

HARSHADA H. SAWANT
(P.A.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1183 OF 2024

Vijaynarayan Narsingh Dwivedi

Petitioner

.. (Orig. Plaintiff)

Versus

Nirmaladevi Shitlaprasad Dubey and Ors.

Respondents

.. (Orig. Defendants)

.....

- Mr. Ghanshyam Mishra a/w. Ms. Ekta Bhalerao, Advocates for Petitioner.
- Mr. Kamran S. Shaikh a/w. Mr. Sanket Karankot, Advocates for Respondents.

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CORAM : MILIND N. JADHAV, J.

DATE : APRIL 25, 2024

P.C.:

- 1.** Mentioned. Not on Board. Taken on Board.
- 2.** Heard Mr. Mishra, learned Advocate for Petitioner and Mr. Shaikh, learned Advocate for Respondents.
- 3.** Perused the praecipe dated 25.04.2024 and the Writ Petition.
- 4.** On 31.01.2024 this Court after hearing the parties, passed the following order :-

“1. Heard Mr. Mishra, learned Advocate for Petitioner.

2. By the present Writ Petition, Petitioner who is Plaintiff before the Trial Court seeks to mark the Power of Attorney (for short ‘POA’) as exhibit in evidence.

3. Briefly stated it is Plaintiff’s case that POA nominating his son as constituted attorney was placed before the Trial Court in the

trial and the same was exhibited in evidence as Exhibit-42 in the suit proceeding. It is Plaintiff's case that save and except at one specific and particular place on page No.4 of the POA, at all other relevant places the name of the constituted POA has been correctly stated and mentioned by the Plaintiff. However, on page No.4 in line No.8 instead of mentioning the name of the attorney, Plaintiff by mistake has mentioned his own name.

4. Mr. Mishra, learned Advocate appears for Plaintiff / Petitioner before me and would submit that the name of the constituted POA at page No.4 was mentioned mistakenly due to a typographical mistake / error and it was never realised. He would submit that on the basis of said POA exhibited below Exhibit-42 the trial commenced, Plaintiff's affidavit-in-lieu of examination-in-chief was accepted by the Trial Court below Exhibit-40 through the same POA. Thereafter Defendant No.3 cross-examined him on 08.06.2023 and infact put a direct question to him with respect to the aforesaid mistake in cross-examination.

5. Mr. Mishra would fairly submit to the Court that it is only at this point of time that the Plaintiff realized that there was a mistake in mentioning the name of the POA on page No.4. Mr. Mishra would contend that substantial cross-examination has also taken place on the said POA during the course of trial. He would further submit that when the Application was filed by Plaintiff for producing a subsequent POA executed by Plaintiff to rectify the said mistake which occurred on page No.4, the said Application has been rejected by the impugned order.

6. He would however qualify and submit that production of the fresh Special POA has in fact been allowed by the learned Trial Court but recall of Plaintiff's witness to produce the same before the Court stands rejected resultantly leading to the fresh Special POA now submitted not been exhibited in evidence which is why the Plaintiff is aggrieved, since there should be no ambiguity later on.

7. I have perused the impugned order. Perused the pleadings of the case and heard Mr. Mishra.

8. Prima facie, I am of the opinion that the error, rather typographical error has occurred at one place in the POA but record reveals that substantial cross-examination has taken place on the basis of the POA as also the pleadings which are filed on its basis. Defendants never took any objection while completing the entire trial. Therefore objection of the Defendant No.3 at this stage may not appear to be relevant, though it is an admitted fact that the subsequent POA was attempted to be placed on record by the Plaintiff only to rectify the typographical mistake and nothing more, it appears that the case of Plaintiff has not been considered on the ground of delay. The delay according to the Trial Court is seven years after the filing of the suit. But reading of the impugned order itself reveals that it came to Plaintiff's knowledge only at the time of cross-examination as far late as on 08.06.2023.

9. That apart, the name mistakenly appearing on page No.4

of the POA is not the only place where the name of the constituted attorney is stated in the POA exhibited under Exhibit-42. I have perused the POA which is at page No.52. I find that name of the constituted POA i.e. 'Satish Vijaynarayan Dwivedi' is mentioned in the substantive conclusive recital of the said POA on internal page No.3 (last line). Thereafter the name of the constituted POA once again is correctly mentioned in the execution clause on internal page No.8 and his signature and photograph appears therein. It is clearly seen that the name appearing on internal page No.4 is a clear typographical mistake as no Executor can execute a POA onto himself.

10. *In view of above, an arguable case has been made out by Mr. Mishra for issuance of notice. Issue notice to Respondents. Petitioner is directed to serve the Respondents. Humdast permitted. In addition to Court's notice, Petitioner is permitted to serve the Respondents a copy of this order and Petition and inform them about the next date of hearing by any permissible mode of service and file appropriate affidavit of service with tangible proof thereof. Respondents are directed to file Affidavit-in-Reply to the Petition on or before the next date. Respondents are directed to cognizance of today's order.*

11. *It is clarified that this Writ Petition shall be disposed at the stage of admission after giving substantive directions to the Trial Court.*

12. *Stand over to 07th February, 2024."*

5. After much deliberation, Mr. Shaikh, learned Advocate appearing on behalf of Respondent No.3 is his usual fairness has agreed to the observations and findings returned in paragraph No.9 of the above order. This Court is therefore of the view that a fresh Power of Attorney by Petitioner which shall be absolutely identical to the contentious Power of Attorney, save and except, that the name change as discerned by this Court in the above order, if filed, then there should be no impediment in taking the said fresh Power of Attorney on record and marking the same as exhibit No.42 by substituting it in place of the previous Power of Attorney which was tendered before the Trial Court.

6. In view of the stance adopted by Respondent No.3 who was the principal objector to exhibiting of the said contentious document below Exhibit-42, the said document shall now stand substituted by a fresh Power of Attorney with the correct name, copy of which is placed on record by the learned Advocate for the Petitioner. It is taken on record and marked 'X' for identification today. This Power of Attorney is dated 15.04.2024. Mr. Shaikh has perused the said Power of Attorney and compared the same with the previously tendered Power of Attorney. He would submit that the contents of both are identical. He would submit that Respondent No.3 would have no objection if the said Power of Attorney is taken on record by the learned Trial Court and marked as Exhibit-42 in place of the previous Power of Attorney.

7. In that view of the above, Application seeking recall of witness to file and explain the discrepancy in the previous Power of Attorney stands disposed.

8. Learned Trial Court shall exhibit the original of Special Power of Attorney dated 15.04.2024 as Exhibit-42 in place of the previous Power of Attorney and proceed with further hearing of the Suit proceeding strictly in accordance with law.

9. With the above directions, Writ Petition stands disposed.