Uttarakhand High Court
Devkinandan Bhatt & Another ... ... vs Smt. Krishna Tiwari & Others ... on 26 February, 2019

Reserved

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Second Appeal No. 123 of 2018

Devkinandan Bhatt & Another ... Defendants/Appellants

Versus

Smt. Krishna Tiwari & Others ...Plaintiff/Respondents

Present: Mr. Neeraj Garg, Advocate for the appellants
Mrs. Menka Tripathi, Advocate for the caveators

Reserved on : 16.11.2018
Delivered on : .....

Hon'ble Sharad Kumar Sharma, J.

This is a defendants' Second Appeal, wherein they have challenged the judgment and decree dated 13.09.2018, as passed by the 2nd Additional District Judge, Nainital in Civil Appeal No. 15 of 2013, Ganesh Bhatt & Others Vs. Smt. Krishna Tiwari, consequent thereto affirming the judgement and decree dated 30.03.2013, as rendered by the Civil Judge (Junior Division), Nainital in Original Suit No. 54 of 1997, Smt. Krishna Tiwari (since deceased) now represented through LR Vs. Revadhar Bhatt (since deceased) now represented through LR & Others. Consequent thereto, the Suit for permanent prohibitory injunction, as well as, for the amended relief of mandatory injunction, as later sought by the plaintiff by way of amendment has been allowed and the Suit was decreed in favour of the plaintiff (respondent herein) by both the courts below concurrently.

2. Before venturing into the intricacies, as argued by the learned counsel for the appellants as well as for the caveator- respondent, it becomes essential to consider the basic factual aspects which are involved in the present second appeal in question.

3. Based on the cause of action, which has been pleaded by the plaintiff-respondent to have accrued on 18.05.1997 is shown to have instituted a Suit on 29.05.1997, initially praying for the following reliefs:-

> "It is, therefore, prayed that the plaintiff may kindly be granted a decree for:
>
> (a) Perpetual injunction in favour of the plaintiff restraining the defendants, their predecessors of successors-in-interest and any other under their direction, from interfering in the peaceful enjoyment of plaintiff's property in the plot No. 7-B in Vernon Cottage, Tallital, Nainital and/or grabbing any part of it, as shown with red colour in the annexed map of the plaint; and

(b) Mandatory injunction directing the defendants in leaving a side - back of 1.5 metre from the side of plaintiff's part of plot No. 7-B in Vernon Cottage, Tallital, Nainital as per the Rules Building Registration 552 of Nainital Lake River Special Area Development Authority; and remove encroachment of 256.6 sq. feet from plaintiff part of his plot (as amended on 15.04.2000).

(c) Costs of the suit."

4. The subject matter of the Suit in question was the property, which was, more particularly, described as Plot No. 7-B lying in the northern half portion in Vernon Cottage, Tallital, Nainital (hereinafter to be referred as "the property") in the plaint, and the other southern half portion which is purchased and owned by Smt. Asha Pant having purchased from predecessor owner Mrs. Uma Joshi.

5. The plaintiff-respondent in the Suit had come up with the case that the property bearing Municipal no. 7-B of Vernon Cottage was initially owned by Smt. Uma Joshi, who had earlier purchased property by virtue of sale deed dated 15.03.1986, who executed the sale deeds of the southern part in favour of one Smt. Asha Pant, and for the other part of the same property lying (on the northern side), the sale deed which shows chaunhadi of plot purchased by plaintiff was executed in favour of the plaintiff-respondent. Over the plots, thus purchased by the plaintiff-respondent and Smt. Asha Pant having a total area of 2940 sq. ft. there exists construction of the plaintiff-respondent and that of Smt. Asha Pant, the other co- purchaser which has been raised by the respective purchasers of the land after due sanction by the Lake Development Authority which was placed on record and as revealed as from paper no. 10x. In fact the predecessor owner/seller of plaintiff had never objected the title claimed by the plaintiff and the construction being made by them. The plaintiff in order to fortify the fact about area purchased has also placed on record map 25 x/1 which was part of sale deed of the plaintiff which demarcates the property sold by figure A B C D E F G. The plaintiff had also placed on record the recent map sanctioned by Lake Development Authority and as well an Affidavit paper no. 80 d 14 which supported the dimension of the property. Thus court held property shown by paper no. 57d/7 and 57d/3 is owned by plaintiff.

6. The portion of the property which was purchased by the plaintiff-respondent i.e. the property lying on the northern side of the disputed plot lies plot No. 7-A belonging to the defendants which was having an area of 1800 sq. ft. The said plot No. 7-A, in fact, was purchased by the defendants/appellants only on 16.03.1992, subsequent to the purchase of Plot No. 7-B by the plaintiff- respondent. It was the case of the plaintiff-respondent that the possession of the plot No. 7-A lying on the northern side of his plot was taken over by the defendants only in March 1997, when they started raising the construction over it.

7. When the defendant tried to encroach upon the northern side of plot No. 7-B, the part of which was belonging to the plaintiff- respondent, the plaintiff got a complaint lodged before the Police through his advocate Mr. Satish Chandra Pant, due to which the defendants' act of encroachment was somehow was momentarily avoided.

8. By virtue of an amended plea, which was made by order 15.04.2000, the plaintiff had added para 7A in the plaint and consequently also amended the relief for mandatory injunction also to the effect that during the pendency of the Suit, the defendants have encroached upon the plaintiff's land in plot No. 7-B by extending their building construction of plot No. 7-A by trespassing the same which has been, more particularly detailed in the plaint map.

9. The plaintiff-respondent has mentioned in the Suit that the defendant has encroached upon the land measuring 256.06 sq. ft on the spot bearing a dimension of 3ft x 54ft and the setback of 1.5 meters towards the plaintiff's property. Para 7-A and 8 are quoted hereunder:

> 7-A That during the pendency of the suit the defendants have encroached upon the plaintiff's land in plot no. 7-B by extending their building construction of plot no. 7-A over illegally by tress passing on plaintiff's land as shown in the map annexed to the plaint as Annexure therewith within the marks C.A. J.-1 J.2 measuring 256'-6" sq. ft at the spot.
>
> 8. That the plaintiff is having a set beck of 1.5 metre on the side of 7-A under the sanctioned plan, as such the owner, if any, of the defendants, of plot no. 7-A is also under an obligation to leave a similar set back towards plaintiff's land.

10. While the Suit was pending, the present appellant No. 1 who was arrayed as party by virtue of the order of the Court order dated 16.06.1997, and even the present respondent No. 1/1 was also substituted after the death of the principal plaintiff. With the amended relief, the amended map was also placed on record by plaintiff by way of Paper No. 57 Ka, showing the extended encroachment as made by the plaintiff which was the basis of seeking the amended relief for mandatory injunction.

11. The appellants had put in appearance and they had filed their written statement on 14.07.1997. However, in the written statement they have admitted the fact that the plaintiff-respondent and Smt. Asha Pant are the purchasers and construction pre-exists on their plot. However, the appellants had showed their ignorance about the existence of any vacant space (set back as per development laws) between plot No. 7-A and 7-B, and hence also showed ignorance about the area in between it.

