RAJASTHAN HIGH COURT

Kailashi Devi

Vs.

Matadeen Agrawal

Civil Revn. Petn. No. 731 of 2000
(J.C. Verma, J.)

23.04.2001

ORDER

J.C. Verma, J.

1. This revision petition has been filed by the plaintiff- Kailashi Devi. The plaintiff had filed a suit for dissolution of the partnership firm against the respondent-defendants. The suit was filed by Rishi Jain in the capacity of power of attorney of Kailashi Devi. Rishi Jain had examined himself as plaintiff witness No. 1. Objection was raised to the effect that he is not the original plaintiff and, therefore, Rishi Jain cannot lead evidence in place of the plaintiff. His objection was accepted vide order dated 30.5.2000 and the trial Court had declined to read the statement of Rishi Jain in place of Kailashi Devi and ordered that Kailashi Devi should be present in the Court to lead evidence. Against the order dated 30.5.2000 the present revision petition has been filed.

2. It is the contention that the original suit was filed by Kailashi Devi through Rishi Jain, Power of Attorney. It is further submitted that the authority, reported in [1] *Ram Prasad v. Hari Narain*, for the aforesaid proposition, is not applicable in the facts of the present case and the material irregularity has been committed by the trial Court by ordering that the evidence of Rishi Jain shall not be read at all. Power of attorney as executed by Kailashi Devi had been placed on record. The only point involved in the present case is whether in the case the plaintiff does not appear as his/her witness but produces the evidence or through power of attorney, can it be said that the evidence of such Power of Attorney is no evidence in place of the plaintiff or that non-appearance of the plaintiff itself shall tantamount to taking adverse inference against such party.

3. Reliance is placed on the decision of Bombay High Court in the case of *Humberto Luis v. Floriano Armando Luis,* [2] and *Parikh Amratlal Ramanlal Trustee and Administrator of Sanskrit Pathshala Institution v. Rami Mafatlal Girdharilal,* [3]

4. The Bombay High Court in the case of Humberto Luis (supra) observed that while adjudging the competency of the witness i.e. holder of power of attorney, after discussing the provisions of Order 3, Rule 1 and Order 18, Civil Procedure Code read with Section 118 of the Evidence Act which clearly provided that all persons are competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by the tender years, extreme old age, disease, whether of body or mind or any other cause of the same kind. It was held that the competency of a person to testify as a witness is different from that of credibility, of the testimony of the witness. It is true that the testimony of such person will definitely be subject to the scrutiny in the manner provided in the provisions contained in Section 60 of the Evidence Act vis-a-vis. creditability of such testimony and not relating to the competency of a person to depose on behalf of some other person. It was further observed that it cannot be concluded that the provisions contained in order III, Rule 1 of Civil Procedure Code would restrict the powers of holder of power of attorney to depose on behalf of the plaintiff in relation to the matter in issue before the Court. Being so, the finding arrived at by the trial Court that the deposition of such witness on behalf of the plaintiff on the basis of Power of Attorney clearly amounts to pleading on behalf of the plaintiff as well as the finding that recognized agents cannot step into the shoes of the plaintiff in order to depose on behalf of the plaintiff could be sustained and were liable to be set aside. It was further held that under Order 3, Rule 1, Civil Procedure Code, a direction to the plaintiff to step into the witness-box can be given only in justifiable cases and not as a matter of course. It is primarily for the party to the suit to decide whether to appear in person to depose in relation to the facts of the matter or not. It is for the Court to draw necessary inference in case of failure of the party to appear in person in a matter before the Court; but that by itself would not entitle the Court to discharge the burden of issues which lies on such person.

5. Single Bench of this Court in the case of *M/s Ramavatar Kailash Chand v. Smt. Suraj Bai,*[4] in a case of Rent Control Act, had held that it cannot be laid down as a very general proposition that if the landlord or landlady does not examine

himself/herself an adverse inference has to be necessarily drawn. It will depend on facts of each case. This fact of course, will be considered as a circumstance while considering the case of the plaintiff and while arriving at the conclusion whether the plaintiff has been able to prove its case of reasonable and *bona fide* necessity. Ordinarily, a person for whom there is need for getting the suit premises vacated, should appear as a witness in the Court and make himself available for cross-examination by the other side, but the *bona fide* need can be proved by other evidence, both oral and documentary and even by circumstances and it is not correct to state that in every case the plaintiff must enter the witness-box and depose about the requirement.

6. In the case of Parikh Amratlal Ramanlal (supra) it was held that the question whether the general power of attorney holder of a party can be a competent witness on behalf of a party before a judicial tribunal or authority has to be answered in the light of Section 118 of the Evidence Act and for answering that question the provisions of Order 3, Rules 1, and 2(a) of the Civil P.C. are beside the point and can afford no guidance whatsoever. Giving deposition on oath as a power of attorney holder of party is not a part of pleadings. It is a part of the procedure for proving a case by examining a competent witness; who can be a competent witness is indicted by the Evidence Act alone as per Section 118. The power of attorney holder of a party, only on the ground that he holds the Power of Attorney, cannot be said to be in the category of persons who are incapable of being witnesses as provided by Section 118 of the Evidence Act; whether such a power of attorney holder has personal knowledge about the matters in controversy may be a question which can be thrashed out by cross-examining him and if it is found that the power of attorney holder had no personal knowledge about the facts in controversy, the evidentiary value of his deposition may be whittled down, but that has nothing to do with the competence of such a power of attorney holder to depose before a Court of a Judicial Tribunal as a competent witness.

