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S. KESARI HANUMAN GOUD
v.
ANJUM JEHAN & ORS.
(Civil Appeal Nos. 2885-2887 of 2005 etc.)

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APRIL 10, 2013
[DR. B.S. CHAUHAN AND FAKKIR MOHAMED
IBRAHIM KALIFULLA, JJ.]

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CODE OF CIVIL PROCEDURE, 1908:

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s.96 read with O. 41, r.31 - First appeal before High Court challenging the judgment and decree passed in a suit for specific performance of agreement to sell - High Court holding that the plaintiff was not ready and willing to perform his part of contract - Held: Finding recorded by High Court on this issue is perverse being contrary to evidence on record - Further, High Court while deciding the first appeal u/s 96, did not consider all the issues as is required under O. 41, r.31 - Judgment and decree passed by High Court set aside and that passed by trial court restored - Appellant directed to refund the amount of compensation to first respondent along with 9% interest.

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O. 3, rr. 1 and 2 - Recognized agent - Power of attorney holder - Held: It is a settled legal proposition that power of attorney holder cannot depose in place of the principal - Nor can he depose for the principal in respect of a matter, as regards which, only the principal can have personal knowledge and in respect of which, the principal is entitled to be cross-examined.

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The appellant in C.A Nos. 2885-2887 of 2005 filed Suit No. 30 of 1984 against respondent no. 1 (defendant no. 1) for specific performance of the agreement to sell entered into between the parties on 15.10.1977 and for

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directing respondent no. 1 to execute a registered sale deed in his favour ignoring the agreement to sell in favour of respondents/defendants no. 3, 6 and 7 which were entered into despite the public notice issued by the plaintiff. It was the case of the plaintiff that he had always been ready and willing to perform his part and it was the first defendant who evaded to perform her part of the suit agreement. Respondent/defendant no. 1 denied the plaint allegation and stated that when the plaintiff failed to raise necessary money, he informed her that she was at liberty to sell the property to anyone. Respondent no. 3/defendant no. 7 also filed Suit No. 135 of 1984 for perpetual injunction restraining the plaintiff from interfering with the construction of a theatre building including the compound wall which was in close proximity to his land. During the pendency of the suit respondent no. 1 executed and got registered a sale deed in favour of respondent no. 2/defendant no. 3 with respect to a part of the suit property. Further, the GPA holder also got registered another sale deed in favour of respondent no. 2/defendant no. 3 with respect to a part of the suit land. The trial court decreed the suit of the appellant except for a small area which had been purchased by defendant no. 6. The suit filed by respondent no. 3/defendant no. 7 was also dismissed. In the appeals preferred by both sides, the High Court held that the plaintiff-appellant was not ready and willing to perform his part of contract. However, it held the plaintiff entitled to get the sale deed executed in respect of the land excluding the land sold to defendants nos. 3, 6 and 7. Both the sides filed the appeals.

Disposing the appeals, the Court

HELD: 1.1 The plaint contained a specific averment that the plaintiff had always been ready and willing to perform his part. In the written statement the said

A averment was simply denied. In the replication the plaintiff stated that he was capable of raising necessary finance. The appellant/plaintiff examined himself as PW.1, and in his cross-examination he has denied any suggestion made to him to the effect that he had ever
 B informed the power of attorney holder of respondent No.1 that he would be unable to raise the balance of the sale consideration. With respect to the issue regarding financial capacity to pay, the appellant/plaintiff examined
 C PW.2 and PW.3. They fully supported his case, deposing that he was a man of means, and that he had sufficient properties and the means to purchase the said suit property. The finding recorded by the High Court on this issue is perverse being contrary to the evidence on record. [para 8-12] [761-C-E; 762-B-D; 763-A-B]