12. In the written statement, the appellants have further submitted that they had purchased plot No. 7-A by virtue of a sale deed dated 16.03.1992 from one Mr. Naveen Chandra, who was the attorney holder of the recorded owner of the property Smt. Shanno Chandra. Besides this, the defendants-appellants denied the pleadings in the Suit to the effect that any action of encroachment had ever been made by the appellants by encroaching upon the northern side of the plot purchased by the plaintiff-respondent. The defendants-appellants in para 8 of the written statement have submitted that whatsoever construction they have made they have already while making the construction on plot No. 7-A the defendants had left the setbacks as provided under the bylaws framed by the Lake Development Authority and since they have not made any efforts to interfere in plot No. 7-B, belonging to the plaintiff, no relief of permanent and prohibitory injunction as amended relief as sought for by the plaintiff-respondent in the Suit could be granted.

13. During the pendency of the Suit, the learned trial Court has called for commission and got it conducted through an Advocate Commission of the spot. The First Advocate Commission which was conducted was through Mr. M.C. Saklani who had submitted his report on 14.08.1997 paper no. 36x. By the report of the First Commission, it rather reflected that there had been encroachments made by the defendants on the plot No. 7-B belonging to the plaintiff. The Commission report was objected by the defendants/ appellants by filing an objection on 08.10.1997, since the first commission report paper 36 x] was opposed by defendant on various grounds. The learned trial court vide its order dated 12.02.1998 did not read the said commission report in evidence. Since there being a contest on the First Commission Report, the plaintiff-respondent themselves had filed another application before the learned Trial Court on 13.11.1997 praying for a further investigation on 2nd commission through an Advocate Commissioner. On the application of the plaintiff dated 13.11.1997, the second advocate commission Mr. Akhil Shah was appointed as an advocate commissioner, who submitted his report paper 43 x dated 07.03.1998 which had yet again established an encroachment by defendant-appellant on 215.06 sq. feet land of planitiff the Second Commission Report was submitted on 07.03.1998. This report too was opposed by the appellants by filing an objection on 11.06.1998. The learned trial Court after exchange of the pleadings had framed the following issues:-

> **1- D;k oknh fookfnr Hkwfe dk Lokeh gS\ 2- D;k izfroknhx.k }kjk fookfnr Hkwfe la[;k 7ch esa voS/k vfrdze.k fd;k x;k gS] ;fn gkWa rks izHkkoA 3- oknh fdl vuqrks'k dks ikus dk vf/kdkjh gS**

14. The plaintiff in support of his contention has produced the oral testimony of PW-1 - Satish Chandra Pant (as alleged by the appellant to be the attorney holder), PW-2 - Akhil Shah, the Second Advocate Commissioner, and other documentary evidence, i.e. the plaintiff placed on record the sanction granted by the Lake Development Authority i.e. Paper No. 8 Ga, the complaint Paper No. 11 Ga, which was lodged by plaintiff before the Tallital Thana on 19.05.1997, the attorney paper No. 12 Ga executed in favour of Mr. Satish Chandra Pant and sale deeds besides this other document were also filed.

15. The defendants had produced the documents paper No. 31 Ga to 32 Ga i.e. the sale deed and also recorded his oral testimony. However it would also not be out of context to submit that earlier when suit was decided on 17.11.2006, the suit has proceeded ex parte against defendant no.I on 25.05.2000 and against defendant No. 1/1 by order dated 25.05.2005.

16. Based on the evidence on record and considering the rival contentions, the Suit was decided on 17.11.2006 and the same was dismissed. Being aggrieved against the said judgment, an appeal was preferred by the plaintiff-respondent which was registered as Civil Appeal No. 42 of 2006, Sharat Chandra Tiwari vs. Nandi Devi and others and while partially allowing the Appeal, the learned Appellate Court passed the following directions:-

> **vkns"k vihykFkhZ dh izLrqr vihy vkaf"kd :i ls Lohdkj dh tkrh gS vkSj okn fo}ku voj U;k;ky; dks iqu% lquokbZ gsrq izfrizsf'kr fd;k tkrk gSA fo}ku voj U;k;ky; bl rF; dks lqfuf"pr djus ds fy, fd oknh dh fdruh Hkwfe ij izfroknh }kjk vfrdze.k fd;k x;k gS] oknh

> dh izkFkZuk o [kpZs ij ,DoksdsV dfe"uj fu;qDr djsxk vkSj ,MoksdsV dfe"uj dh fjiksVZ ij i{kdkjksa dks lquokbZ dk volj iznku fd;s tkus ds ckn iqu% xq.k&nks'k ds vk/kkj ij vkns"k ikfjr djsaxsA nksuksa i{k fo}ku voj U;k;ky; esa fnukad 30-04-2010 dks is"k gksa fnukad 02-04-2010 ¼vkj0Mhoik.Ms½ ftyk U;k;k/kh"k] uSuhrkyA** There was partial order of remand to a limited extent as the findings on other issues was not disturbed by the Appellate Court. At least from the above finding it is quite clear that one issue which stood confirmed is that defendant has encroached upon the land of plaintiff the only aspect which was directed to be re-

determined by the order of remand dated 02.04.2010, was only to the extent of encroachment made by the defendant by getting fresh Advocate Commission conducted and by getting a new Advocate Commission report.

17. If the order of remand dated 02.04.2010 is read, in its entirety and precision what is reflected therein is that, as a matter of fact, the Appellate Court in its judgment dated 02.04.2010 has concluded by an unassailed findings against defendant/appellant, that there had been an encroachment made by the defendants-appellants. But since it was not specifically determined by the learned trial Court in its judgment dated 07.11.2006 by meets and bounds and the extent of encroachment made by the Appellate Court directed that the trial Court will re-affirm the actual extent of encroachment as to upto what extent the defendants had encroached upon the land belonging to the plaintiff-respondent and for the said purpose it was directed that the trial Court will get a fresh Advocate Commission conducted. In pursuance of the order of remand, the learned Civil Court on 21.07.2010 had appointed the Advocate Commission and directed to hold the fresh inspection over the land in question. In compliance with the Appellate Courts judgment dated 02.04.2010, as remanded the learned trial court appointed a fresh advocate commissioner Mr. Girish Chandra, Advocate, on the application of plaintiff respondent who submitted the fresh commissioners report, paper no. 165 Ga which was placed to be considered for evidence by trial court on 14.12.2011, and the advocate commissioner was also examined as CWI.

