore, the suit of plaintiff cannot be decreed. In support of his contention, learned Counsel has placed reliance on two decisions of the Supreme Court, they are Chandradhar Goswami and Ors. v. Gauhati Bank Ltd., MR 1967 SC1058 and Central Bureau of Investigation v. V.C. Shukla and Ors. . On these premised submissions, it has been argued that since the plaintiff has failed to prove its case, the suit be dismissed.

19. The Supreme Court in the case of Chandradhar Goswami (supra), has specifically held that no person can be charged with liability merely on the basis of entries in books of account, even where such books of account are kept in the regular course of business. The Supreme Court has further laid down the law that there has to be further evidence to prove payment of the money which may appear in the books of account in order that a person may be charged with liability thereunder, except where the person to be charged accepts the correctness of the books of account and does not challenge them. In the present case, the cash book has not all been proved nor there is any evidence that

entries in books of account are regularly kept in the course of business. In order to attract Section 34 of the Evidence Act it should come in the evidence that entries in the books of account are regularly kept in the course of business. This has not at all been stated by said Vishnu Kumar Jaiswal in his evidence nor the cash book has been proved and marked as exhibit in the Trial Court by providing opportunity of cross-examination to the defendant. I may further add that such entries cannot by itself be sufficient for fastening liability on any person. P.W. 1-Vishnu Kumar Jaiswal, the sole witness, is not having any personal knowledge about the transaction embodied in the ledgers. The account books are not in themselves proved the liability and the liability was required to be proved by other evidence also. The entries in books of account regularly kept in the course of business though relevant are corroborative evidence and mere production and proof of these entries is not by itself sufficient to charge any one with liability and there must be some other independent evidence to prove the transaction, therefore, no reliance could be placed on these entries. Since there is no corroborative evidence and the entries are also not proved by examining the person who is acquainted or under whose handwriting such entries were made, I am of the view that plaintiff's suit cannot be decreed.”

8. From the perusal of the aforesaid judgments passed by the Supreme Court as well as the Coordinate Bench of this Court it is apparently clear that it is only the principal, who can appear in the witness box and be cross-examined. As far as the Power of Attorney holder is concerned, the Power of Attorney holder is having a right to conduct the proceedings of the trial Court. As far as entering into the witness box is concerned, he cannot enter into the witness box

on behalf of the principal but appear as a witness in his personal capacity only. There are provisions in the CPC for getting the witnesses recorded by issuance of commission also. Therefore, the learned trial Court was justified in rejecting the application filed by the plaintiff under Order 3 Rules 1 and 2 of CPC for recording his evidence on behalf of the Power of Attorney. It is a well reasoned and a justified order passed by the learned trial Court, which does not call for any interference in the present petition.

9. It is a petition under Article 227 of the Constitution of India having limited scope of interference as has been held by the Hon'ble Supreme Court in the case of **Shalini Shyam Shetty Vs. Rajendra Shhankar Patil** reported in (2010) 8 SCC 329, wherein, certain guidelines have been issued by the Supreme Court, which are as under:-

"The scope of interference under Article 227 of the Constitution is limited. If order is shown to be passed by a Court having no jurisdiction, it suffers from manifest procedural impropriety or perversity, interference can be made. Interference is made to ensure that Courts below act within the bounds of their authority. Another view is possible, is not a ground for interference. Interference can be made sparingly for the said purpose and not for correcting error of facts and law in a routine manner."

10. In such circumstances, no illegality appears to have been committed by the learned trial Court.

11. The petition sans merits and is hereby **dismissed**.

12. The interim relief granted by this Court stands vacated. The trial Court may proceed with the Civil Suit.

(VISHAL MISHRA)
JUDGE

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