

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**FIRST APPEAL No. 201 of 2008**  
**With**  
**FIRST APPEAL No. 2118 of 2008**  
**With**  
**CIVIL APPLICATION No. 5220 of 2008**  
**In FIRST APPEAL No. 2118 of 2008**

**For Approval and Signature:**

**HONOURABLE THE CHIEF JUSTICE Y.R.MEENA**

**HONOURABLE MR.JUSTICE J.C.UPADHYAYA**

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1 Whether Reporters of Local Papers may be allowed  
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of  
the judgment ?

Whether this case involves a substantial question of  
4 law as to the interpretation of the constitution of  
India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**GAEKWAD INVESTMENT CORPORATIONPVT LTD - Appellant(s)**

**Versus**

**JAYESH JAGDISHCHANDRA DAVE & 1 - Defendant(s)**

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**Appearance :**

MR SN SOPARKAR, SR. COUNSEL with MR KP JETHMALANI, SUDHIR  
M MEHTA, SUDERSHAN KANOJIA and MS KIRAN CHOPRA for  
Appellants,

MR YATIN OZA, SR. COUNSEL with MR RS SANJANWALA for  
Appellants in FA No. 2118/2008

MR BHARAT JANI for Defendant(s) : 1,

MS MEGHA JANI for Respondent 2,

NOTICE SERVED for Defendant(s) : 3

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**CORAM : HONOURABLE THE CHIEF JUSTICE Y.R.MEENA  
and  
HONOURABLE MR.JUSTICE J.C.UPADHYAYA  
Date : 30/06/2008**

**CAV COMMON JUDGMENT :**

**[Per : HONOURABLE MR. JUSTICE J.C. UPADHYAYA]**

First Appeal No. 2118 of 2008 is admitted.

Both these First Appeals arise out of the impugned judgment delivered by the learned 6<sup>th</sup> Additional Senior Civil Judge, Ahmedabad [Rural] [hereinafter referred to as 'the Ld. Trial Judge'] on 24.12.2007 in Special Civil Suit No. 242 of 1998. The appellant in First Appeal No. 201 of 2008 was original defendant no. 1 and respondent no. 1 was original plaintiff and respondent no. 2 was original defendant no. 2 in the aforesaid Special Civil Suit. However, the appellants in First Appeal No. 2118 of 2008 were not parties to the aforesaid Special Civil Suit No. 242 of 1998, but the respondents are plaintiff and defendants respectively in the said suit. Leave was granted to move appeal to the appellants by order dated 1.4.2008 with direction that the appeal be listed with the main appeal i.e., First Appeal No. 201 of 2008.

2. The case of defendant No.1 - appellant is that appellant was the owner of the property, that one Power of Attorney has been executed in favour of Kantibhai Ambalal Patel – respondent No.2 on 18<sup>th</sup> July, 1991 and he was empowered to approach the authorities in connection with the property in question, namely – to approach all authorities in concerned office for completion of Housing Project, for getting necessary permissions in connection of the property i.e. U.L.C Collector, Mamlatdar, Municipal Corporation, and all other Government/Semi-Government and local body offices as and when required to remain present, to sign all papers, applications, statements, to file affidavits,

declarations, to submit forms, plans, estimates as required under the law and to pay and deposit the necessary sums and amounts in the offices and to take receipts for the same, to get the plans prepared from engineers/architects and to get it sanctioned and to represent the company for obtaining necessary orders, permissions and directions, including to appear before the judicial or executive authority.

2.1. It has been mentioned at serial No.4 that the Power of Attorney is also authorized to commence, carry and complete all legal formalities for completing a housing project upon the said property. The Power of Attorney has also been authorized to sign and execute all papers and documents for obtaining sanction or approval for grant of loan by any Government or other statutory body to the various proposed allottees of the premises/tenements in the said development, but not to create any mortgage or charge on the said property or any part thereof without the express consent in writing of the company. It has also been confirmed that all the acts and deeds so done by the Power of Attorney shall be construed to have been done by the company personally and shall be binding upon the company.

2.2. Learned counsel for the appellant further submits that this Power of Attorney was given in favour of Kantibhai Ambalal Patel on behalf of the appellant for completing the housing project and thereafter to sell that with the consent of the company in writing. Learned counsel for the appellant has drawn our attention to clause (ii) of Condition No.7, and submitted that there are some interpolations made by the Power of Attorney holder. According to him, clause (ii) was to the effect that “the said attorney is **not** authorized to execute any agreement/sale deeds or any other deeds or to make or agree to make any allotment to

any person of any tenement in the said property”, but it was interpolated to read “the said attorney is **also** authorized to execute...”