18. Consequently, the Advocate Commission submitted his report dated 07.09.2010 which had yet again fortify the fact and was in consonance to the earlier Advocate Commission's reports dated 14.08.1997 and 17.03.1998, showing therein that the appellants had encroached upon plot No. 7-B, which undisputedly belonged to plaintiff-respondent. The said Advocate Commission report was yet again opposed by the defendants/appellants by filing an objection on 01.10.2010. The said commission report dated 07.09.2010 was also opposed by the plaintiff who filed his objection on 11.10.2010. Further what is born out from the record is that the 4th Advocate Commission was also conducted by the learned trial Court after the order of remand by appointing the Advocate Commission, who conducted commission on 20.11.2011 directing the Advocate Girish Chandra to conduct a spot inspection and submit his report which

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was placed on record on 26.11.2011. The Commissioner in his report as submitted on 26.11.2011 had recorded the following findings:-

2- ;g fd IykV ua- 7ch dh uke if"pe esa mRrj ls nf{k.k rd 40 fQV ikbZ x;h tcfd uD"ks esa 42 fQV n"kkZ;h x;h gS rFkk iwjc esa mRrj ls nf{k.k rd 54 fQV nf{k.k esa iwjc ls if"pe rd 54 fQV ik;bZ x;h tcfd uD"ks esa 55 fQV n"kkZ;h x;h gS] IykV ua 7ch dh yEckbZ mRrj esa iwjc ls if"pe rd 56 fQV e; edku o [kkyh txg ds ikbZ x;h tcfd mls uD"ks esa 64 fQV n"kkZ;k x;k gSA vFkkZr mRRj esa iwjc ls if"pe rd dh yEckbZ 8 fQV de ikbZ x;hA IykV ua 7, tks fd izfroknhx.k dk gS mldh uki tksi djus ij ik;k x;k fd uD"ksa esa mDr IykV ua 7, dh yEckbZ nf{k.k esa iwjc ls if"pe rd 50 fQV n"kkZ;h x;h gS tksfd ekSds ij e; edku fuekZ.k ,oa jkLrs ds lh?ks ukius ij 1 fQV T;knk ikbZ x;h rFkk mRrj esa iwjc ls if"pe rd izfroknhx.k dh Hkwfe dks 20 fQV n"kkZ;k x;k gS rFkk jftLVªh ds uD"ks esa Hkh mDr yEckbZ 20 fQV n"kkZ;h x;h gS tcfd ekSds ij izfroknhx.k }kjk e; edku fuekZ.k fgr mRrj dh vksj iwjc ls if"pe rd [kkyh LFkku lfgr 28 fQV esa izfroknhx.k dk dCtk ik;k x;k tcfd mRRj dh lkbM iwjc ls if"pe dh rjQ Hkwfe dh uke djus ij ik;k fd oknh 64 fQV ,oa izfroknh dh 20 fQV Hkwfe dqy feykdj 84 fQV Hkwfe ekSds ij ekStwn gS ysfdu oknh ds dCts esa edku o e; [kkyh txg ds 56 fQV gh Hkwfe ikbZ x;h] tcfd izfroknhx.k ds dCts esa mRrj dh rjQ iwjc ls if"pe rd e; edku fuekZ.k ,oa jkLrs dh Hkwfe lfgr 20 fQV ds LFkku ij 28 fQV Hkwfe ikbZ x;h rFkk nf{k.k esa yxHkx 1 fQV Hkwfe izfroknhx.k ds dCts esa T;knk ikbZ x;h ftls uD"kk utjh esa yky L;k;h ls n"kkZ;k x;k gS] fookfnr LFky dh pkSgnnh iwjc esa **, if"pe esa **ch** mRrj esa **lh** rFkk nf{k.k esa **Mh** ls n"kkZ;k x;k gSA vr% deh"ku fjiksVZ ekuuh; U;k;ky; Jheku ds voyksdukFkZ lsok esa izsf'kr gSA**

19. As would be apparent from the Commissioner's report paper no. 165x on measuring the dimensions of the two plots i.e 7-A and 7-B, which was made in the presence of both the parties to suit after prior notice to them as per Order 26 of the Code of Civil Procedure, and it was found that the defendant was in possession of part of the property lying from east to west. It was also found that the total area of land in possession of the appellants-defendants were in excess to the land them what they were actually entitled to posses based on their document of title, i.e. sale deed 16.03.1992, as area purchased by defendant by sale deed on commission was found to be in excess to the area purchased by him.

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1 fQV Hkwfe izfroknhx.k ds dCts esa T;knk ikbZ x;h ftls uD"kk utjh esa yky L;k;h ls n"kkZ;k x;k gS] fookfnr LFky dh pkSgnnh iwjc esa **, if"pe esa **ch** mRrj esa **lh** rFkk nf{k.k esa **Mh** ls n"kkZ;k x;k gSA**

20. The leaned trial court before reading the report paper 165 x in evidence under order 26 Rule 10 has examined the Advocate Commissioner appointed on remand as Mr. Girish Chandra (Advocate) as CW I, who supported the report 26.11.2011. This Commission report as submitted on 26.11.2011 was objected by the defendant by filing an objection dated 05.12.2011. The commissioner in his report dated 26.11.2011 paper 165 x/5 had recorded the following findings:-

vkSj dkxt la[;k 165x esa yky jax ls fcUnw fcUnw "kSyh esa tks Lfkku nf"kZr fd;k x;k gS og vc lkfcr rF; gS fd oknh ds lEifRr dk Hkkx gSA tks izfroknhx.k us vfrpkj dj fuekZ.k

dj fy;k gSA U;k;ky; dks fo"ok" djus dk vk?kkj mRiUu djrk gS fd dkxt la[;k57d@3 esa ftl fcUnq lh vkSj Mh ds chp izfroknhx.k us 8 QhV Hkwfe pkSM+h oknh dh Hkwfe dks frjNs vkdkj esa dCtk dj fuekZ.k dj j[kk gS] tks ts 1 ls ts 2 fcUnq esa Hkh 2 QhV lEifRr IykV la[;k 7ch esa de gksuk ik;k tkrk gSA vkSj blls oknh ds dFku dks cy feyrk gS fd ts1 ls ts2 ds chp mlds 2 QhV pkSM+h Hkwfe ij vfrØe.k dj fuekZ.k dj fy;k x;k gSA izkjEHk esa 18-05-1997 dks flQZ vfrØe.k dk iz;kl fd;k x;kA okng nkSjku okn izfroknhx.k us fookfnr lEifRr ij vfrØe.k fd;k gSA ;g lk{; fo'oluh; ik;k tkrk gSA

21. The learned trial Court after considering the rival contentions and while deciding the issues framed therein had decreed the Suit of the plaintiff-respondent for permanent injunction vide its decree dated 30.03.2013.

22. Aggrieved against the said judgment and decree dated 30.03.2013, the defendants-appellants preferred a regular First

Appeal under Section 96 of the Code of Civil Procedure. The same has been dismissed by the Appellate Court by the impugned judgment dated 13.09.2018 under challenge and had affirmed the trial courts judgment. The defendant-appellant had challenged the concurrent findings of facts rendered by both the courts below against him in the present Second Appeal purporting therein an involvement of the following substantial questions of law was sought to be pressed by the counsel for the defendant/appellant:-

"A) Whether learned District Judge, Nainital was justified in passing order of remand dated 02.04.2010 without reversing the findings of learned trial court and fulfilling the conditions for remand under order 41 rule 23, 23a and 25 CPC that too without framing and deciding points for determination under order 41 rule 31 CPC which vitiated the all subsequent proceedings. B) Whether evidence of power of attorney holder of plaintiff Sri Satish Chandra Pant was admissible as regards facts in the knowledge of principal, not performed under the strength of power of attorney, in view of judgement of Hon'ble Supreme Court of India in case of S. Kesri Hanuma Joud Vs. Anjum Jehan & others, 2013(12) SCC, page 64, Man Kaur Vs. Hartar Singh Sanga, 2010 (10) SCC, page 512 and Janki Vshdeo Bhojwani Vs. Indusind Bank Ltd., 2005 (2) page 217.

