

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.10372 OF 2021

**KASUBAI DEORAM SHINDE THROUGH GPA MINABAI CHAMPALA
SHINDE
VERSUS
SUBERSINGH AJABSINGH PATIL (DIED) THROUGH LRS VIMALBAI
SUBERSINGH PATIL AND OTHERS**

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Advocate for Petitioner : Mr. Bipinchandra K Patil
Advocate for Respondent Nos. 1A, 1C & 1D : Mr. B.R. Waramaa

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CORAM : NITIN B. SURYAWANSHI, J.

DATE : 03rd JULY, 2023

PER COURT :

1. By filing application Exhibit-52 petitioner/plaintiff sought permission of the Trial Court that in her place her General Power of Attorney holder should be cross-examined. Rejection of this application is impugned in the present petition.
2. Petitioner/plaintiff filed Regular Civil Suit No.112/2013 for specific performance of contract. At Exhibit-41, she filed her affidavit-in-lieu of examination-in-chief. Thereafter, by filing application Exhibit-52, she contended that she is suffering from illness and high blood pressure and hence, is not in a position to appear before Court for cross-examination. Therefore, she appointed Meenabai Champalal Shinde as her General Power of Attorney holder and sought permission of the Court to allow her

General Power of Attorney holder to prosecute the suit on her behalf. Trial Court has permitted the General Power of Attorney holder to appear as a witness in her personal capacity in respect of personal knowledge about the transactions pleaded in the suit, but not as a witness in place of plaintiff in the capacity of plaintiff. Petitioner is aggrieved by this order to the extent it denies General Power of Attorney holder to appear as a witness in place of petitioner in the capacity of petitioner.

3. Heard learned advocate for petitioner and learned advocate for respondent Nos. 1A, 1C and 1D. Perused the memo of writ petition, annexures thereto, impugned order and the citations relied upon the respective parties.

4. Though prayer made in application Exhibit-52 is innocuously worded, the prayer in fact pressed into service by the petitioner appearance to be that her General Power of Attorney holder should be cross-examined in her place. Admittedly, petitioner has filed her affidavit-in-lieu of examination-in-chief. If the petitioner claims to be not in a position to attend the Court due to her ailments and age, she can be examined by a commission, but that cannot be a ground to allow the request of petitioner to cross-examine her General Power of Attorney holder in her place, irrespective of the fact that the General Power of Attorney holder

has personal knowledge about the transactions, as is claimed by the petitioner.

5. In *Man Kaur (Dead) By LRs. Vs. Hartar Singh Sangha, (2010) 10 SCC 512*, the Hon'ble Apex Court held:-

"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., 2005 (2) SCC 217, held as follows:-

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

...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, 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.

The aforesaid judgment was quoted with the approval in the case of Ram Prasad V. Hari Narain - AIR 1998 Raj 185. 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

he 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.

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."

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

(a)

(b)

(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."

In view of aforesaid ratio, the order passed by Trial Court cannot be faulted with.

6. To prove the fact that plaintiff was ready and willing to perform her part of contract, plaintiff as to enter the witness box and face the cross-examination. From the agreement to sale, specific performance of which is claimed by the plaintiff, it does not appear that General Power of Attorney holder was witness to the same. In that view of the matter, she cannot be permitted to face the cross-examination in the place of plaintiff.

7. Learned advocate for petitioner in support of his submissions relied on ***A. C. Narayanan Vs. State of Maharashtra and Another, AIR 2014 SC 630***, wherein the Hon'ble Supreme Court was considering issue whether filing of complaint under Section 138

of the Negotiable Instruments Act, 1881, through power of attorney holder is legal. It is held perfectly legal for power of attorney holder to file complaint, but the power of attorney holder must have witnessed transaction as an agent of the payee/holder in due course or possess due knowledge regarding the said transaction. This decision is rendered in different set of facts and would not be applicable to the facts of the present case.

8. If the petitioner is unable to appear before Court for cross-examination, the commissioner can be appointed under Order 18 Rule 4 of the Code of Civil Procedure to conduct her cross-examination. The contention of petitioner that in her place her General Power of Attorney holder should be cross-examined, is devoid of merit and is against the settled legal position. The same is, therefore, rightly rejected by the Trial Court.

9. There is no illegality or perversity in the order impugned in present petition. No case is made out by the petitioner to warrant interference in exercise of extraordinary writ jurisdiction. Writ petition being devoid of merit, is dismissed.

(NITIN B. SURYAWANSHI, J.)