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PUNJAB AND HARYANA HIGH COURT

Before:- Justice Harbans Singh.

Smt. NAND KAUR - Appellant

Versus

MASTAN SINGH and others – Respondents

R.S.A. No. 1334 of 1963.

6.10.1965.

1. Power of Attorney - Construction, Interpretation and Limitation of Authority

Power of attorney must be strictly construed and confer only authority given expressly or by necessary implication. Where authority is given to do particular acts followed by general words, the general words are restricted to what is necessary for the proper performance of the particular acts. Where a power of attorney is executed primarily for litigation and subsequent management, the power to sell must be exercised only when necessary for such purposes. The primary purpose of the power of attorney controls its interpretation and limits the agent's authority.

Mt. Jan v. Mt. Fajjan AIR 1938 Lahore 351 - followed

"The primary and the main object of the power of attorney was to authorise Mastan Singh to carry on litigation... such an authority must be taken in the context of the purpose for which the power of attorney was given, which was either to obtain land by fighting litigation or thereafter to manage it, and in as much as, there is not even a suggestion that the present sale was necessitated either because of the litigation or for the purpose of proper management of the land, the mukhtar had no authority to sell the land."

"Power of attorney must be strictly construed, and construed as giving only such authority as they confer expressly or by necessary implication. The following are the most important rules of construction : (1) The operative part of the deed is controlled by the recitals. (2) Where authority is given to do particular acts, followed by general words, the general words be restricted to what is necessary for the proper performance of the particular acts."

[Para 8, 9, 10]

2. Power of Attorney by Pardanashin Lady - Understanding and Explanation Required

In case of a power of attorney executed by a pardanashin lady, particularly an illiterate young lady, mere reading of the document is not sufficient. It must be shown that she fully understood the import of the document. The extent and character of explanation required depends on circumstances including length, intricacy and unfamiliarity of subject matter. A comprehensive and detailed power of attorney with legal terminology cannot be presumed to be fully understood by an illiterate executant.

Bishan Devi v. Jagat Singh AIR 1937 Lahore 353 - followed *Farid-un-nisa v. Mukhtar Ahmad* AIR 1925 Privy Council 204 - relied upon

"There is no finding of the lower appellate Court that authority to sell, etc. was given consciously by Smt. Nand Kaur, I am of the view that mere reading over of a document is not enough to convey to an

executant who is not familiar with the legal terminology or the effect of the words used, and much more so, in case where the executant is an illiterate young lady who was executing a power of attorney in favour of an elder relation of hers..."

"Length, intricacy, the number of complexity of the disposition, or the unfamiliarity of the subject matter are all reasons for requiring an increased amount and efficiency of Explanation. Thus a matter not likely to attract the attention of the executant in itself ought not to be relied on as binding, unless her attention has been directly drawn to it."

[Para 6, 7]

3. Fiduciary Relationship - Breach of Good Faith in Transactions

Where an agent holding power of attorney occupies a fiduciary position, he must protect the interests of his principal. When an agent sells property to his own sons without necessity, without payment of consideration to the principal, and under circumstances suggesting the transaction was for his own benefit, such transaction lacks good faith. The burden lies heavily on the agent to establish that such transaction was made in good faith, especially when dealing with his own family members.

"In the present case as a mukhtar of Smt. Nand Kaur he was bound to protect her interests, and in a way, he occupied a fiduciary position qua her... Mastan Singh being the mukhtar of Smt. Nand Kaur plaintiff and also the father and the guardian of his sons, the burden lay heavily on Mastan Singh and the vendees to establish that the transaction was made in good faith."

"No Court of equity can uphold such a transaction which is void of all good faith and has been entered into by Mastan Singh complete disregard of faith that was reposed in him."

[Para 11]

FACTS

Smt. Nand Kaur, an illiterate young lady, executed a power of attorney in favor of Mastan Singh primarily for conducting litigation on her behalf. The power of attorney contained comprehensive legal powers including general words authorizing sale, mortgage or gift. Mastan Singh sold the property to his own sons claiming it was at Smt. Nand Kaur's express instruction because she wanted cash. However, no consideration was actually paid to her. She challenged the sale contending it was without authority, unnecessary for litigation or management purposes, and lacking good faith. The second appeal court found the sale invalid and set aside the appellate court's judgment.

Cases Referred :-

Bishan Devi v. Jagat Singh, AIR 1937 Lahore 353.