C) Whether in absence of proof of due execution and contents of basis of the suit viz. sale deed dated 15.03.1986 by plaintiff, the suit for mandatory injunction could have been decreed in favour of plaintiff ignoring section 90A, 68 of the Evidence Act.

D) Whether the relief of mandatory injunction as regards leaving setback while raising construction as per bylaws of development authority was barred under section 41(h) of Specific Relief Act on the ground of efficacious remedy under section 16,27 & 28 of Uttar Pradesh Urban Planning and Development Act, 1973.

E) Whether relief of mandatory injunction sought by plaintiff for removing construction during

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pendency of suit was barred in view of section 41(g) of Specific Relief Act 1963.

F) Whether judgement and decree passed by the lower Appellate Court without stating and rendering its decision on points for determination following the mandate of Order 41 Rule 31 Cr.P.C., is vitiated and is a judgement within the meaning of section 2(9) C.P.C. and decree within the meaning of section 2 (2) C.P.C.

G) Whether in the absence of partition by decree of court or by meets and bounds between plaintiff and co-owner Smt. Asha Pant, suit as regards possession over specific portion was maintainable that too when the description of property was vague and incomplete."

23. Let us deal with the substantial questions of law as argued and tried to be pressed by the learned counsel for the appellant, particularly substantial questions of law as contained in question of law i.e. A, B, D.

24. Learned counsel for the appellant though in the memo of appeal has formulated a number of other substantial question of law, which according to his wisdom is said to be involved in the present second appeal, but primarily, the counsel for the appellant has harped upon the substantial question of law as framed in A, B and D. Each of these substantial questions of laws is being dealt with separately by this Court.

25. The first substantial question of law on which learned counsel for the appellant wants to stress upon is pertaining to the order of remand dated 02.04.2010 as passed in First Appeal 42 of 2006, which was earlier passed by the learned Appellate Court regarding the matter in question for its fresh adjudication by learned

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trial Court. From a very narrow and restricted view point regarding the determination of actual area encroached by defendant.

26. What is important is that the earlier order of remand dated 02.04.2010, as passed by first Appellate Court? It has resulted into setting aside the said earlier judgment of the learned trial court dated 17.11.2008 and consequent thereto it contained certain directions to be followed by the learned trial court yet again as directed by Appellate Court by holding afresh commission, so as to verify the actual status of the extent of encroachment made by the defendant (appellant herein) over the property belonging to the plaintiff at least even by order of remand, one aspect was quite settled that there was encroachment by defendant on the land of the plaintiff. After the order of remand

dated 02.04.2010, the defendant had candidly participated in the proceedings on merits of the matter, without a challenge to judgment of remand submitted to and thereafter had solicited the judgment impugned rendered by the trial court on 30.03.2013, when the trial court had yet again decreed the suit, they had rather submitted to the said judgment of trial court dated 30.03.2013, and has preferred the appeal before the First Appellate Court invoking Section 96 of Code of Civil Procedure and thus another principle of submission. Once the appellant has not questioned the judgment of remand order dated 02.04.2010, and had voluntarily participated on all the subsequent proceedings, now at this stage of 2nd phase of litigation they cannot now at this stage and particularly at the second appellate stage contend that the order of remand made by the First Appellate Court as back as on 02.04.2010 was unsustainable. What is more important is that even after the pursuing of the order of remand, the first of all it was not challenged initially by questioning and its validity by filing an appeal from order under order 43 rule 1 (U) read with order 41 rule 23. They have also

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not questioned the judgment dated 02.04.2010, even in the instant second appeal too because in this present second appeal is question only judgments of learned trial Court as well as of the first Appellate Court has been put to challenge. Thus, the substantial question of law which is sought to be pressed in the light of the provisions contained under order 41 Rule 23 pertaining to remand and order 41 Rule 25, is absolutely is not available to the defendant (appellant herein) because if it at all there was any grievance by the defendant- appellant against the order of remand dated 02.04.2010. There ought to have been an independent proceedings, because under the provisions contained under order 41 rule 23 read with order 41 rule 23(A)where the Appellate Court remands the matter to trial Court for afresh decision, an independent forum is contemplated under law by filing of an appeal for order. In that eventuality its scrutiny has to be made in the proceedings of appeal from order and not in the second appeal would not be remedy available to the defendant-appellant, at this belated stage after culmination of proceedings on remand.

27. Hence, the purported question with regards to the challenge given to the order of remand dated 02.04.2010 now, (1) First of all it cannot be agitated in the second appeal at this stage without initially challenging it by filing an appeal from order under order 43 Rule 1 (u).

(2) Secondly as per the principles of submission, the appellant has accepted that order of remand and participated in the proceedings after remand on merits.

(3) Thirdly, the order of remand if at all, the appellant had any grievance against it. He had a remedy which is available to him by preferring an appeal from order under Code of Civil Procedure, which he himself has waived off by not giving a challenge to it, and

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thus once the defendant-appellant has stepped forward and his participation in the proceedings of the first appeal on remand and (4) Fourthly thereafter, the judgment has been rendered against

him. He cannot take the liberty and be opportunist to revert back and challenge remand order to question the judgment which no more exists in the eyes of law, having being overridden by the impugned judgment in the second appeal.

(5) Fifthly the implication of order 41 rule 23 read with order 41 rule 23(A) has had to be read along with the provision contained under order 43 Rule 1(U) because when the remedy under a forum has been provided under order 43 which was never invoked by the defendant- appellant, for redressal of his grievance against the judgment dated 02.04.2010.

Then the question as raised will not arise for consideration as argued by learned counsel for the appellant, hence the questions is decided against him.

28. Learned counsel for the appellant has argued the question from the view of the point of implications of provisions contained under order 41 Rule 25, which is a provision which gives ample of power to the Appellate Court to frame an issue and then to refer that particular issue for trial by the sub-ordinate Court.

29. The purpose of the provision contained under order 41 rule 25, it intends to provide the court within the authority that wherever the Appellate Court comes to a conclusion that the trial court by human prudence had missed out to frame or try an issue and in particular an issue which has a detriment effect on the controversy in question the appellate court can always frame an issue and refer the issue thus framed to the trial court for its reappriciation based on

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the evidence and merits of the matter. Order 41 rule 25 in fact when reference is made to the trial court is the trial court who has to return the findings to the Appellate Court and that to at the stage when the principle proceedings before the trial court is kept pending awaiting the finding on the issue which has been refer to the trial court for its adjudication.

> "25. Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.- Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such cases shall direct such Court to take the additional evidence required; and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor [within such time as may be fixed by the Appellate Court or extended by it from time to time].