D 1.2 It is a settled legal proposition that the power of attorney holder cannot depose in place of the principal. Provisions of O. 3, rr. 1 and 2 CPC empower the holder of the power of attorney to "act" on behalf of the principal. The term "act", would not include deposing in
 E place and instead of the principal. Similarly, the power-of-attorney holder cannot depose for the principal in respect of a matter, as regards which, only the principal can have personal knowledge and in respect of which, the principal is entitled to be cross-examined. [para 13]
 F [763-C-F]

Vidhyadhar v. Manikrao & Anr., 1999 (1) SCR 1168 = AIR 1999 SC 1441; *Janki Vashdeo Bhojwani v. Indusind Bank Ltd.*, 2004 (6) Suppl. SCR 681 = (2005) 2 SCC 217; *M/S Shankar Finance and Investment v. State of A.P & Ors.*, 2008
 G (10) SCR 905 = AIR 2009 SC 422; and *Man Kaur v. Hartar Singh Sangha* 2010 (12) SCR 515 = (2010) 10 SCC 512 - relied on.

H 1.3 So far as the notice of the agreement between the appellant and respondent No. 1 is concerned, the trial

court after taking note of the recital of the said agreement in the agreement to sell and sale deed also, has held, that, so far as the land sold to the respondents other than respondent no.6 is concerned, the parties had been fully aware of the same. Only respondent no.6 had no such notice. It has been conceded on behalf of the appellant that the same being a very small area, the appellant is not willing to disturb the possession of respondent no.6. [para 14] [763-G-H; 764-A]

2.The judgment and decree passed by the High Court is set aside, and that passed by the trial court is restored. As a consequence, the appellant is entitled to get the sale deed executed and registered, with respect to all the suit land available (minus the land acquired and the land purchased by respondent no.6). The appellant is directed to refund the amount of compensation to respondent no. 1 along with 9% interest. [para 16-17] [764-D-E]

Case Law Reference:

1999 (1) SCR 1168	relied on	para 13
2004 (6) Suppl. SCR 681	relied on	para 13
2008 (10) SCR 905	relied on	para 13
2010 (12) SCR 515	relied on	para 13

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2885-2887 of 2005.

From the Judgment and Order dated 10.06.2003 of the High Court of Judicature Andhra Pradesh in C.C.C. Appeal Nos. 34, 33 of 1991 and 92 of 1993.

WITH

C.A. Nos. 2888 and 4459 of 2005.

Anoop G. Chaudhari, A.T.M. Rangaramanujam, P. Vinay

A Kumar, Vijay Prakash, Sohan Singh Rana, Bindra Rana, Vikrant Rana, Piyush Kumar (For S.S. Rana & Co.), Vishal Yadav, R. Santhan Krishnan, Praveen Kumar Pandey, Aditya A., D. Mahesh Babu, A.V. Rangam, Richa Bharadwaja, Abhijit Sengupta for the Appearing Parties.

B The Judgment of the Court was delivered by

DR. B.S.CHAUHAN, J.

Civil Appeal Nos. 2885-2887 of 2005

C 1. These appeals have been preferred against the judgment and order dated 10.6.2003 by the High Court of Judicature, Andhra Pradesh at Hyderabad in C.C.C.A. Nos.34 and 33 of 1991 and C.C.C.A.No. 92 of 1993, by way of which the appeals filed by the respondents against the common judgment and decree dated 22.3.1991, in O.S. No.30 of 1984 and O.S. No.135 of 1984, passed by the court of the Additional Chief Judge, City Civil Court, Hyderabad, have been partly allowed, by modifying the said judgment and order of the trial court.

E 2. Facts and circumstances giving rise to these appeals are that:

F A. The appellant/plaintiff was carrying on business prior to 1.1.1978 in the appurtenant land as a tenant, and had made an offer to purchase the said premises, alongwith two other premises belonging to the landlady Ms. Anjum Jehan - respondent No.1/defendant No.1 (hereinafter referred to as 'Res.No.1').