Farid-un-nisa v. Mukhtar Ahmad, AIR 1925 Privy Council 204.

Jan v. Fajjan, AIR 1938 Lahore 351.

For the Appellants :- B.R. Aggarwal, Advocate. For the Respondents :- D.S. Nehra, Advocate.

JUDGMENT

Harbans Singh, J. - This second appeal arises in the following circumstances. Property owned by Haryana, the last male-holder, was inherited by his widow Smt. Khemi. She died some seven years before the filing of the suit, out of which the present appeal has arisen, leaving her surviving two daughters, Smt. Kauri and Smt. Nand Kaur plaintiff. Both of the daughters were married. Smt. Kauri the elder, was married to Mastan Singh defendant, whereas Smt. Nand Kaur, the younger, was married to Sucha Singh. On the demise of Smt. Khemi, the property left by her

was taken possession of by the collaterals of her husband. Smt. Kaur and Smt. Nand Kaur had consequently to fight litigation against the collaterals as well as against the tenants for getting possession of the land and they executed a general power of attorney in favour of Mastan Singh defendant (he being the eldest in the family), giving him full authority to do things that were necessary in connection with the litigation and the consequential proceedings, etc. He was also given power to manage the property as well as to power to sell, mortgage or gift the land after obtaining possession thereof. A suit was filed on 4th of June, 1958 by Mastan Singh on behalf of Smt. Kaur and Smt. Nand Kaur and the same was decreed on 2nd of June, 1959. Actual possession of the land was taken by Mastan Singh on 15 of October, 1959. Within a year of this, i.e. on the 14th of September, 1960, Mastan Singh acting as *mukhtar* of Smt. Nand Kaur under the aforesaid *mukhtarnama* sold one-half share in the land left by Smt. Khemi to his own five sons, two of whom were major and the remaining three minor. The sale consideration was aid to be Rs. 10,000/- out of which Rs. 5,000/- were said to have already been taken from the vendees (who were his own sons) and paid towards litigation expenses. Regarding the remaining of Rs. 5,000/- it was said that the same will be received at the time of registration. Before the Sub-Registrar, Ujagar Singh, one of the major sons of Mastan Singh, is purported to have paid Rs. 5,000/- to Mastan Singh acting as *mukhtar* of Smt. Kauri and Smt. Nand Kaur. Thereafter Smt. Kauri died on in 1st January, 1961. It is not disputed that suits were filed against the collaterals for *mesne profits* and a total amount of Rs. 5,000/- was recovered by Mastan Singh. Not obtaining any share of the income from Mastan Singh, notice was given by Smt. Nand Kaur to Mastan Singh in July 1962 and on 12th of July, 1962 the above mentioned power of attorney in his favour was cancelled by a registered deed (Exhibit P.1) and four days thereafter i.e. on 16th of July, 1962, the suit, out of which the present appeal has arisen, was filed seeking a declaration that the aforesaid sale was not binding and effective on the plaintiff and had been entered into by Mastan Singh without consideration and as a breach of trust and confidence reposed in him. *Inter alia* it was averred that the *mukhtarnama* was executed with the object of giving Mastan Singh authority to fifth out the litigation for the benefit of both the sisters (Smt. Kauri and Smt. Nand Kaur), that no power was consciously given by the plaintiff to Mastan Singh to sell away the property, and that the power authorising him to alienate the property was got entered as a result of fraud. Furthermore, it was averred that Mastan Singh acting on the one hand as the *mukhtar* of the plaintiff and on the other being the natural guardian of his minor sons, the interests clashed and the sale-deed was only a fictitious document and not dining on the plaintiff in law and equity and that the price mentioned in the sale-deed was far less than the market-value of the land. The suit was resisted by Mastan Singh and the vendees from mastan Singh and separate written statements were filed one by Mastan Singh and the other by the vendees, though the two were practically the same. The plea taken in the paragraph 10 of the written statements was that the land was sold on the express desire of the plaintiff inasmuch as he had no male issue and was old and wanted to turn the land into cash and she expressly asked the defendants, who were owners of one-half of the land, to purchase the other half and pay cash to her, so that she may live in comfort. It was further stated that the sale-money as well as the share in the produce had already been received by the plaintiff. As a result of these pleadings the following issues were settled :-

1. Was defendant No. 1 (Mastan Singh) competent to effect the sale of the suit property on behalf of the plaintiff ?
2. If so, is the sale invalid as pleaded ?
3. Is the suit for accounts incompetent ?
4. To what amount, if any, is the plaintiff entitled on account of *mesne profits* and sale-money ?
5. Relief.