30. As a matter of fact in the given set of circumstances, such a circumstances of remand by framing of any issue by the Appellate Court is not involved in the present case because if we scrutinize the judgment dated 02.04.2010, which was an order of remand passed by the First Appellate Court. In

fact, the First Appellate Court has set aside the trial court's judgment. On the limited ground that the Advocate Commissioner's report which was placed before the trial court had giving a contradictory finding and thus the Appellate Court directed the trial court only to hold afresh Advocate Commission and to determine as to the extent of encroachment made by the defendant-appellant only and then to adjudicate the matter afresh. As a matter of fact this court as of the

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view that remand was only for the purpose of specifying the specific area encroached only. Thus it will not attract the above principles. Even the principles of order 41 rule 25 will not apply in the instant case because the provision contemplates to fill up the lacunae of human error committed by trial court by omitting to frame an issue which is of a vital consideration and has an impact on the merits of the matter. The provision of order 41 Rule 25, contemplates as omission by the court in framing of an issue nor its the case of the defendant appellant at any stage that court failed to frame an important issue. Another important aspect for invocation of Order 41 Rule 25 is exclusively a determination to be made by Appellate Court, nor there is any such reference by the Appellate Court at any stage hence the argument of learned counsel for the appellant from this aspect is not acceptable by this court.

31. Learned counsel for the appellant has placed reliance upon judgment reported in the case "2008(8) SCC page 485 of Municipal Corporation, Hyderabad v/s Sunder Singh".

18. It is now well settled that before invoking the said provision, the conditions precedent laid down therein must be satisfied. It is further well settled that the court should loathe to exercise its power in terms of Order 41 Rule 23 of the Code of Civil Procedure and an order of remand should 8 not be passed routinely. It is not to be exercised by the appellate court only because it finds it difficult to deal with the entire matter. If it does not agree with the decision of the trial court, it has to come with a proper finding of its own. The appellate court cannot shirk its duties.

32. A distinction must be borne in mind between diverse powers of the appellate court to pass an order of remand. The scope of remand in terms of Order 41 Rule 23 is extremely limited. The suit was not decided on a preliminary issue. Order 41 Rule 23 was

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therefore not available. On what basis, the secondary evidence was allowed to be led is not clear. The High Court did not set aside the orders refusing to adduce secondary evidence.

32. On a nutshell if the aforesaid judgment is taken into consideration in the light of the present case principally the provisions contained under order 41 rule 23 A of the Code of Civil Procedure, which deals with an order of remand. It's always whether the Appellate Court is of the opinion that the Trial Court has skipped to deal with an issue which is having a vital bearing on the controversy in question. What has been discussed above and as would be apparent from the controversy herein the

Appellate Court while passing an order of remand had only felt the difficulty to adjudicate the matter from the view point that though there have been Advocate Commission conducted on number of occasion the court has expressed its inability to accept the report of Advocate Commission, as it was not clearly settling the area encroached by defendant-appellant belonged to the plaintiff, however the act of encroachment was to established. But then while interpreting the provisions contained of remand under order 41 rule 23 and order 41 rule 23 A, if appellant was aggrieved its veracity has had to be challenged by the party aggrieved by the order of remand by invoking the provisions contained under order 43 Rule (1) (u) and hence when the legislature has provided a forum for challenge of an order passed under order 41 rule 23 read with order 41 rule 23 A, in that eventuality when issue stands decided after a remand by the trial court in that prospective is that this court is of the considered view that there cannot be a challenge to a remand order after culmination of the proceedings by the trial court, because there happens to be an apparent and tacit waiver of a challenge to the remand order as

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contemplated under order 43 rule (1) (u) which is quoted hereunder and which has happens to be statutory procedure under the Code of Civil Procedure.

1. Appeals from orders.- An appeal shall lie from the following orders under the provisions of Section 104, namely:- (u) an order under Rule 23 [or Rule 23-A] of Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court;

33. The learned counsel for the defendant-appellant had placed reliance on the judgment reported in 2005 volume 3 SCC page 422 Mangal Prasad Tamoli vs Narvadeshwar Mishra and others para 13 of the judgment is hereunder:

> "13. When we put to the learned counsel as to how he could in the present appeal filed in the year 1999 challenge the order of remand made by the judgment of the High Court on 18.01.1966 in Second Appeal No. 3033 of 1958, the learned counsel drew our attention to the decision of this Court in Kshitish Chandra Bose vs Cmmr. Of Ranchi as authority for the proposition that an order of remand by the High Court being an interlocutory judgment, which did not terminate the proceedings, it is open to the aggrieved party to challenge it after the final judgment. This Court in Satyadhyan Ghosal vs. Deorajin Debi, under similar circumstances, took the view that an order of remand was an interlocutory judgment which did not terminate the proceedings and hence could be challenged in an appeal from the final order. This view was again reiterated in K. C. Bose wherein it is observed (SCR p. 767 A-B): (SCC p. 106, para 7) "Mr. Sinha appearing for the respondent was unable to cite any authority of this Court taking a contrary view or overriding the decisions referred to above. In this view of the matter we are of th eopinion that it is open to the appellant to assail even the first judgment

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> of the High Court and if we hold that this judgment was legally erroneous then all the subsequent proceedings, namely, the order of remand, the order passed after remand, the appeal and the second judgment given by the High Court in appeal against the order of remand would become non est."

wherein the hon'ble apex court was dealing with the proceedings arising out of a Transfer Property Act, this was a case where the order of remand was not challenged and then the issue cropped up before the honorable Apex Court as to whether Hon'ble Apex Court while exercising its power under Article 136 of the Constitution of India could have scrutinized the order of remand and its veracity or not and there can be no doubt that the provision contained under Article 136 has altogether different and a vivid and a wider scope of interference as compared to the scope under Section 100 of the Code of Civil Procedure, which is confined to consideration of substantial question of law only and not the facts, when the High Court is seized with the second appeal against the judgments of the trial court, as well as of the first Appellate Court, when the High Court deals with such a situation the High Court will have to also consider the aspect that when as against an order of remand if the party to the proceedings has voluntarily participated into the proceedings on merits after an order of remand then at a later stage, at least before the Second Appellate Court, which is exercising power under Section 100 against an order under challeng rendered by the first Appellate Court, would not be appropriate to deal with the order of remand which has ultimately by a voluntary Act of a party has culminated by the culmination of proceedings, by a party questioning the order of remand at an appellate stage.

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34. Thus this substantial question of law is decided against appellant.

35. Coming to the second substantial question of law which has been argued by the learned counsel for the appellant is to the effect as to what would be the impact when the Attorney holder who deposes on behalf of the principle, in relation to the fact which is alleged that he otherwise as an Attorney holder is not suppose to have the knowledge of the same and also in view of the bar which according to the appellants counsel has been created by the judgment reported in case "2013 (12) SCC, page 64, S. Kesari Hanuman Goud vs Anjum Jehan and others,

23. It is a settled legal proposition that the power-of-attorney holder cannot depose in place of the principal. 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 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, 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, Janki Vashdeo Bhojwani v. Indusind Bank Ltd., Shankar Finance and Investments v. State of A.P and Man Kaur v. Hartar Singh

Sangha.).

