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IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

BEFORE:
THE HON'BLE JUSTICE RAVI KRISHAN KAPUR
AND
THE HON'BLE JUSTICE ATARUP BANERJEE

FA 262 of 2012

SRI MANOJ KUMAR AGARWALA

Vs.

SRI OMPRAKASH BRAJABASI & ANOTHER.

For the Appellant :Mr. Sounak Bhattacharya, Adv.
Mr. Sounak Mondal, Adv.
Mr. Abhirup Halder, Adv.
Mr. Anirban Saha Roy, Adv.
Mr. Bipasha Bhattcharyya, Adv.

For the Respondent :Mr. Agniva Mandal, Adv.
Mr. Nitish Samanta,Adv.
Ms. Shreyashee Mitra, Adv.

Heard On :16.09.2026

Judgement On :14.10.2026

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Atarup Banerjee, J. :

1. This is an appeal against the judgment and decree passed by Learned Civil Judge, (Senior Division) at Bankura, in Title Suit No. 55 of 2007 dated 4th June, 2012, whereby the Trial Judge has dismissed the suit for specific performance.
2. The appellant/plaintiff filed this suit *inter alia* praying for a decree of specific performance of a suit property situated at Ward No.2 under Bankura Municipality measuring an area of 1223 sq. feet at Mouza Bankura, Plot No. 3190, Holding No. 83 in District Bankura (the suit premises).
3. Briefly, the case of the appellant was that the suit premises previously belonged to one Baibarta Debya (since deceased) (Debya) who was the grandmother of the defendant no.1 and the mother of the defendant no. 2. It is alleged that the mother of the defendant no.2, Debya (since deceased) entered into an agreement with one Manoj Kumar Agarwal (Manoj) for sale of suit premises on 17.03.2004 for consideration of Rs.5,00,000/- (Five lakhs). It is alleged that in terms of the agreement, Manoj paid a sum of Rs.1,00,000/- (one lakh) to Debya at the time of registration of agreement. The agreement was executed by Debya where the Identifier (bakalamdar) was her son, the defendant no. 2.
4. There is also a rented shop within the suit premises. In respect of the same, it was agreed by both the parties that Debya herself or her successor would vacate the same before the registration. In case Debya, herself or her successor failed to vacate the shop then the consideration

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money would stand reduced to Rs. 3,75,000/-, i.e. Rs. 1,25,000/- would be deducted from Rs. 5,00,000/-.

5. Subsequently, Debya died leaving her son. Admittedly, the defendants received Rs.60,000/- from the plaintiff on different dates. Nonetheless, the predecessor of the defendant no.2 failed to vacate the shop room and instead filed a prior suit being Title Suit No. 46 of 2004/12 of 2006 the seeking of declaration and injunction. This suit was dismissed for default and the same was not pursued further.

6. The defendant no.1/respondent no. 1 herein, i.e., Om Prakash Brajabasi, entered appearance and filed his Written Statement indicating *inter alia* that the appellant did not have any right to institute this suit and the same was barred by the principles of estoppel, acquiescence and under section 34 of the Specific Relief Act, 1963. It was also indicated in the Written Statement that the original owner, i.e., Debya during her lifetime duly executed a Will. After her demise, the will was placed for probate by the respondent no. 1 and the same was granted in favour of the respondent no. 1 in Probate Case No. 33 of 2006.

7. In the said suit, on behalf of Manoj, the appellant herein, his brother Paresh Agarwal deposed as PW-1 as a Power of Attorney holder. In cross examination, he stated that Hiralal Brajabasi the respondent no.2 took Rs. 60,000 from Manoj and Om Prakash Brajabasi took a loan from Paresh Mittal though he has no document in support of the same. He further deposed that he has not filed any document in respect of Title Suit No. 12 of 2006/46 of 2004 before the Learned Trial Judge. He also deposed that Om Prakash Brajabasi filed a Probate Suit being No. 33 of

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2006 and necessary steps as to publication were made in respect of such probate of the Will and they had also filed an objection in the said probate case.

8. Upon framing of issues and after appreciating the oral and documentary evidence on record, the Trial Judge passed an order of dismissal on the sole ground that the appellant did not present himself for deposition to prove his readiness and willingness to perform the essential terms of the contract.

9. On behalf of the appellant, it is submitted that there can be no adverse inference against the appellant for not stepping into the witness box to adduce evidence to prove his readiness and willingness to perform his part of the contract. Since the Power of Attorney holder of the appellant had specifically stated that he was acquainted with the facts and circumstances of the case, the witness became automatically qualified as a competent witness in law. He also submitted that the language under Order 3 Rule 1 & 2 of the Code of Civil Procedure, 1908 applies to an appearance on behalf of a party to the suit. However, adduction of evidence cannot be included within the ambit of representation or appearance on behalf of the party to the suit. A witness stands on an entirely different footing than a representative of a party for the purpose of proof. It is necessary to have direct knowledge of the facts and circumstances which would entitle a plaintiff to adduce to a decree.