G B. The parties entered into an agreement dated 15.10.1977, for the sale of land admeasuring 1200 square yards situated at Musheerabad, Hyderabad, Andhra Pradesh, for a total consideration of Rs.1,70,070/-. Out of which a sum of Rs.25,000/- was paid as earnest money. The said agreement H to sell, provided that the sale deed was to be executed within

a period of six months from the date of agreement, or upon intimation by the vendor, as she had to obtain permission from the competent authority under Section 27 of the Urban Land Ceiling Act, 1976 (hereinafter referred to as 'the Act 1976), the necessary income tax clearances and the sub division permission from the municipal corporation. The aforesaid suit land was also in the possession of the landlady, and had partly been occupied by defendant no. 2/respondent (Narsoji).

C. After the execution of the said agreement to sell, the appellant/plaintiff paid non-agricultural assessment tax. A legal notice dated 18.6.1979 was received by the appellant from Res. No.1 Ms. Anjum Jehan, stating that she had obtained requisite permission from the statutory authorities under the Act 1976, from the income tax authorities, and also from the sub-divisional authorities.

D. The appellant/plaintiff asked Res. No.1 vide letter dated 2.7.1979, to send the copies of the aforesaid permissions, as well as a copy of the General Power of Attorney (hereinafter referred to as the 'GPA'), that had been executed by her.

E. Instead of executing the sale-deed in favour of the appellant/plaintiff, Res. No.1 tried to sell the suit property to other persons. Therefore, the appellant/plaintiff got a public notice published in local newspapers on 29.4.1980 and 30.4.1980, in respect of the suit property, stating that an agreement to sell had been executed between the parties as regards the said land, and that therefore, no other person must purchase the same.

F. Despite the said notice, the GPA holder of Res. No.1 entered into two different agreements to sell with respondent no. 2/defendant no.3 (K.S.R.Murthy) on 29/30.4.1980, for open land admeasuring 510 square yards.

G. The appellant/plaintiff filed a suit bearing O.S. No. 30 of 1984 on 23.6.1983 for specific performance of the

A agreement to sell dated 15.10.1977, directing the Res. No.1 to execute a registered sale deed in favour of the appellant/plaintiff, and ignoring the agreement to sell in favour of respondent/defendant nos.3, 6 and 7.

B H. Respondent no.3/Defendant No. 7 (K.Y. Rajaiah) filed Original Suit No. 135 of 1984 on 27.12.1983, for perpetual injunction, restraining the appellant/plaintiff from interfering with the construction of a theatre building, including the compound wall of the same, which was in close proximity to his land.

C I. During the pendency of these two suits, Res.No.1 executed a sale deed, and she got the same registered on 29.4.1985, in favour of respondent no.2/defendant no.3 with respect to the part of the suit property admeasuring 260 square yards, and the recital of the sale deed acknowledged the agreement between the appellant/plaintiff and Res. No.1.

J. The GPA holder registered another sale deed in favour of respondent no.2/defendant no. 3 on 30.4.1985, with respect to the suit property admeasuring 260 square yards.

E K. The trial court, vide judgment and decree dated 22.3.1991 decreed the suit of the appellant/plaintiff except for a small area admeasuring 65 square yards, which had been purchased by defendant no.6 (represented by Lrs. defendant nos.6 to 10), observing that the said defendant had no knowledge of any agreement to sell between the appellant/plaintiff and Res. No.1. The trial court also dismissed Suit No.135 of 1984 that had been filed by respondent no.3/defendant No.7 (K.Y. Rajaiah).

G L. The appellant/plaintiff was directed to deposit the balance consideration amount in the trial court within a period of four weeks, and the same was duly deposited by the appellant/plaintiff on 6.4.1991.