The ratio as propounded therein in para 23 has been dealt by the Hon'ble Apex Court in the light of the provision contained under

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order 3 rule 1 and 2, which creates a restriction on a deposition by an Attorney holder on behalf of the principle, but this Court is of the view that if the provision of the order 3 rule 1 is read it rather permits an appearance in the proceedings by recognized agent or a pleader, as it had already been dealt in the present judgment that the nature of appearance and the person who was given an authority and recognized a person as an agent, as a matter of fact was a person who was authorized to initiate the proceedings and had a firsthand knowledge of the entire controversy right from the date of purchase of disputed property. Even otherwise also the law in this regard limiting the power, the power of an agent from recording the statement is only from the view point that since he lacks a firsthand knowledge, he ought to be restricted from making any statement on the behalf of the principle but there has to be an exception because the law creates a bar only to provide an adjudication from making a statement of a person who otherwise does not have a firsthand knowledge of the controversy, but there has to be an exception carved out as in the instant case whether the principle agent under order 3 rule 1 who authorised to initiate the proceedings in the present case was a co-purchasers who had a knowledge of all the facts and hence he was never deprived of the knowledge of the principle proceedings.

36. "2010 volume (10), SCC page 512 Man Kaur vs Hartar Singh Sangha,

15. We may next refer to two decisions of this Court which considered the evidentiary value of the depositions of attorney holders. This Court in Janki Vashdeo Bhojwani vs. Indusind Bank Ltd. held as follows: (SCC pp. 222-24, paras 13, 17-18 & 21)

13. "Order III, Rules 1 and 2 CPC, empowers the holder of power of attorney to "act" on behalf of the principal. In our

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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 of 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.

17. In the case of Shambhu Dutt Shastri v. State of Rajasthan, 1986 2 WLN 713 (Raj) it was held that a general power of attorney holder can appear, 11 plead and act on behalf of the party but he cannot become a witness on behalf of the party. He can only appear in his own capacity. No one can delegate the power to appear in witness box on behalf of himself. To appear in a witness box is altogether a different act. A general power of attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff.

18. The aforesaid judgment was quoted with the approval in the case of Ram Prasad v. Hari Narain. It was held that the word "acts" used in Rule 2 of Order III of the CPC does not include the act of power of attorney holder to appear as a witness on behalf of a party. Power of attorney holder of a party can appear only as a witness in his personal capacity and whatever knowledge he has about the case he can state on oath but be cannot appear as a witness on behalf of the party in the capacity of that party. If the plaintiff is unable to appear in the court, a commission for recording his evidence may be issued under the relevant provisions of the CPC.

21. We hold that the view taken by the Rajasthan High Court in the case of Shambhu Dutt Shastri followed and reiterated in the case of Ramprasad is the correct view." (emphasis supplied)

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18. We may now summarise for convenience, the position as to who should give evidence in regard to matters involving personal knowledge:

> (a) An attorney holder who has signed the plaint and instituted the suit, but has no personal knowledge of the transaction can only give formal evidence about the validity of the power of attorney and the filing of the suit.
>
> (b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved.
>
> (c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge.
>
> (d) Where the principal at no point of time had personally handled or dealt with or participated in the transaction and has no personal knowledge of the transaction, and where the entire transaction has been handled by an attorney holder, necessarily the attorney holder alone can give evidence in regard to the transaction. This frequently happens in case of principals carrying on business through authorized managers/attorney holders or persons residing abroad managing their affairs through their attorney holders.

(e) Where the entire transaction has been conducted through a particular attorney holder, the principal has to examine that attorney holder to prove the transaction, and not a different or subsequent attorney holder.

(f) Where different attorney holders had dealt with the matter at different stages of the transaction, if evidence has to be led as to what transpired at those different stages, all the attorney holders will have to be examined.

(g) Where the law requires or contemplated the plaintiff or other party to a proceeding, to establish or prove something with reference to his 'state of mind' or 'conduct', normally the person concerned alone has to give evidence and not an attorney holder. A landlord who seeks eviction of his tenant, on the ground of his 'bona fide' need and a purchaser seeking specific performance who has to

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show his 'readiness and willingness' fall under this category. There is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney even with reference to bona fides or 'readiness and willingness'. Examples of such attorney holders are a husband/wife exclusively managing the affairs of his/her spouse, a son/daughter exclusively managing the affairs of an old and infirm parent, a father/mother exclusively managing the affairs of a son/daughter living abroad.

37. Janki Vshdeo Bhojwani and another vs. Indusind Bank Ltd and others., 2005(2) SCC page 217".

6. As already noticed, the 1st appellant is the wife of the 5th respondent and the 2nd appellant is the wife of 2nd respondent. On 3.10.2000 the respondent-bank filed a suit against the 2nd respondent and the 7th respondent, OA No.159-P of 2001 before the DRT for the recovery of a sum of Rs.3.86 crores. Again on 25th October, the respondent-bank filed another suit against respondent nos. 2 to 6 and one M/s Progressive Land Development Corporation, OA No.160-P of 2001 for recovery of a sum of Rs.27.5 crores. M/s Progressive Land Development Corporation is a partnership firm of which the appellants are the partners along with others. Thereafter, as recited above the DRT passed an injunction order in which one of the properties the respondents were restrained from alienating was 38, Koregaon Park, Pune. On 13.9.2001, a decree was passed in OA No.159-P of 2001 and in the said decree the property at 38, Koregaon Park, Pune was shown as one of the mortgaged properties. All these proceedings against their husbands and M/s Progressive Land Development Corporation which is a partnership firm and in which the appellants are partners along with others, were within the knowledge of the appellants. The appellants, however, feigning ignorance of the facts and proceedings, took a plea that they came to know about the attachment of the property at 38, Koregaon Park, Pune only through the public notice published in the Times of India of 25.1.2002.

13. Order 3 Rules 1 and 2 CPC empower the holder of power of attorney to "act" on behalf of the principal. In our view the word

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"acts" employed in Order 3 Rules 1 and 2 CPC confines only to in respect of "acts" done by the power-of-attorney holder in exercise of power granted by the instrument. The term "act" 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 of 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 of which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.

There cannot be any doubt with regards to the ratio as laid down by the said judgment pertaining to the authority of the Attorney holder to disposes on behalf of the principle. But there are few vital aspects which are involved to be considered in the present case in the light of provisions contained in the Code of Civil Procedure. The deposition by the Attorney Holder in a case undoubtedly has been barred by the aforesaid ratio. On the ground that the Attorney Holder is not supposed to have the first hand knowledge of the fact which otherwise is in the personal knowledge of the principle and which is vital to a case and that is why the law has created a bar that in the judicial proceedings, it should always be desisted from the permitting the Attorney holder to deposes on behalf of the principle. But this issue when it was raised by defendant/appellant before the trial court, the fact which has been revealed from records is that in the instant case, most of the facts pertaining to the ownership of the property stood admitted by parties, only the extent of encroachment was to be established by evidence, they all are the facts which are otherwise proved by the documents as well as the oral testimony and consistent commissions reports on record and, other witnesses which were produced before in the proceedings, before the court below hence in the given set of circumstances. The testimony of the Attorney Holder

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of the plaintiff didn't have much role to play in the adjudication of the suit on its own merits, because of the statements of the Advocate Commissioner's, the document of the sectional map as issued by the Village Development Authority, the original map on record, the Commissions' report, all these documents has led to an infringing evidence as well as the foundation to come to a conclusion about the actual extent of encroachment made by the defendant-appellant. Looking to the nature of controversy involved this issue about the Attorneys' entitlement to record his statement on behalf of the principle plaintiff came for determination before the learned trial Court when issue no. 2 was under consideration in relation to the extent of encroachment made by the defendant-appellant on plot no. 7-B, it would not be of much relevance and of importance as the issue was encroachment on land to be proved by evidence and not a decleration of title where oral testimony would have same role to play.