10. On behalf of the respondent, it is submitted that the appellant must establish that at all times he was always ready and willing to perform his part of the contract to succeed in a suit for specific performance. The

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continuous willingness and readiness of the appellant is a condition precedent and it is necessary that appellant should step into the witness box and adduce evidence to establish that he had all along been ready and willing to perform his obligations.

11. The issues which arise for consideration are as follows:-

a) Whether the conduct of the appellant attracts the provisions as laid down in 16(c) of the Specific Relief Act, 1963?

b) Whether a Power of Attorney Holder is competent to witness under Order 3 Rule 1& 2 C.P.C for the purpose of adducing evidence?

c) Whether the judgement and decree passed by the Trial Court suffers from any legal infirmity or perversity?

12. Recently, in an unreported decision in ***R. Shama Naik vs. Srinivasiah***, ***SLP (c) No. 13933/2021*** dated ***28th November, 2024*** the Hon'ble Supreme Court held as follows:

> *".....The law is well settled. The plaintiff is obliged not only to make specific statement and averments in the plaint but is also obliged to adduce necessary oral and documentary evidence to show the availability of funds to make payment in terms of the contract in time. There is a fine distinction between readiness and willingness to perform the contract. Both the ingredients are necessary for the relief of specific performance. While readiness means the capacity of the plaintiff to perform the contract which would include his financial position, willingness relates to the conduct of the plaintiff."*

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13. Under section 16 (c) of the Specific Relief Act, 1963, it is incumbent on the party, who seeks specific performance of a contract, to both aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract. The explanation appended to this sub-section (c) makes it clear that if a contract involves the payment of money, it is not essential for the appellant to actually tender to the respondent or to deposit in Court any money except when so directed by the Court. However, the appellant must aver and prove performance of his or her readiness and willingness to perform the subject contract.

14. In a suit for specific performance of contract, it is incumbent on the plaintiff not only to set out the agreement on the basis of which he sues in all its details. He must go further and plead that he has applied to the defendant specifically to prove the agreement pleaded by him, but the respondent has not done so. He must further plead that he has been and is still ready and willing to specifically perform his part of the agreement.

15. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance. Right from the date of execution till date of the decree he must prove that he is ready and has always been willing to perform his part of the contract. The continuous readiness and willingness is a key and relevant fact and is required to be considered by the Court before granting or refusing to grant the relief of specific performance. If the plaintiff fails to either aver or prove the same, he must fail.

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16. In ***Janki Vashdeo Bhojwani vs. IndusInd Bank Ltd.,*** reported in ***(2005) 2 SCC 217*** the Hon'ble Supreme Court, while considering Order III Rules 1 and 2 of the Code of Civil Procedure, 1908, distinguished between the authority of an agent to act on behalf of the principal and the competence of such agent to give evidence concerning facts within the personal knowledge of the principal. The authority to act on behalf of a party does not, by itself, entitle the attorney holder to substitute himself for the principal as a witness.

17. 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.

18. The aforesaid principle laid down in ***Janki Vashdeo Bhojwani*** (supra), has been reiterated by the Hon'ble Supreme Court in ***Mahinder Kaur vs. Sant Paul Singh, (2019) 9 SCC 358***, and ***Rajesh Kumar vs. Anand Kumar, 2024 SCC OnLine SC 981***. It is well settled that a Power of Attorney holder may depose in respect of acts done by him pursuant to

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the power conferred upon him but cannot depose in place of the principal in respect of acts done by the principal or matters of which the principal alone has personal knowledge and in respect of which the principal is liable to be cross examined. Accordingly, where the plaintiff's readiness and willingness to perform his contractual obligations is in issue in a suit for specific performance, the testimony of an attorney holder who lacks personal knowledge of the transaction cannot be substituted for that of the plaintiff.

19. Upon appreciation of evidence on record both oral and documentary, it is found that:

    (a). The plaintiff has failed to prove continuous readiness and willingness.

    (b). The Power of Attorney Holder of the appellant having deposed for the appellant is insufficient to satisfy the evidential burden.

20. In this context, reliance placed by the appellant on the decision in ***Daljit Singh Sondhi vs. Ranjit Kaur and others 2026 SCC Online Cal 27,*** cited by the appellant is distinguishable on facts as the said suit was pertaining to the partition. The son of the appellant adduced the evidence on behalf of the appellant.

21. For the reasons discussed above, we find that there is no legal infirmity nor perversity in the impugned in T.S. No. 55 of 2007. The impugned judgment passed in Title Suit No. 55 of 2007 is affirmed. The instant appeal being F.A. 262 of 2012 is dismissed.

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22. The Registry is directed to return the Trial Court Records to the concerned Court.

23. There shall be no order as to costs.

24. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

I agree

[RAVI KRISHAN KAPUR, J.] **[ATARUP BANERJEE, J.]**