H M. Both sides preferred appeals before the High Court,

and all the appeals were disposed of by a common judgment dated 10.6.2003, as referred to hereinabove. A

N. The High Court held, that the appellant/plaintiff was not ready and willing to perform his part of the contract, thus, in view of the same, there was no occasion to decide issues regarding whether the subsequent purchasers were in fact, bonafide purchasers for consideration without notice of the agreement to sell between the appellant/plaintiff and Res. No.1. However, the court further held, that the appellant/plaintiff would be entitled to get the sale deed executed in respect of the said land, excluding the land sold to defendant nos.3, 6 and 7 at the rate of Rs.750/- per square yard, adjusting the amount that had already been paid. B
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O. Res.No.1 filed a Review Petition before the High Court. During the pendency of the said review petition, both the sides have preferred these appeals. The Review Petition filed by Res. No.1 stood dismissed vide order dated 20.2.2004. The said order is also under challenge before us in connected appeal Nos. 2888 and 4459 of 2005. D

Hence, these appeals. E

3. Shri Anoop G. Chaudhari, learned senior counsel appearing on behalf of the appellant/plaintiff, has submitted that the High Court, while dealing with the first appeal, has decided the same under Section 96 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the CPC'), giving strict adherence to Order XLI Rule 31 CPC, and thus that it ought to have dealt with each and every issue, and appreciate all the evidence on record. It was under an obligation to record findings on each issue separately. The High Court has committed an error in appreciating the evidence on record, and coming to the conclusion that the appellant/plaintiff was not ready and willing to perform his part of the contract, as the appellant/plaintiff had in fact been issuing public notices, with the intention of making other people aware of the fact that they F
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A must not indulge in any kind of transaction in respect of the suit property, as the same belonged to him. He also had the financial capacity to pay, which stood proved by the fact that within a period of three weeks from the date of judgment and decree of the High Court, he deposited the entire amount.

B Furthermore, the High Court ought to have appreciated the evidence on record, with respect to whether the other defendants/subsequent bonafide purchasers had purchased the land without notice. Merely saying that the same was not necessary, would mean that the court itself has violated the

C mandate of Order XLI Rule 31 CPC. Res.No.1 (Ms. Anjum Jehan) never appeared in the witness box and never filed a written statement. The same was filed by her GPA holder. The said GPA was in respect of various other properties, and the GPA holder was not authorised to pursue suits in respect of

D the suit property. Under no circumstance is the GPA holder competent to enter the witness box and to give evidence as a substitute for the original party. Thus, the appeals deserve to be allowed, and the judgment and decree of the High Court, is liable to be set aside.

E 4. Per contra Shri A.T.M. Rangaramanujam, Senior Advocate, Shri R. Anand Padmanabhan, Shri Sohan Singh Rana and Shri A.V. Rangam, learned counsel appearing on behalf of the respondents, have opposed the appeals

F contending that the High Court has appreciated the evidence on record and has reached the correct conclusion. The findings of the fact recorded by the High Court are based on evidence, and do not warrant any interference by this Court. The appellant/

G plaintiff, has not furnished any explanation for the delay, as he was duly informed by Res. No.1 of the fact that she had obtained the required sanctions/permissions. Had the appellant/plantiff been in a position to perform his part of the contract, he could not have waited for a period of more than 4 years to file the suit. During the pendency of the cases, a part of the suit land stood acquired for widening the road. The

H appellant without having any title over the land, has claimed and

withdrawn a huge amount of compensation unauthorisedly/ fraudulently. Thus, the appeals are liable to be dismissed. A

5. We have considered the rival submissions made by the parties, and perused the record.

6. The trial court, after appreciating the evidence on record came to the following conclusions: B

I) The evidence adduced on behalf of the defendants does not conclusively establish their plea to the effect that the plaintiff himself had cancelled the agreement to sell (Ex.A-1), in view of his inability to pay the balance of the sale consideration. C

II) The plaintiff had the capacity to raise and pay the balance of the sale consideration under Ex.A-1. Thus, the plaintiff was ready and willing to perform his part of the contract. D

III) There were inconsistent versions with regard to the extent of the land alleged to have been sold to defendant nos.3 and 7. E

IV) The plaintiff had paid the amount towards non-agricultural assessment tax and property tax for the suit property.