38. The main concerned with regards to the impact of the statement of the Attorney Holder had already been considered by the learned trial Court, while deciding issue no.2. What would be relevant to consider is the decision making? The process of decision on issue no.2 is that before reaching to the findings on considering the statement of the Attorney holder, the trial court has consider the impact of documentary evidence for example:- the sanction map paper no. 57Ka; The Advocate Commission's report paper no.165G, as well as, the Advocate Commission's report paper no. 43Ka. These documents itself lead to an unflinching evidence that there had been encroachment by defendant over arid on the land of the plaintiff by the defendant-appellant. After considering the material evidence on record, the trial court considered the oral testimony which was

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placed on record by way of paper no. 25G which was Attorney executed in favour of the witness of the plaintiff PW1 Satish Chandra Pant, who in his statement as PW1, he had supported the contention of the plaintiff and the Act of encroachment of the defendant-appellant. As a matter of fact would be reliable evidence because of having knowledge of all the facts at first hand as PW1 Satish Chandra Pant, apart from the fact that he was a relative of the principle plaintiff and he was aware of the factual aspects of the entire controversy. There is another aspect as far as the Attorney Holder PW1 Satish Chandra Pant is concerned, he is bound have to a first knowledge of the entire controversy, for the reason being that he was the husband of Asha Pant who is the co-owner of the plot no. 7- B purchased along with the plaintiff and since there was a joint purchasers, it cannot be said that any statement which has been recorded by Mr. Satish Chandra Pant under the strength of Attorney Holder paper no. 25G was beyond his personnel knowledge.

39. There is another practical aspect which has also to be considered by courts that the Attorney Holder, PW1 Satish Chandra Pant has seen the entire proceedings right till from its inception from date of purcahse and till its culmination upto the present proceedings by the impugned judgments and all action of encroachment made by the defendant-appellant. The learned trial Court while considering the said objection raised by the defendant/appellant before the learned trial Court had held that while considering the said aspect that while the ratio on which reliance was placed by the defendant- appellant as reported in "1998(2) Civil Court Cases page 1 Supreme Court" which has deprecated the recording of the statement of the Attorney Holder in the light of the provisions contained under Section 14 of the Evidence Act.

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14. Facts showing existence of state of mind, or of body or bodily feeling.- Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant, when the existence of any such state of mind or body or bodily feelings is in issue or relevant. [Explanation 1.- A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.

[Explanation 2.- But where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall also be relevant fact.] Even if the language of the Section 14 of the Evidence Act is taken into consideration, it's a deposition of a fact which ought to be reflected to be existed in the state of mind of the person making a statement on behalf of the principle in the case at hand the agent of the principle plaintiff who had rather instituted the proceedings right from its inception since being a person who also happens to be a joint purchasers of the property along with the plaintiff had a firsthand knowledge and thus he made out the principles as contemplated under Section 14 of the Indian Evidence Act. This Court is of the view that if an agent who has a knowledge and was an participants of the proceedings right from its inception it cannot be ruled out that he cannot depose for the principle, because its the knowledge of the fact of the case which has the pivot of consideration.

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40. In the case at hand it had, it's not that the Attorney Holder was introduced only for the purpose to record the statement, at the later stage of the proceedings, rather record shows that the proceeding itself was initiated by the plaintiff through his Attorney Holder Satish Chandra Pant. Learned trial Court further held that it had never been the case of the defendant-appellant in his objection in written statement or at any stage before the court below that an Attorney Holder cannot bring a suit on behalf of the principle in view of provisions contained under Order 2 of Code of Civil Procedure as it is not barred. Even, otherwise also as per the ratio laid down by the Hon'ble Apex Court as reported in the case of "Pandu Rang vs. Ram Chandra reported in AIR 1981 Supreme Court Cases page no. 2235" of para 11, 13 and 14 are quoted hereunder:-

> 11. In our opinion the question of drawing an adverse inference against Apte and Bavdekar on account of their absence from the court would arise only when there was no other evidence on the 1025 record on the point in issue. The first Appellate Court had relied A upon the admission of the decree-holder himself and normally there could be no better proof than the admission of a party. The High Court, however, has observed in its judgment that the decree-holder has made no admission in his evidence which would justify refusal to draw adverse inference for the failure of Apte and Bavdekar to step into the Witness box.
>
> 13. In the agreement dated December 29, 1958 between the decree-holder and the judgment debtor, Ext 58, there is a clear reference to the amounts due to Apte from the judgment-debtor and the decree-holder had full knowledge of the dues of Apte. Apart from the dues of Apte there were other dues also to be paid by the judgment-debtor. If according to the judgment-debtor himself the amount of Rs. 46,000 which was due to Apte, had not been cleared
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off even by the sale of the property to Bavdekar the decree- holder could not proceed against the property in the hands of Bavdekar. The attachment of the property at the instance of the decree-holder was only subject to the lien of Apte and unless the entire amount due to Apte was cleared off the decree-holder could not proceed against the property in the hands of the purchaser, Bavdekar. Therefore, the conclusion drawn by the two courts below that the amount of Rs. 46,000 and odd was due to Apte from the judgment debtor and the same had not been cleared off even by the sale of the property under attachment, was based on the materials on the record viz., the admission of the decree- holder, the admission of the judgment-debtor and from various letters and receipts Ext. 47/1 to Ext. 47/13. All these documents have been lost sight of by the High Court which has indeed exceeded its jurisdiction in reversing the finding on the assumption that the courts below had approached the case with a wrong view of law in not drawing an adverse inference against Apte and Bavdekar on their failure to appear in court when the question of loan due to Apte from the judgment-debtor and the sale of the properties for Rs. 46,000/- has been amply proved by the evidence on the record. The question of drawing an adverse inference against a party for his failure to appear in court would arise only when there is no evidence on the record.

14. On the findings of fact recorded by the two courts below, which are final and which could not be normally set aside by the Second Appellate Court, the decree-holder cannot compel Apte or Bavdekar to produce the property before the Court or the proceeds of the sale of the property as the amount due to Apte from judgment-debtor has not still been satisfied.

