



THIS APPEAL, COMING ON FOR FURTHER HEARING, THIS DAY, THE COURT DELIVERED THE FOLLOWING:

JUDGMENT

Present second appeal is preferred by defendant Nos.1 to 4 in O.S.No.606/1989 (old No.122/1982). Original suit was dismissed by the Trial Court. Against which the plaintiff preferred first appeal before learned Civil Judge (Sr. Dn.), Chikodi in R.A.No.113/1996 which was allowed and suit of the plaintiff came to be decreed.

2. Being aggrieved by the same, defendants have preferred this appeal and this Court admitted the matter on the following substantial question of law:

"Whether the judgment of the first Appellate Court reversing the judgment and decree passed by the Trial Court relying upon the evidence of the power of attorney holder of the first plaintiff - PW1 is contrary to the decision of the Hon'ble Supreme Court



in JANKI VASHDEO BHOJWANI AND ANOTHER VS. INDUSIND BANK LIMITED AND OTHERS (ILR 2005 KAR 729)."

3. A suit came to be filed by the plaintiffs seeking following relief:

"(a) That it be declared that the suit properties are the joint family ancestral properties of the plaintiffs and that they are in actual possession, wahiwat and cultivation of these lands and that the defendants have no manner of right to create any illegal documents.

(b) Consequential relief of injunction be granted against the defendants 2 to 4 and the men on their behalf from disturbing the actual possession and lawful wahiwat of the plaintiffs in respect of the suit properties at any time in future.

(c) Any other relief that deem fit be granted.

(d) Costs of this suit be granted to the plaintiffs.



(e) Permission to amend and after the plaint as and when necessary be granted. Decree be passed accordingly."

4. The suit was dismissed by the Trial Court.

5. Plaintiffs preferred an appeal before learned Civil Judge Senior Division, Chikodi challenging the validity of the judgment passed by learned Trial Judge. Learned Judge in the first appellate Court, reconsidering the facts and law by exercising the power under Section 96 of the Cr.P.C., decreed the suit of the plaintiffs.

6. Learned Trial Judge has dismissed the suit of the plaintiffs on the ground that plaintiffs did not step into witness box and in his place his wife examined based on power of attorney executed by her husband. Power of attorney is marked at Ex.P.1. Learned Judge of the first appellate Court however reconsidered the issue regarding competency of PW-1 in deposing about



the plaint averments and decreed the suit of the plaintiffs. Defendant who was successful before the Trial Court has suffered the decree at the hands of first appellate Court has preferred the present appeal.

7. Heard the arguments of Shri. Shrikant T. Patil, learned counsel for appellants and Shri. B. S. Kamate, learned counsel for respondent Nos.2(A & B), 3 to 6.

8. At the time of arguments contended by appellant has placed reliance on the judgment of the Hon'ble Supreme Court in ***Janki Vashdeo Bhojwani and Another Vs. Indusind Bank Ltd. And others*** reported in ***ILR 2005 KAR 729***. The relevant portion of the said judgment reads as under:

"12. In the context of the directions given by this Court, shifting the burden of proving on the appellants that they have a share in the



property, it was obligatory on the appellants to have entered the box and discharged the burden by themselves. The question whether the appellants have any independent source of income and have contributed towards the purchase of the property from their own independent income can be only answered by the appellants themselves and not by a mere holder of power of attorney from them. The power of attorney holder does not have the personal knowledge of the matter of the appellants and therefore he can neither depose on his personal knowledge nor can he be cross-examined on those facts which are to the personal knowledge of the principal.

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 deposing 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."



9. This Court has considered the legal principles of law enunciated in the aforesaid decision and its applicability to the case on hand.

10. However in the case on hand, PW-1 is none other than the wife of the plaintiff. Whether at all the wife of the plaintiff would be competent witness *de-hors* the power of attorney executed in her favor, is the question that has to be gone into by this Court in order to appreciate the substantial question of law. When such an exercise is carried out, in view of Section 120 of the Indian Evidence Act, even in the absence of power of attorney or its validity PW-1 being the wife of the plaintiff, was competent enough to depose on behalf of the original plaintiff.

11. In order to appreciate the same, it is just and necessary for this Court to culled out Section 120 of the Evidence Act, which reads as under:



"120. Parties to civil suit, and their wives or husbands, Husband or wife of person under criminal trial. In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be competent witness."

12. On careful reading of the above provision of law it is crystal clear that a spouse is a competent witness even in the absence of any written authority or power of attorney.

13. When such in the factual aspect, even assuming that the power of attorney executed in favor of the wife of the original plaintiff is held to be incorrect and PW-1 is held to be incompetent to speak on behalf of the principal namely her husband, by virtue of the operation of law as is found in Section 120 of the Indian Evidence Act,



PW-1 is competent enough to depose for and on behalf of the plaintiff.

14. Since the appeal came to be admitted only on the substantial question of law referred to *supra* and no other point need to be considered in the present appeal, by application of Section 120 of the Indian Evidence Act, it is to be held that PW-1 who is the wife of the original plaintiff was competent enough to depose about the facts of the case for and on behalf of the her husband who is the original plaintiff. Therefore, the first Appellate Court decreeing suit of the plaintiff is perfectly valid.

15. There cannot be any dispute as to the principals of law enunciated in ***Janki Vashdeo Bhojwani (supra)***. However, in view of the facts and circumstances of the present case, wherein PW-1 being the wife of original plaintiff, principles of law enunciated in ***Janki Vashdeo Bhojwani***



(supra) is not applicable to the case on hand as PW-1 is otherwise competent to depose on behalf of original plaintiff who is her husband in view of Section 120 of the Evidence Act.

16. Accordingly, substantial question of law referred to supra is answered in negative.

17. Consequently, the following order is passed:

ORDER

Appeal is merit less and hereby dismissed.

**Sd/-
JUDGE**