

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.2511 OF 2016

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ORDER:

This revision is filed under Article 227 of the Constitution of India challenging the order dated 12.11.2015 passed by the Junior Civil Judge, Palasa, Srikakulam District, in I.A. No.126 of 2015 in O.S. No.94 of 2005, whereby the permission sought for by the petitioner, to examine her son by name Venkata Satya Nageswara Rao to give evidence on behalf of the petitioner, who is looking after her affairs, as she became old and not in a position to give evidence due to ill health, was dismissed.

02. The respondent filed counter contending that the said Venkata Satya Nageswara Rao is a chronic litigant, he made attempts several times to disturb the possession and that he is not competent to depose on behalf of the petitioner and prayed for dismissal of the petition.

03. In the impugned order, the trial court observed that the petitioner was already examined in chief by filing an affidavit under Rule 4 of Order XVIII of the Code of Civil Procedure, 1908 (for short, 'the Code') and when cross-examination of the petitioner was deferred, the present application is filed seeking permission to examine the said Venkata Satya Nageswara Rao as a witness to depose on her behalf. But, the trial court basing on Section 120 of the Indian Evidence Act, 1872 observed that the said Venkata Satya Nageswara Rao is not a competent witness to testify and denied permission.

04. During hearing, learned counsel for the petitioner submitted that he is ready to examine the petitioner/ Ravi Shyamala Devi as a witness on Commission as she is suffering from ill health, requested to permit the petitioner to examine herself on Commission and to pass necessary order.

05. The petitioner is an old lady and proposed witness-Venkata

Satya Nageswara Rao is, undisputedly, the son of the petitioner who filed the suit. She, admittedly, filed her affidavit under Rule 4 of Order XVIII of the Code, in lieu of examination-in-chief and when the matter was posted for cross-examination of the petitioner by the counsel for the respondent, the present petition is filed seeking permission to cross-examine the proposed witness-Venkata Satya Nageswara Rao to depose on her behalf.

06. Undoubtedly, Section 120 of the Indian Evidence Act, 1872 permits either of the spouse to testify on behalf of other in civil cases. But Venkata Satya Nageswara Rao is only a son not a spouse of the petitioner and that he had no authorization to depose, in writing. Even if there is any authorization, it always depends upon the power conferred on the Power of Attorney holder, in a case where the power of attorney was executed in favour of the proposed witness by the party to the suit to act on her behalf.

07. The Apex Court in **S.KESARI HANUMAN GOUD v. ANJUM JEHAN AND ORS.**^[1] drawn distinction between ‘act’ and ‘depose’ and concluded that the power of attorney holder is not a substitute for the party as a witness to testify before the Court, placing reliance on the judgments reported in **VIDHYADHAR v. MANIKRAO AND ANR.**^[2] and **JANKI VASHDEO BHOJWANI v. INDUSIND BANK LTD.**^[3], **SHANKAR FINANCE AND INVESTMENT v. STATE OF A.P. AND ORS.**^[4], **MAN KAUR v. HARTAR SINGH SANGHA**^[5], wherein it was held that to prove readiness and willingness, the person, who posted with the facts, shall depose as a witness not as a party. In the judgment in **S.KESARI HANUMAN’s** case referred to supra the Apex Court held that any person can testify as a witness on behalf of the party to the suit not as a party, since he is not a substitute to the party.

08. Therefore, by applying the principle laid down in the

Judgment in **S.KESARI HANUMAN**'s case referred to supra, I am not inclined to interfere with the order passed by the trial court, since the proposed witness-Venkata Satya Nageswara Rao is neither agent to the petitioner, who posted with the facts of the case nor competent to testify on behalf of the petitioner under Section 120 of the Indian Evidence Act. Therefore, the order is free from any illegally, infirmity and does not call for interference of this Court. Hence, the order passed by the trial court is upheld at the stage of admission itself.

09. At this stage, learned counsel for the petitioner sought permission to examine the petitioner as a witness on Commission, but such permission need not be given by this Court in view of the limited scope of the revision. However, liberty is given to the petitioner to file application for appointment of an Advocate-Commissioner to record evidence i.e., cross-examination of the petitioner subject to satisfying the requirements provided under Rule 5 of Order 26 read with Section 75 of the Code.

10. With the above observation, the revision is dismissed. No costs.

11. Miscellaneous petitions, if any, pending in these revisions shall stand closed.

M. SATYANARAYANA MURTHY, J

Date: 03.06.2016

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[\[1\]](#) MANU/SC/0356/2013

[\[2\]](#) AIR 1999 SC 1441

[\[3\]](#) (2005) 2 SCC 217

[\[4\]](#) AIR 2009 SC 422

[\[5\]](#) (2010) 10 SCC 512