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41. It has been held therein that merely, because of non- examination of the plaintiff in the proceedings of the suit it will not disentitle the plaintiff from getting the relief which is otherwise he or she is able to substantiate by way of other evidences on record and oral testimony of the witness on record. Hence, this case is likely to be based upon altogether and a distinct footing. It's not that in the present case the judgment impugned is exclusively based on the interpretation of oral testimony of PW1 only, rather, it's primarily based on the other material on record, both documentary and oral evidence which has assisted the court in the proceedings and in the decision making process of both the courts below, so as to determine the fact pertaining to the expanse of encroachment made by the defendant-appellant. Hence, looking to the above backdrop from the view point this substantial questions of law is not sustainable on the following grounds:-

1. One, PW1 Attorney holder was the principle Attorney Holder, who has initiated the proceeding by instituting the suit.

2. Two, he was the husband of the co-owner of the property who too purchased the property with plaintiff's land and had knowledge of the entire proceedings right from the stage of purchase.

3. Third, since he was present on the spot always and he had the firsthand knowledge of the entire case, thus meet the spirit and purpose of law, provided under section 14 of Evidence Act,.

4. Fourth, his testimony was not the exclusive basis which is the foundation of the judgment rendered by the learned trial both the Courts below; and

5. The other oral evidence and testimony and documents i.e. various report given by Advocate Commissioners goes to prove the case.

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6. The defendant appellant had never at any stage of trial or at the stage of appeal has questioned the authority of deposition of PW1.

7. Defendant appellant had voluntarily pariticpated the proceedings without questioning the authority of PW1 to depose, hence now after having concurrently failed in the two proceedings he cannot questions the judgment on the said grounds based on principle of submission.

42. In view of the observations made above and also on account of the fact that the statement of PW1 since was not being the exclusive foundation for the reasons of the judgments by both the Courts below rendering the judgments impugned detail in the second appeal. The second substantial question of law is also answered against the defendant-appellant.

43. Apart from the fact that, both the judgments rather are based upon a concurrent finding of fact and is exclusively based on appreciation of evidence pertaining to an Act of encroachment conducted by the defendant-appellant, which has got no nexus with that so called statement of PW1, because it is an action which is required to be proved by an Act conducted by defendant-appellant, on the said, which was very well established by the evidence and in particular. The Advocate Commissioner's report paper no. 165G, which was conducted after the reward of the proceedings on record. Hence, the substantial question of law is answered against the appellant.

44. Lastly, the appellant counsel has argued upon the substantial question of law as contained in Clause D quoted hereunder:

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D) Whether the relief of mandatory injunction as regards leaving setback while raising construction as per bylaws of development authority was barred under section 41 (h) of Specific Relief Act on the ground of efficacious remedy under section 16, 27 and 28 of Uttar Pradesh Urban Planning and Development Act 1973.

45. The argument is from the view point that since there is an efficacious remedy available to the plaintiff under the provisions contained of U.P. Urban Planning and Development Act, 1973 and in particular provisions as contained under Section 16, 27 and 28. The suit in question for a decree of mandatory injunction would not be maintainable in view of the bar created by Section 41(h) of Specific Relief Act. This substantial question of law is absolutely a misconceived proposition which has been floated by the learned counsel for the appellant. There are certain reasons behind it. The

learned counsel for the appellant during the course of argument has tried to attract upon the provisions contained under U.P. Urban Planning and Development Act, 1973, which in the given set of circumstances and particularly in the territory of Municipal Area of Nainital, or the development area of Nainital as declared under the Act is not applicable. Developments in the municipal area or over the developed area are governed by the Special Lake Area Development Authority Act, 1987 and not by the provisions of the Urban Planning and Development Act, 1973. Thus, it will have no application as far the present case is concerned as the Act of 1973 has got no applicability.

46. A reference made Section 41(h) of the Specific Relief Act is called herein:-

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"41. Injunction when refused.- An injunction cannot be granted-

(a) .....

(b) .....

(c) .....

(d) .....

(e) .....

(f) .....

(g) .....

(h) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust;

47. In either of the circumstances whether it is an implication which is drawn from the provision contained under the Special Lake Area Development Authorized Act, 1987 or been under the Urban Planning and Development Act, 1973 on which the reliance has been placed by the learned counsel for the defendant-appellant. According to the SOR of the Act and the reasons for its enactment had altogether different object to be achieved so as to enable a planned development of an urbanized area, the act nowhere grants the power to the authorities created under the Act to deal with a private dispute pertaining to a determination of a right or an act of encroachment made by the parties, hence even according to the statement, object and reasons of the Act the principles sought to be pressed by the appellant by arguing ground on substantial question of law in ground D, will not be attracted hence is not acceptable and is turned down.

48. The argument of the learned counsel for the appellant with regards to the bar being created in institution of the suit for mandatory injunction in the light of Development Acts, as referred

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above and relied by him. From the view point of the implications, and SOR contained under the Development Acts of 1987 is absolutely a misnomer for the reason that as per the statement object and reasons of the Development Act, it only contemplates an intends to meet an objective of a planned development in an area. It does not contemplates or gives the power to the authorities who are quasi judicial authorities under an Act to resolve an inter se private dispute between the two private litigants and more particularly when it relates to an action of encroachment alleged against the other because the Development Authority itself cannot under the Development Act of 1987 or under the by-laws framed under the Act, under it has any authority to injunct a private individual for an act of encroachment, or pass a decree of permanent or mandatory injunction. The Urban and Planning Development Act has got altogether a different intention and object to be attained and it does not entitle the authorities to resolve an issue of title, it does not entitle the authorities thus created under a special Act to scrutinize, the evidence pertaining to the title and to hold a detailed trial for examining the rights and thus the bar of 41(h) of the Specific Relief Act will not come into play in the light of the provisions contained under the U.P. Urban Planning and Development Act, 1973.

49. This issue as argued can also be looked into from the another view point that even if the Development Act of 1987 is taken in its entirety apart from the fact that it has got a different connotation to be made with it, it nowhere prohibits the institution of the suit which is contemplated under Section 9 of the Code of Civil Procedure, Section 9 of the Code of Civil Procedure in its specific term which is quoted hereunder:-

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> 9. Courts to try all civil suits unless barred.- The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognisance is either expressly or impliedly barred.
>
> Explanation [I].- A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies. Explanation II.- For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place.]

50. It provides that civil courts to try all civil suits. The only restrictions which has been imposed is when it is barred by the specific Law bar of the specific Law will also have to be determined from the view point of the nature of dispute which is being sought to be adjudicated and relief sought because the inherent power which has been conferred on an individual for redressal of his grievance cannot be restricted by a distorted interpretation of section 41(h) of the Specific Relief Act. Besides this as far as this issue is concerned, it had never been bone of contention or pleading even before by the defendant/appellant at any stage of the proceedings. Owning to the above, since looking to the

totality of the dispute and the grievance which was being sought to be redressed by the plaintiff pertaining to an Act of encroachment over a private land. The suit would have been the only remedy available and hence the bar of 41(h) of Specific Relief Act will not come into play. Hence, the issue no. D is also decided against the defendant-appellant. No other substantial question of law was pressed.

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51. In view of the above, this court is of the considered view that there is no substantial question of law involved in the present second appeal to be answered by this Court; it is concluded by the concurrent finding of the facts. Hence same deserves to be dismissed.

52. Accordingly, the same is dismissed.

(Sharad Kumar Sharma, J.) 26.02.2019 PANT/NEHA