1. The trial Court after considering the entire evidence and circumstances of the case came to the conclusion that Rs. 5,000/- had been recovered by Mastan Singh as *mesne profits* from the collaterals for being in wrongful possession and consequently granted a decree for half that amount, viz. Rs. 2,750/-. So far as the sale is concerned, it was held that in fact no power to sell

the property was consciously given and, therefore, the sale was bad and was not binding on the plaintiffs and consequential relief of possession was granted.

2. On appeal filed by Mastan Singh and the vendees, the appellate Court came to the conclusion that out of Rs. 2,750/- realized, Mastan Singh must have spent Rs. 1,000/- for effecting realisation and consequently reduced the money decree to Rs. 1,750/-, and there is no appeal against this part of the decree and we need not refer to it any further. So far as sale is concerned, the lower appellate Court held that inasmuch as in the power of attorney, authority to sell, mortgage or gift was specifically given and as it was admitted by the plaintiff herself that this power of attorney was read over to her before she signed it. Mastan Singh was entitled to alienate the property and other matters did not arise and consequently the sale was binding on the plaintiff, but that Mastan Singh was bound to pay Rs. 5,000/- to the plaintiff as the balance of the sale-proceeds. The decree of the trial Court was accordingly modified, decree for possession being set aside and in its place decree for recovery of Rs. 5,000/- being passed. Smt. Nand Kaur has come up in second appeal.

For the proper understanding of the case, it is necessary to refer to the power of attorney and the sale-deed. Exhibit D.1. is the original power of attorney and Exhibit P. 15 is the copy. The test covers nearly 2 pages, out of which 1½ pages have been devoted to giving details of the power which may have been necessary for proper prosecution of the litigation and for effectively getting possession of the land in dispute. Of the remaining ½ page a portion is devoted to giving authority for the management of the land, after recovering its possession, and giving the same to tenants, etc., and the remaining portion contains the following words relating to the power of settling, etc.

"He (Mastan Singh) will have full authority to mortgage, sell or gift, or in any other way alienate the property of all types inherited by us from Smt. Khomi. In other words, Mastan Singh has full power to obtain the above mentioned property by filing suits, prosecuting them and putting in replies, and the power of mortgaging, selling or gifting the land was also with the *mukhtar*."

So far as the sale-deed is concerned, in it there is no mention that the sale was being effected on the express desire of Smt. Nand Kaur or that Smt. Nand Kaur found it difficult to manage the property or that she was in need of money or that she had not been able to sell it to others. and therefore had requested for the sale to her co-sharers. All that is stated is that the sale is being effected for "*kharch muqadma, kharidne bail wa gadda was digar arazi*" (i.e. for expenses of the suit, purchase of the bullocks and a cart and other land). As already stated, out of Rs. 10,000/-, Rs. 5,000/- were said to have been obtained from the vendees and paid towards expenses of the litigation. There is no indication in the sale deed as to whom this payment was made and when. In any case the sale-deed is dated 14th of September, 1960, and on the record a receipt of 25th of February, 1962 (Exhibit D.2) is sought to be proved to the effect that Rs. 10,000/- had been paid to one Mahinder Singh Zaildar.

3. The facts admitted or found concurrently by the Courts below are as follows :-

Smt. Nand Kaur plaintiff is the younger sister of the wife of Mastan Singh, and Mastan Singh being the eldest member in the family was given power of attorney to obtain possession of the land from the collaterals, who had taken illegal possession thereof; that after obtaining possession in 1959 Mastan Singh sold the land to his own sons, three of whom were minor, of whom he was the natural guardian; and that he has not paid any part of the consideration money or any part of the *mesne profits* recovered by him to Smt. Nand Kaur.

4. The points for consideration that arise in this case are :-

(1) Did Smt. Nand Kaur consciously give authority to Mastan Singh to sell, mortgage or gift away the property in dispute, which he was to obtain from the collaterals;

(2) Even if the words written in the power of attorney were written consciously, how has this power to be constructed. In other words whether this power to sell or mortgage must be taken to have been given in relation to the main purpose of the power of attorney, i.e.

to obtain possession of the land by fighting litigation, or was it a general power of attorney to sell away the property irrespectively of the fact whether such a thing was necessary or not for the purpose of litigation or management; and

(3) Whether this bargain can be upheld by a Court of equity as a conscionable and proper bargain.

