

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION No. 6004 OF 2016

ORDER:

This civil revision petition under Article 227 of the Constitution of India is filed assailing order dated 14-10-2016 in I.A.No. 1071 of 2016 in O.S.No. 67 of 2012 on the file of the Court of IX Additional District Judge, West Godavari at Kovvur (for short, 'the Court below'), whereby the Court below permitted the respondent-defendant to examine her mother, who is power of attorney holder, on her behalf as she posted with all facts.

The petitioner-plaintiff challenged the impugned order on various grounds. However, the short question that falls for consideration before this Court is as follows:

"Whether the power of attorney holder of the respondent-defendant can be permitted to give evidence on behalf of the respondent-defendant?"

Undisputedly, the suit is filed for recovery of money against the respondent. The respondent executed general power of attorney dated 11-09-2014 authorizing her mother Potamsetty Lakshmi to prosecute the proceedings in O.S.No. 67 of 2012 but the Court below passed the impugned order permitting the respondent to examine her mother to give evidence on her behalf even without insisting on compliance with Rule 32 of Civil Rules of Practice.

Learned counsel for the petitioner, in support of his contention that an agent can depose about facts which are within his knowledge from the date of authorization and not more than that, placed reliance on ***S.Kesari Hanuman Goud Vs. Anjum Jehan and others***¹, wherein the Apex Court examined the

¹ (2013) 12 SCC 64

scope of Order III Rules 1 and 2 of the Code of Civil Procedure (for short, 'C.P.C.') and held that

"It is a settled legal proposition that the power of attorney holder cannot depose in place of the principal. The provisions of Order 3 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 (sic liable) to be cross-examined."

Learned counsel for the respondent, to contend that any person who is posted with facts can depose, placed reliance on ***Man Kaur (Dead) by L.Rs. Vs. Hartar Singh Sangha***², wherein the Apex Court laid down certain guidelines and guideline (c) is relevant, according to which 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. Even according to the above guideline, power of attorney holder who is an agent is not entitled to depose on behalf of principal for the acts done by the principal but agent can depose with regard to the acts done by power of attorney holder. This judgment is of no assistance to the respondent. Thus, the legal position laid down in both the judgments is not in dispute and the fact is one and the same.

² (2010) 10 SCC 512

In ***Iswar Bhai C. Patel @ Bachu Bhai Patel Vs. Harihar Behera and another***³, the Apex Court held that in the instant case also, the appellant had abstained from the witness box and had not made any statement on oath in support of his pleadings set out in the written statement. An adverse inference has, therefore, to be drawn against him. Since it was specifically stated by respondent No. 2, in his statement on oath that it was at the instance of the appellant that he had issued the cheque on the account of respondent No. 1 in the Central Bank of India Limited, Sambalpur Branch, and the appellant, admittedly, had encashed that cheque, an inference has to be drawn against the appellant that what he stated in the written statement was not correct. In these circumstances, the High Court was fully justified in decreeing the suit of respondent No. 1 in its entirety and passing a decree against the appellant also. The same principle is reiterated in ***Vidhyadhar Vs. Mankikrao and another***⁴.

This Court in ***Kanakapudi Bharathi and another Vs. Authority***⁵ held that

"Power of attorney holder of a party can appear only as a witness in his personal capacity to speak about the facts which are within his personal knowledge about the case, but, he cannot appear as a witness on behalf of a party in the capacity of that party. Testimonial compulsion is the very foundation of the law of evidence for without such compulsion every refusal to give evidence will render administration of justice impossible. It is not a legal fetish. It is a necessity and also the general rule. The petitioners cannot stay back without entering into witness box and subjecting themselves to cross-examination by the second respondent. Further, even if the petitioners are unable to appear in Court, a Commissioner for recording their evidence may be taken out under the relevant provisions of the Code of Civil Procedure."

³ AIR 1999 SC 1341

⁴ AIR 1999 SC 1441

⁵ 1999 (3) ALT 428

In ***S.Padmavathamma Vs. S.Sudha Rani and others***⁶, this Court is of the view that under Order 3 Rule 2, a general power of attorney holder not a substitute to the party incompetent to appear as a witness in the capacity of party and depose about facts within exclusive personal knowledge of the party. However, he can depose about facts which are within his personal knowledge. The same principle is reiterated in ***Ramnivas Gupta and others Vs. Maliram***⁷. In view of the law declared by the Apex Court and this Court, power of attorney holder is incompetent to testify in the place of party but competent to testify as witness on behalf of principal.

Yet, another *lacuna* in the case of the respondent is that she admittedly did not comply with the requirement under Rule 32 of Civil Rules of Practice. Therefore, on this ground also, power of attorney holder is incompetent to act on behalf of the respondent. However, liberty is given to the respondent to comply with Rule 32 of Civil Rules of Practice and power of attorney holder is permitted to represent the respondent subject to limitations contained in ***S.Kesari Hanuman Goud*** (1st supra) and ***Man Kaur*** (2nd supra).

The civil revision petition is accordingly allowed granting liberty as stated above. Pending miscellaneous petitions, if any, shall stand closed in consequence. No costs.

M.SATYANARAYANA MURTHY, J.

Date: 13-07-2017.

JSK

⁶ 2004 (3) ALT 213

⁷ 2002 (3) ALT 754