Supreme Court of India

Justice Navin Sinha, Justice Indira Banerjee

MOHINDER KAUR v. SANT PAUL SINGH

CIVIL APPEAL NO(s). 2869-2870 OF 2010

01.10.2019

(i) Power of attorney – Statement of – Respondent gave a power of attorney on 02.11.1989 to PW1 – The witness was naturally unaware of the preceding events – The witness was therefore also incompetent to deny receipt of photocopy of the release documents pertaining to a prior period – PW-1 was not competent to depose with regard to the same because these were facts which had to be personal to the knowledge of the respondent alone.

Held, In *Janki Vashdeo Bhojwani v. Indusind Bank Ltd. (2005-2)140 PLR 001 (SC)* , it was held that a power of attorney holder, who has acted in pursuance of the said power, may depose on behalf of the principal in respect of such acts but cannot depose for the principal for the acts done by the principal and not by the power of attorney holder. Likewise, the power of attorney holder cannot depose for the principal in respect of matters of which the principal alone can have personal knowledge and in respect of which the principal is entitled to be cross-examined. In our opinion, the failure of the respondent to appear in the witness box can well be considered to raise an adverse presumption against him

(ii) Suit for specific performance – Readiness and Willingness – Mortgage – Except for the solitary statement in the plaint no evidence whatsoever was led on behalf of the respondent – Merely because the respondent may not have been satisfied by the intimation given by the appellant regarding release of the property from mortgage, it cannot be construed as readiness and willingness on part of the respondent and his capacity to perform his obligations under the agreement, particularly when he is stated to have subsequently migrated to America and in which circumstance he executed the power of attorney in favour of PW-1, who had no personal knowledge. [Para 8]

Cases Cited :

1. *Paras 3, 7: I.S. Sikandar (D) by L.Rs. v. K. Subramani and Ors., (2013) 15 SCC 27*
2. *Paras 3, 6: Janki Vashdeo Bhojwani v. Indusind Bank Ltd. , (2005-2)140 PLR 001 (SC)*
3. *Para 3: Vijay Kumar v. Om Parkash, 2018 (15) SCALE 65*

Petitioner Counsel: TANUJ BAGGA, Respondent Counsel: VINEET BHAGAT

JUDGEMENT

NAVIN SINHA, J. – The defendant is in appeal, aggrieved by the concurrent findings

decreeing the suit for specific performance filed by the respondent.

2. An agreement for sale with regard to House no.3343/3, situated in Rupnagar Municipality was executed between the parties on 16.03.1988 for an agreed consideration of Rs.1,50,000/-. At the time of execution, a sum of Rs.15,000/was paid. As the suit property stood mortgaged to the education department, a further agreement dated 20.06.1988 was executed between the parties, that the sale deed would be executed within 15 days of the defendant obtaining release of the property from mortgage, giving due intimation to the plaintiff. A further sum of Rs.53,000/- and cash of Rs.2,000/- was paid to the defendant. The appellant after redemption of the mortgage, intimated the respondent on 27.07.1989 in accordance with the agreement, requiring payment of balance consideration and execution of the sale deed. The respondent disputed the redemption requiring proof of the same. The appellant, after due notice cancelled the agreement for sale on 01.09.1989 and forfeited the earnest money. The plaintiff then filed the instant suit seeking specific performance of the agreement by the defendant. The suit was decreed and the appeal preferred by the defendant was also dismissed. The second appeal of the defendant having also been dismissed, the present appeal has been lodged before this Court.

3. Shri Neeraj Kumar Jain, learned senior counsel appearing for the appellant, submitted that indisputably due intimation was given to the respondent after redemption of the mortgage, as required under the agreement. The respondent raised frivolous objections and failed to perform its obligations by payment of the balance consideration amount and to take steps for execution of the sale deed. The appellant, after due notice cancelled the agreement and confiscated the amount paid, for lapses of the respondent. Relying on **I.S. Sikandar (D) by L.Rs. v. K. Subramani and Ors.,** (2013) 15 SCC 27, it was submitted that the suit for specific performance simpliciter was not maintainable in absence of any challenge to the cancellation of the agreement, and seeking consequential declaratory relief. It was next submitted that the respondent did not enter the witness box to establish his readiness and willingness to perform his obligations under the agreement for sale. PW-1 was a power of attorney holder from the respondent by execution on 02.11.1989. She was not competent to depose with regard to events prior to the same, especially with regard to facts personal to the knowledge of the respondent. Reliance was placed on **Janki Vashdeo Bhojwani v. Indusind Bank Ltd.,** (2005-2)140 PLR 001 (SC) , (2005) 2 SCC 217. Mere bald assertions in the plaint, were not sufficient, in absence of any evidence to establish readiness and willingness. Relaince was placed on **Vijay Kumar v. Om Parkash,** 2018 (15) SCALE 65.