5. The learned lower appellate Court did not go properly into any one of these matters. It took merely superficial view of the whole thing and felt that once a document covering about 2 pages is said to have been read over to an illiterate lady, that would be enough to conclusively prove that she consciously not entered every word that is in that document. It did not even touch the question as to how this power, even if it was there, was to be constructed. So far as the conscionable nature of the bargain is concerned, no reference was made. I have gone through the evidence and have heard the parties at length and I will deal with these points seriatim.

6. There is no finding of the lower appellate Court that authority to sell, etc. was given consciously by Smt. Nand Kaur, I am of the view that mere reading over of a document is not enough to convey to an executant who is not familiar with the legal terminology or the effect of the words used, and much more so, in case where the executant is an illiterate young lady who was executing a power of attorney in favour of an elder relation of hers in whom naturally she had to repose creates possible confidence. As I have indicated above, 1½ pages out of the 2 contain comprehensive and detailed powers, all relating to the litigation proposed to be started, and then follow one or two lines giving this general power of alienation. It is difficult for anyone not very conversant with such document, to be able to fully understand the legal import of the various powers given in such a longish document. I have no doubt in my mind that Smt. Nand Kaur could, not, in any case have consciously give power to Mastan Singh to gift away the property after obtaining possession thereof in litigation. But all the same we find that the power given includes not only the power to sell or mortgage but also the power to gift away the land. In *Smt. Bishan Devi v. Jagat Singh, AIR 1937 Lahore 353*, a Division Bench of the Lahore High Court came to the conclusion that in the case of a document executed by a Pardanashin lady mere reading of the document was not enough. It must be shown that she fully understood the import of the document. In *Smt. Farid-un-nisa v. Mukhtar Ahmad, AIR 1925 Privy Council 204*, it was observed as follows :

"The law of India contains well known principles for the protection of persons, who transfer their property to their own disadvantage, when they have not the usual means of fully understanding the nature and effect of what they are doing. In this it has only given the special development, which Indian social usages make necessary, to the general rules or English law, which protect persons, persons whose disabilities make them dependent upon or subject them to the influence of others, even though nothing in the nature of discretion or coercion may have occurred.

The extent and character of the explanation required must depend on the circumstances of each case. Length, intricacy, the number of complexity of the disposition, or the unfamiliarity of the subject matter are all reasons for requiring an increased amount and efficiency of Explanation. Thus a matter not likely to attract the attention of the executant in itself ought not to be relied on as binding, unless her attention has been directly drawn to it. It must be a question whether having regard to the proved personality of the settler, the nature of the settlement, the circumstances under which it was exercised, and the whole history of the parties it is reasonably established that the deed executed was the free and intelligent act of the settler or not. If the answer is in the affirmative, those relying on the deed have discharged the onus which rests upon them. Of course fraud, duress and actual undue influence are separate matters."

7. In view of the above, therefore, irrespectively of the question of fraud, undue influence, etc., and in view of the circumstances in which Smt. Nand Kaur had to execute this power of attorney, she could not have given powers other than those which were necessary for the prosecution of the case. The mere fact that the words "*rehan, hibba and tamlik* (mortgage, sale or gift) were also

entered therein, would not lead to the conclusion that she fully realised the import of these words in the power of attorney, when the same was read over to her.

8. In any case one thing is clear. The primary and the main object of the power of attorney was to authorise Mastan Singh to carry on litigation on behalf of Smt. Nand Kaur and her elder sister Smt. Kauri, and it was urged on behalf of the appellant that even if there was an authority given to the *mukhtar* to sell or mortgage the land, such an authority must be taken in the context of the purpose for which the power of attorney was given, which was either to obtain land by fighting litigation or thereafter to manage it, and in as much as, there is not even a suggestion that the present sale was necessitated either because of the litigation or for the purpose of proper management of the land, the *mukhtar* had no authority to sell the land. It was pointed out that although in the sale deed some effort was made to show that there was necessity for the sale, i.e. for payment of the expenses of the suit and for the purpose of the bullocks, cart and other land, yet according to the written statement, the real reason for selling the land was that Smt. Nand Kaur wanted to turn the land into cash. I feel that there is a good deal of force in this argument. Reference was also made in this connection to *Smt. Jan v. Smt. Fajjan, AIR 1938 Lahore 351*, the fact of which are very near to the present case. The head-note runs as follows :-

"One of the rules of construction of a power of attorney is that where authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the proper performance of the particular acts. A executed a power of attorney in favour of B whereby B was entrusted with the management of A's property, as A was married and could not look after her estate. Power to mortgage and sell the property was also mentioned in the deed. B sold the property although there was no necessity of the sale for the purpose of management of the property.