3. Learned counsel for the appellant submits that the Power of Attorney had no authority to sell the property in question without the express consent of the appellant in writing.

3.1. That for the first time only on 19.8.1998, appellant came to know that Power of Attorney has entered an agreement in 1991 with Jayesh Dave, when Suit was filed by respondent No.1 – Jayesh J. Dave, claiming that the Power of Attorney holder of the appellant entered into an agreement with him on 26.8.1991 for sale of the property for Rs. 21 lakhs and an amount of Rs. 1 lakh was paid to the Power of Attorney, at the time of execution of the agreement. In 1998, in the Suit, plaintiff prayed that appellant be directed to execute the sale deed in favour of plaintiff Jayesh Dave.

3.2. Learned Sr. Counsel Mr. Soparkar further submitted that neither plaintiff Jayesh Dave appeared in the witness box, nor did Power of Attorney holder of the appellant appear in the witness box to prove the agreement in respect of the suit property. Neither the Power of Attorney has at any stage conveyed to the appellant regarding the transaction, nor he was authorized, nor he has paid even a single rupee to the appellant and therefore, it is nothing but a case of clear fraud. He submitted that the trial Court has grossly erred and committed gross negligence in passing the decree in favour of the original plaintiff.

3.3. Mr. Bharat Jani, learned Advocate appears for the

respondent no. 1 herein [original defendant no. 1 in the suit]. His case is that Power of Attorney was given to Kantilal Ambalal Patel and original plaintiff – Jayesh Jagdishchandra Dave entered into an agreement with respondent No.2 – Kantilal Ambalal Patel, Power of Attorney Holder of the appellant and he paid Rs. 1 lakh and even he placed reliance on the letter dated 23.9.1997 sent by Gaekwad Investment Corporation Pvt. Ltd. to respondent No.2, and according to him thereafter Rs. 10 lakhs was paid, out of which Rs. 5 lakhs was kept with Power of Attorney and Rs. 5 lakhs was paid to the appellant and he was waiting for completion of the housing project. A query was put to Mr. Bharat Jani whether this letter is admitted by the company, but he was unable to satisfy the Court. On the contrary, in the affidavit, on behalf of the company it has been stated that this letter is fabricated.

4. Thus, the entire controversy centers round the alleged deed of power of attorney dated 18.7.1991 exh. 169. The appellant alleged that the power of attorney was given in favour of Kantilal – respondent no. 2 herein on behalf of the appellant for completing the housing project and thereafter, to sell them with the consent of the company in writing, but the power of attorney had no authority to sell the property in question without the express consent of the appellant in writing. In the impugned judgment though the Ld. Trial Judge discussed about the condition no. 7 contained in the deed of power of attorney, but we are not at all satisfied with the reasonings assigned by the Ld. Trial Judge in arriving at the conclusion that the document of power of attorney authorized Kantilal Patel to dispose off the entire property by sale. It is pertinent to note that in the document in question, in condition no. 6 the power of attorney holder Kantilal Patel was not authorized to create any mortgage or charge on the said property or any part thereof without

the express consent in writing of the appellant. When creation of mortgage or any charge on the said property or any part thereof without the express consent in writing of the appellant was expressly barred in condition no.6, the learned trial Judge should have considered as to whether whatever evidence was adduced before him was sufficient to arrive at the conclusion that though creation of any mortgage or any charge on the said property by the power of attorney holder Kantilal was expressly prohibited, yet the power of attorney holder Kantilal was authorized to dispose of the entire disputed property by sale. In this respect, considering the entire impugned judgment, we are of the opinion that no satisfactory reasonings are assigned by the learned trial Judge. We do not touch the merits of the case, but this aspect of the matter should have been properly appreciated by the learned trial Judge. It appears that to resolve this controversy and to arrive at right conclusion even regarding this aspect of the matter, the learned trial Judge should have recorded the evidence of the concerned party. On behalf of the appellant it was submitted that clause (ii) of condition no. 7 was to the effect that “The said attorney is **not** authorized to execute any agreement/sale-deed or any other deeds or to make or agree to make any allotment to any person of any tenement in the said property,” but it was interpolated to read “the said attorney is **also** authorized to execute...” In the impugned judgment, the Ld. Trial Judge observed that if at all there be any interpolation in clause (ii) of condition no. 7 in the document, then the appellant would have initiated criminal action against Kantilal. We are not at all satisfied with the reasonings assigned by the Ld. Trial Judge in the impugned judgment while resolving such serious controversy. The Ld. Trial Judge should have taken into consideration that the so called agreement to sell the disputed property was entered into by Kantilal with respondent no. 1 herein i.e., original plaintiff – Jayesh Dave in the year 1991, but Jayesh Dave filed Special