V) The plaintiff had not rescinded the suit contract, and had not informed the first defendant that he was not in a position to complete the sale transaction, and that therefore, defendant no.1 was at liberty to sell the suit land to any other person, as has been contended by defendant no.1 F G

VI) Defendant nos.3 and 6 were subsequent purchasers for consideration without notice. Defendant no.6 is a bonafide purchaser for value, without notice of the agreement to sell (Ex.A-1). H

A 7. The High Court while deciding the first appeal filed under Section 96 CPC, did not consider all the issues as is required under Order XLI Rule 31 CPC. On the other hand, it dealt with only one issue elaborately, without making any reference to the pleadings taken by the parties. The High Court
B held:

(i) No steps were taken by the appellant/plaintiff in establishing his readiness and willingness to perform his part of the contract.

C (ii) Only a nominal sum was paid by the appellant/plaintiff in 1977 and till the date that the suit was filed, no effort was made by the appellant/plaintiff to pay the balance amount.

D (iii) There has been inordinate delay on the part of the appellant/plaintiff in filing the suit. Had he been ready and willing, he ought to have approached the court at the earliest.

E (iv) As per the evidence of defendant no. 7, the power of attorney holder (DW.1), did not call the appellant/plaintiff and ask him to get the sale deed executed, in pursuance of agreement dated 15.10.1977. The appellant/plaintiff expressed his inability to get the sale deed executed as he had no ready cash.

F (v) There was no requirement in law to obtain permission for separate sub-division and thus, Res.No.1 was not required to obtain any such sanction. Furthermore, the said property had already been sub-divided, and bore different
G numbers.

(vi) Res. No.1 had obtained the requisite permission from the Urban Land Ceiling Authorities in December 1977, and the appellant/plaintiff had handed over the draft sale deed to Res. No.1.
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(vii) It was because the appellant/plaintiff was not willing and ready to perform his part of the contract, and was resorting to dilatory tactics, that Res. No.1 had entered into two agreements to sell with respondent nos.3 and 7.

(viii) In view of the above, there was no occasion to examine the other issues, particularly those with respect to whether the other respondents were bonafide purchasers for consideration without notice, and the appeals were hence disposed of, as has been referred to hereinabove.

8. The plaint contained a specific averment in paragraph 7 as under:

"The plaintiff is and had always been ready and willing to perform his part of the suit agreement and it is the first defendant, who evaded to perform her part of the suit agreement and finally committed to refusal of the terms of the suit agreement amounting to refusal on her part to so perform her part of the suit agreement."

9. In the written statement, Res. No. 1 simply denied the said averment, and further averred that:

"The allegation in para 7 of the plaint that the plaintiff was always ready and willing to perform his part of the suit agreement being incorrect is denied. The allegation that the defendant committed breach of the agreement and failed to perform her part of the agreement being incorrect is denied. The Defendant submits on the contrary that the plaintiff failed to perform his part of the agreement thereby committed a breach of the agreement The Defendant, submits that the Defendant performed her part of the agreement and was ready to perform her part of the agreement, It is submitted that finally when the plaintiff failed to raise necessary money towards the sale price plaintiff

A informed the Defendant that she/is at liberty to sell the property to anyone."

B 10. A replication was filed by the appellant/plaintiff under Order VIII Rule 9 CPC, wherein it has been submitted in paragraph 6 thereof as under:

"The plaintiff is a big businessman having a business turnover of more than 5 lakhs per year. He is always capable of providing and raising the necessary finances to complete the sale transaction"