"Held that B was only authorised to sell the property when it was necessary for the purpose of the management of the property. As there was no necessity for the sale, the sale could not be upheld."

9. For coming to this decision reliance was placed by the learned Judge on Article 34 in Bowstead on Agency, Edition 8, which was to the following effect :-

"Power of attorney must be strictly construed, and construed as giving only such authority as they confer expressly or by necessary implication. The following are the most important rules of construction : (1) The operative part of the deed is controlled by the recitals. (2) Where authority is given to do particular acts, followed by general words, the general words be restricted to what is necessary for the proper performance of the particular acts."

10. In the present case there can be no possible doubt that the main purpose of executing the power of attorney was to fight litigation and subsequent management and consequently this power, which is followed by general words, must be construed to have been given for these two purposes. On this ground alone, therefore, Mastan Singh had no authority to sell the property to his own sons when such a thing was not at all necessary for the purpose of litigation or management.

11. The appeal must also succeed on the ground that the transaction together lacks good faith. In the present case as a *mukhtar* of Smt. Nand Kaur he was bound to protect her interests, and in a way, he occupied a fiduciary position *qua* her. On the other hand, as the natural guardian of his minor sons and otherwise too the vendees being his own sons, he naturally would have to protect the interests of the minors and would have a soft corner for the major sons. Mastan Singh being the *mukhtar* of Smt. Nand Kaur plaintiff and also the father and the guardian of his sons, the burden lay heavily on Mastan Singh and the vendes to establish that the transaction was made in good faith. If, as is stated by Mastan Singh, the transaction was at the express instruction or desire of Smt. Nand Kaur, there would have been no difficulty whatever in Smt. Nand Kaur herself coming to Nabha, where the deed was registered, because her village is situated, according to the evidence on the record at a distance of 7 miles from there. In as much as the purchase was made by Mastan Singh's sons, it was only proper for him to get Smt. Nand Kaur to execute the deed

and to get the consideration money. The further fact that no money was actually paid to Smt. Nand Kaur after the transaction, falsifies the averment of Mastan Singh that the sale was effected at the request of Smt. Nand Kaur because she wanted cash. On the record there is evidence to show that Smt. Nand Kaur's husband has ample landed property, out of which he gets an income of Rs. 5,000/- to Rs. 6,000/- a year. There was consequently no question to Smt. Nand Kaur being in need of money for the household expenses. Her age as given in the power of attorney is 25 and consequently the further averment in the written statement that Smt. Nand Kaur, because of her old age, wanted to get money to use it for her comfort is also palpably false. No Court of equity can uphold such a transaction which is void of all good faith and has been entered into by Mastan Singh complete disregard of faith that was reposed in him.

12. In the view that I have taken it is not necessary to go into the question whether Rs. 5,000/- were in fact given by Mastan Singh to Mohinder Singh Zaildar. No clear finding in this respect has been given by the lower appellate Court. In any case if any money is due to Mastan Singh for any expenses that may have been incurred by him, that is a separate matter and he can, after rendering accounts, take such legal steps as may be open to him for the recovery of the same. The evidence on the record, however, does not show that any expenses were incurred by Mastan Singh himself, because according to him expenses were incurred by Mohinder Singh Zaildar, who by agreement was promised Rs. 10,000/- as compensation in case of success. No agreement was produced and in any case that is a matter into which it is not necessary to go in the present dispute.

13. For the reasons given above, I accept this appeal, set aside the judgment and the decree of the lower appellate Court and restore that of the trial Court except to the extent that the money decree granted by the trial Court for Rs. 2,750/- shall stand reduced to Rs. 1,750/- as ordered by the first appellate Court and against which order there is no appeal. The appellant will have her costs in this Court as well as in the Courts below.

On oral request made by the learned counsel for the respondents I grant leave to appeal under clause 10 of the Letters Patent and the reasons for my agreeing to this course are that my judgment is one of reversal and the value of the property involved, as stated by the appellant, is above Rs. 20,000/-.