7. In the case of *Ram Kishan Dass v. Dwarka Prasad Bhousarla,*[5] it was held that where in an ejectment application filed against the tenant, power of attorney holder appeared as his witness and some of his statement as to be recorded, but on the objection being raised by the counsel for the tenant, that he could not make out anything from the statement of the power of attorney, the Rent Controller had directed that the landlord be produced for making the statement. The Rent Controller had directed the landlord to be produced for statement which order was challenged before

the High Court. It was held that the impugned order passed by the Rent Controller was wholly without jurisdiction, there was no jurisdiction in the Rent Controller to order the landlord to appear in the witness-box.

8. This Court in the case of *Ram Prasad v. Hari Narain,* [6] held that under Order 3, Rule 2 power of attorney holder is not entitled to appear as witness for party appointing him power of attorney holder. The word 'acts' in Rule 2 does not include act of power of attorney holder to appear as witness on behalf of a party. Such power of attorney 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 and if the plaintiff is unable to appear in the Court, a commission for recording his evidence may be issued under the relevant provisions of Civil Procedure Code.

9. Reliance is placed by the petitioner on the case of *Pritam Singh v. Vimla Devi,* [7] wherein it was observed that the second contention raised by the learned counsel for the appellant is that the plaintiff respondent, Smt. Vimla Devi, did not appear in the witness-box. The statement of her husband, Satyanarain (PW 1), who is said to be her power of attorney holder, to the effect that the appellant did not pay the rent from 11.9.1982 to 10.9.1985, cannot be relied upon that the appellant had not paid the amount of rent, as stated by PW 1. According to the learned counsel, it was necessary for the appellant to have personally entered into witness-box and state about non-payment of tent. The appellant, therefore, could not have been held to be a defaulter. It may be pointed out that PW 1, husband of the respondent was her power of attorney and the appellant himself had stated that the rent has been paid to, the respondent, by way of supply of cloth from time to time to Satyanarain, husband of the respondent. Therefore, when the appellant himself had taken a defence of payment of rent by way of supply of cloth to Satyanarain, it is only appropriate for him to have come in the witness-box and give statement. Moreover, respondent being a lady, there was nothing wrong if her husband enters into witness-box to give evidence as her power of attorney. The Division Bench did not find any force in the submission that the evidence of the power of attorney cannot be read out or that as a general rule the party on whose behalf power of attorney was appearing shall always appear as witness.

10. In the case of *Pandurang Jivaji Apte v. Ramchandra Gangadhar Ashtekar,* [8] where question was raised that because of failure of Apte and Bavdekar to appear before the

Court, adverse inference is to be drawn against such persons. it was held that such situation would only arise when there was no evidence on the record on the point in issue. It was held that the question of drawing adverse inference against a party for his failure to appear in Court is only when there is no evidence on the record.

11. I fully agree with the law laid down by the Bombay High Court in the case of Humberto Luis (supra), a single Bench decision of this Court in the case of M/s Rantavatar Kailash Chand v. Smt.Suraj Bai (supra), Parikh Amratlal Ramanlal (Supra), Ram Kishan Dass v. Dwarka Prasad Bhousrarla (supra) and Pritam Singh v. Vimla Devi (supra).

12. The case of Ram Prasad v. Hari Narain, a single Bench decision of this Court which has been relied by the trial Court is for the proposition that the power of attorney cannot be a plaintiff himself, but it is not for the proposition that in case the plaintiff does not appear, the witness of power of attorney is to be rejected or that in all circumstances, the plaintiff or defendant i.e. the party must appear in the case.

13. In view of the above said discussions it is settled law that power of attorney is a competent witness and is entitled to appear as such. His statements in the Court cannot be ignored or it cannot be said that the statement of such a witness shall not be read in evidence only because of the reason that he had appeared as power of attorney and in case the parties to suit i.e. plaintiff or defendant do not choose to appear as a witness in witness-box it cannot be said that the evidence of the power of attorney who had appeared in the capacity as holder of power of attorney is not to be read at all. His evidence is to be evaluated as per his deposition before the Court and in case the Court finds that witness/evidence of such power of attorney does not repose a confidence, the Court is at liberty to evaluate the same. There is no jurisdiction with the Court to say that the evidence of such person shall not be read at all and that the plaintiff must appear in the case in her support. The order of the trial Court is liable to be set aside.

14. For the reasons mentioned above the order of the trial Court to the effect that the evidence of power of attorney shall not be read is without jurisdiction, and therefore, it is to be set aside. The power of attorney is as competent witness as other witnesses cited by the parties.

15. For the reasons mentioned above, the revision petition is allowed. The impugned order is set aside. The application of respondent, on which the impugned order has been passed is dismissed. The trial Court shall decide the case on the evidence including the evidence of power of attorney in case the plaintiff does not choose to appear.

Petition allowed.

Cases Referred.

1. 1998 DNJ (Raj.) 41: AIR 1988 Raj185
2. (2000) 2 CLT 455
3. AIR 1983 NOC 108 (Guj)
4. 1986 Raj LW 523
5. (1980) 1 Ren CJ 5 (Punj and Har)
6. AIR 1998 Raj 185
7. D.B. Civil Special Appeal No. 21/92 decided on 3.7.1992
8. AIR 1981 SC 2235