C 11. These are the only pleadings taken by the parties so far as the issue of readiness and willingness to perform part of the contract by the appellant/plaintiff is concerned. The appellant/plaintiff examined himself as PW.1, and in his cross-examination he has denied any suggestion made to him to the effect that he had ever informed the power of attorney holder of Res. No.1, namely, Shri S.S. Noor Ali, that he would be unable to raise the balance of the sale consideration. Nor he had ever told defendant no. 7 that he wanted to sell the agricultural land to raise money to purchase the suit property. D
E No question was put to him in the cross-examination, in response to which he could establish that he was a man of means, which he has thus stated in the replication, though he has admitted that he has certain outstanding dues towards the bank. He has denied the suggestion that he had neither a house, nor agricultural land, and that he had no capacity to pay the sale consideration, and further, that he had falsely deposed in respect of the same. F

G 12. The allegation made in the written statement stating that the appellant/plaintiff had told Res. No. 1 that she was free to sell the land, was not established by leading any evidence. Additionally, Res. No. 1 lives in the USA. It is nobody's case that the appellant/plaintiff had any communication with her. It was not mentioned in the averments raised in the written statement, H that she had been informed anyone of the same through the

power of attorney holder. Further, with respect to the issue A
regarding financial capacity to pay, the appellant/plaintiff
examined K. Narayana Reddy (PW.2) and Laxman Gore
(PW.3). They fully supported his case, deposing that he was a
man of means, and that he had sufficient properties and the
means to purchase the said suit property. B

Thus, the finding recorded by the High Court on this issue
is perverse being contrary to the evidence on record.

13. It is a settled legal proposition that the power of
attorney holder cannot depose in place of the principal. C
Provisions of Order III, Rules 1 and 2 CPC empower the holder
of the power of attorney to "act" on behalf of the principal. The
word "acts" employed therein is confined only to "acts" done
by the power-of-attorney holder, in exercise of the power D
granted to him by virtue of the instrument. The term "acts",
would not include deposing in place and instead of the
principal. In other words, if the power-of-attorney holder has
preferred any "acts" in pursuance of the power of attorney, he
may depose for the principal in respect of such acts, but he
cannot depose for the principal for acts done by the principal, E
and not by him. Similarly, he cannot depose for the principal in
respect of a matter, as regards which, only the principal can
have personal knowledge and in respect of which, the principal
is entitled to be cross-examined. (See: *Vidhyadhar v.*
Manikrao & Anr., AIR 1999 SC 1441; *Janki Vashdeo Bhojwani*
v. Indusind Bank Ltd., (2005) 2 SCC 217; *M/S Shankar*
Finance and Investment v. State of A.P & Ors., AIR 2009 SC
422; and *Man Kaur v. Hartar Singh Sangha*, (2010) 10 SCC
512). F

14. So far as the notice of the agreement between the G
appellant and Res. No. 1 is concerned, the trial court after taking
note of the recital of the said agreement in the agreement to
sell and sale deed also, has held, that, so far as the land sold
to respondents other than respondent no.6, the parties had
been fully aware of the same. Only respondent no.6 had no such H

A notice. Shri A. G. Chaudhari, learned senior counsel appearing on behalf of the appellant, has submitted that the same being a very small area, the appellant is not willing to disturb the possession of defendant no.6.

B 15. In the facts and circumstances of the case, as the appellant has not yet acquired any title over the land, he has no right to receive compensation to the tune of Rs. 29,47,112/-. However, he withdrew the said amount by giving an undertaking to return the said amount to Res. No. 1 in case any such order was passed by the court in this regard.

C 16. In view of the above, the appeals are allowed. The judgment and decree passed by the High Court is set aside, and the same passed by the trial court is restored. As a consequence, the appellant is entitled to get the sale deed executed and registered, with respect to all the suit land available now (minus the land acquired and the land purchased by the respondent no.6).

D 17. The appellant is directed to refund the amount of compensation received by him to Res. No. 1 within a period of three months, alongwith 9% interest from the date of receipt till the date of payment.

Civil Appeal Nos. 2888 and 4459 of 2005

F In view of the judgment and order in Civil Appeal Nos. 2885-2887 of 2005, these appeals are dismissed.

R.P.

Appeals Disposed of.