

04. 10.12.2021
Ct. No.21
A.B.

C.O. 1581 of 2021

Somnath Das

-Versus-

Smt. Maya Das

(Through Video Conference)

Mr. Amlan Jyoti Sen Gupta,
Mr. Raja Ram Banerjee,
...for the Petitioner.

Ms. Shohini Chakraborty,
Mr. Amit Chowdhury,
...for the Opposite party.

Assailing the order dated 23.03.2021 passed by learned Civil Judge (Junior Division), Bidhannagar in Title Suit no. 231 of 2004 rejecting the application of the petitioner/defendant under section 151 Civil Procedure Code, where the defendant has challenged the plaintiff's prayer to examine her power of attorney holder as a witness on her behalf, the petitioner has filed the present revisional application.

Therefore, the question that requires determination in the present revision is whether the plaintiff who has filed the plaint in her own personal capacity and not through her authorised agent or through legal representative or through her constituted power of attorney will be allowed to

examine her constituted power of attorney holder on her behalf.

Learned Advocate for the opposite party submits that as per provision of Section 118 of Indian Evidence Act, constituted power of attorney holder being the brother of the plaintiff is competent to testify on behalf of the plaintiff and also in view of Order 3 of the Civil Procedure Code. Thereby, learned Advocate submits there is no illegality and irregularity in the impugned order.

On the other hand learned Advocate for the petitioner submits that power of attorney holder can appear/plead and act on behalf of the plaintiff, but he cannot become a witness on behalf of the party. A general power of attorney holder cannot be allowed as a witness on behalf of the plaintiff in the capacity of the plaintiff. He in support of his contention refers to *Janaki Vashdeo Bhajwani vs. Indusind Bank Ltd.*, reported in AIR 2005 Supreme Court 439 and *Ram Prasad vs. Harinarain & Ors.* reported in AIR 1998 Rajasthan 185.

In both the above referred decisions the Hon'ble Supreme Court as well as Hon'ble High Court of Rajasthan has been pleased to hold Order III, Rules 1 and 2 CPC, empowers the holder of power of attorney to "act" on behalf of the principal. 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 depositing in place and instead of the principal. In other words, if the power of attorney holder has rendered some "acts" in pursuance to power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.

Considering the above referred decisions and as well the provisions of Order 3 of Civil Procedure Code and Section 118 of the Evidence Act. It appears the word 'acts' used in Rule 2 of Order III, Code of Civil Procedure 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 party can appear only as a witness in his personal capacity and whatever he has knowledge about the case, he can state on oath but he cannot appear as a witness on behalf of the party in the capacity of that party.

Further, this Court is of view if the plaintiff due to physical disability is unable to attend the Court to depose then she could have examined herself through

commission by invoking provisions of Order 18 Rule 4 Civil Procedure Code and as well Order 26 Rule 1 Civil Procedure Code, but instead she wanted to examine her constituted power of attorney holder and which is not permissible in view of the decision of the Hon'ble Supreme Court referred above as well as in view of provisions of Order 3 of Civil Procedure Code.

Therefore, I hold the impugned order of the learned Court below permitting the plaintiff to allow her power of attorney to step in her shoes and depose in the suit filed by her and rejecting the objection of the defendant against such prayer of the plaintiff filed in the form of application under section 151 of Civil Procedure Code, appears to be bad in law and liable to be set aside.

Thereby the impugned order dated 23.03.2021 passed by learned Civil Judge (Junior Division), Bidhannagar in Title Suit no. 231 of 2004 is set aside.

Interim order, if any, stands discharged.

Connected application if any stands dispose of.

Accordingly C.O. 1581 of 2021 is hereby allowed.

There will be no order as to costs.

All parties are directed to act on a server copy of this order duly downloaded from the official website of this Court.

Urgent Photostat certified copies of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(Kesang Doma Bhutia, J.)