4. Shri Vineet Bhagat, learned counsel for the respondent, submitted that the appellant did not give proper intimation regarding the redemption from mortgage of the suit property. The respondent was always ready and willing to perform his obligations under the agreement, but was hindered by the conduct of the appellant in not placing correct and relevant information in accordance with the agreement.

5. We have considered the submissions on behalf of the parties. It is an undisputed fact that the suit property stood redeemed from mortgage on 04.07.1989. The appellant sent due intimation by registered post to the respondent on 27.07.1989 and also provided him

with a photocopy of the release deed, requiring the respondent to take steps for execution of the sale deed. The respondent by reply dated 02.08.1989 insisted on the no-dues certificate, denying receipt of the release deed. The respondent then gave a power of attorney on 02.11.1989 to PW1. The witness was naturally unaware of the preceding events and denied receipt of the notice dated 27.07.1989 itself. The witness was therefore also incompetent to deny receipt of photocopy of the release documents by the respondent. It was for the respondent to establish his readiness and willingness for execution of the agreement by entering the witness box and proving his capacity to pay the balance consideration amount. Except for the solitary statement in the plaint no evidence whatsoever was led on behalf of the respondent with regard to the same, if PW-1 was competent to depose with regard to the same because these were facts which had to be personal to the knowledge of the respondent alone. Had the witness even led any documentary evidence on behalf of the respondent, in support of the plea for readiness and willingness on part of the respondent, different considerations may have arisen. The witness also sought to deny any knowledge regarding the cancellation of the agreement on 01.09.1989.

6. In **Janki Vashdeo** (supra), it was held that a power of attorney holder, who has acted in pursuance of the said power, may depose on behalf of the principal in respect of such acts but cannot depose for the principal for the acts done by the principal and not by the power of attorney holder. Likewise, the power of attorney holder cannot depose for the principal in respect of matters of which the principal alone can have personal knowledge and in respect of which the principal is entitled to be cross-examined. In our opinion, the failure of the respondent to appear in the witness box can well be considered to raise an adverse presumption against him as further observed therein as follows :

“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....”

7. The agreement was cancelled by the appellant on 01.09.1989 and the consideration already paid confiscated under intimation to the respondent. The respondent never challenged the communication of cancellation. In Sikandar (supra) it was observed as follows:

“37. As could be seen from the prayer sought for in the original suit, the Plaintiff has not sought for declaratory relief to declare the termination of Agreement of Sale as bad in law. In the absence of such prayer by the Plaintiff the original suit filed by him before the trial court for grant of decree for specific performance in respect of the suit schedule property on the basis of Agreement of Sale and consequential relief of decree for permanent injunction is not maintainable in law.

38. Therefore, we have to hold that the relief sought for by the Plaintiff for grant of decree

for specific performance of execution of sale deed in respect of the suit schedule property in his favour on the basis of non existing Agreement of Sale is wholly unsustainable in law....”

8. We are of the considered opinion that merely because the respondent may not have been satisfied by the intimation given by the appellant regarding release of the property from mortgage, it cannot be construed as readiness and willingness on part of the respondent and his capacity to perform his obligations under the agreement, particularly when he is stated to have subsequently migrated to America and in which circumstance he executed the power of attorney in favour of PW-1. The relief of specific performance being discretionary in nature, the respondent cannot be held to have established his case for grant of such relief. The conclusions of the High Court, both on aspects of readiness and willingness of the respondent and lack of due intimation by the appellant to the respondent regarding redemption of the mortgage are held to be unsustainable.

9. We are therefore unable to sustain the impugned orders under appeal which are accordingly set aside. The appeals are allowed.