Civil Suit No. 242 of 1998 in the year 1998 seeking specific performance of the disputed agreement. The case of the appellant herein is this that only in the year 1998 the suit was filed, the company came to know about the disputed agreement for sale and the interpolation made in condition no. 7 of the deed of power of attorney. Therefore, merely because during the pendency of said suit the appellant did not launch any criminal prosecution for interpolation against Kantilal, respondent no. 2 herein, it cannot be presumed that Kantilal was authorized to dispose of the property by sale. It is further pertinent to note that neither original plaintiff Jayesh Dave entered into witness box nor original defendant no. 2 Kantilal – the so called power of attorney holder of appellant herein [original defendant no. 1 ] entered into witness box to prove the agreement for sale dated 26.8.1991. The Ld. Trial Judge further failed to consider that the amount of consideration in alleged agreement to sell dated 26.8.1991 for the entire disputed property was settled at Rs.21 lacs, but considering the letter correspondence produced, in the year 1995 the offer was approximately of Rs.12 crores. We are, therefore, of the opinion that when the important issue regarding genuineness of certain terms and conditions contained in the deed of power of attorney is in dispute, which goes to the root of the authority of Kantilal to sell the property, the Ld. Trial Judge should have recorded the evidence of the parties and should not have disposed of the suit in the manner as it is done by the Ld. Trial Judge.

5. In First Appeal No. 2118 of 2008 though the appellants were not parties to Special Civil Suit No. 242 of 1998, Ld. Senior Counsel Mr. Yatin Oza for the appellants submitted that the respondent no. 2 herein M/s. Gaekwad Investment Corporation Pvt. Ltd., has executed agreement to sell the very disputed property in favour of the appellant for a

consideration exceeding Rs.10 crores and out of which an amount of Rs.1.75 crore has already been paid by the appellants to the respondent no. 2 herein. Mr. Oza further submitted that for specific performance of the said agreement the appellants herein filed Special Civil Suit No. 82 of 2002 against the respondents herein, who are parties in Special Civil Suit No. 242 of 1998. That as per order dated 25.7.2007 passed by the Ld. Principal District Judge, Ahmedabad [Rural], the suit of the appellants bearing Special Civil Suit No. 82 of 2002 was ordered to be transferred in the Court of the Ld. Trial Judge where Special Civil Suit No. 242 of 1998 was pending. Mr. Oza submitted that the subject matter of both the suits i.e., the disputed property is the same. Mr. Oza, therefore, submitted that instead of simultaneously disposing of the Special Civil Suit No. 82 of 2002 along with Special Civil Suit No. 242 of 1998 the Ld. Trial Judge hurriedly disposed of the Special Civil Suit No. 242 of 1998 by judgment dated 24.12.2007 and the Special Civil Suit No. 82 of 2002 filed by the appellants herein is still pending for disposal. Therefore, the impugned judgment is challenged by the present appellants in this First Appeal.

6. We are of the opinion that the Ld. Trial Judge should have simultaneously recorded evidence in Special Civil Suit No. 82 of 2002 and should have simultaneously disposed of both the suits. By virtue of the impugned judgment, the situation has arisen that the suit filed by the appellants herein bearing Special Civil Suit No. 82 of 2002 virtually came to be dismissed without recording any evidence therein.

7. For the aforesaid reasons, we are inclined to set aside the impugned judgment and decree passed by the Ld. Trial Judge. Special Civil Suit No. 242 of 1998 is remanded to the trial Court with direction



to dispose of the suit in accordance with law after recording evidence of the parties. The Ld. Trial Judge is further directed to record evidence in Special Civil Suit No. 82 of 2002 and both the suits to be disposed of simultaneously in accordance with law without being influenced in any manner regarding whatever discussions made in this judgment, as expeditiously as possible.

8. Pursuant to the undertaking filed by Gaekwad Investment Corporation Pvt. Ltd., in compliance with the order dated 03.04.2000 passed in Special Leave to Appeal [Civil] No. 4853 of 2000 by the Hon'ble the Apex Court, any transfer of the property or any construction made on the disputed property during the pendency of aforesaid Special Civil Suits would be subject to the final outcome of both the suits.

Both the appeals are accordingly allowed.

Consequently Civil Application stands disposed of.

( Y. R. MEENA, C.J.)

( J .C. UPADHYAYA, J. )

\*Pansala.