

HIGH COURT OF ORISSA: CUTTACK.

W.P.(C) NO. 325 of 2009

In the matter of an application under Articles 226 & 227 of the Constitution of India.

Sobhagini Tripathy Petitioner

Versus

Subhashini Tripathy & Others Opp.Parties

For petitioner : Mr. Digambar Mishra.

For Opp. Parties : M/s T.Nanda & K.Dash for Opp.
Party No.1.

M/s Gurudatta Kar, A.Mohanty & J.

Behera for Opp. Party No.2

M/s Arun Kr. Mishra, T.Mishra &

K.K.Mohapatra for Opp. Party No. 3.

P R E S E N T:

THE HON'BLE DR. JUSTICE A.K.RATH

Date of hearing: 20.09.2013

Date of Judgment: 30.09.2013

Dr. A.K.Rath,J. The seminal question that hinges for my consideration is as to whether power of attorney holder of a party is entitled to appear as a witness on behalf of the said party?

2. Opposite party no. 1 as plaintiff laid a suit in the court of the learned Civil Judge (Senior Division), Bolangir for a declaration that she is entitled to 1/4th share over the Schedule- A and B property, for recovery of the amount already taken by the defendant no. 1 from the defendant no. 5 and for permanent injunction, which was registered as

Civil Suit No. 147 of 2005. Pursuant to issuance of summons, defendant no. 1 entered appearance and filed a comprehensive written statement denying the assertions made in the plaint. Be it noted that dispute pertains to the insurance claim and other service benefits of deceased Sudhir Ranjan Tripathy between mother and widow of the deceased.

3. While the matter stood thus, Dayanidhi Hota, husband of the plaintiff filed evidence on affidavit on behalf of the plaintiff. The defendant no. 1 filed an application on 11.11.2008 with a prayer to direct the plaintiff to give her evidence and to reject the evidence of affidavit filed by said Dayanidhi Hota. By order dated 4.12.2008 the learned trial court rejected the petition filed by the petitioner-defendant no.1. The said order is impugned in the present writ application.

4. Assailing the said order dated 4.12.209, Mr. Digambar Mishra, learned counsel for the petitioner submitted that a 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. Per contra, Mr. Trilochan Nanda, learned counsel appearing for contestant defendant supported the order passed by the learned trial court.

5. To appreciate the rival contentions made at the bar, it is necessary to quote Rules 1 and 2 of Order III of the Code of Civil Procedure (for the sake of brevity "CPC")

Order-III

"1. Appearance, etc., may be in person, by recognized agent or by pleader.- Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader(appearing, applying or acting, as the case may be,) on his behalf:

Provided that any such appearance shall, if the Court so directs, be made by the party in person.

2. Recognized agents.- The recognized agents of parties by whom such appearances, applications and acts may be made or done are-

(a) persons holding powers-of-attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties;

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, whereon other agents is expressly authorized to make and do such appearances, applications and acts.”

6. An identical question came up for consideration before the Hon’ble Supreme in the case of **Janki Vashdeo Bhojwani and another v. Indusind Bank Ltd. and others**, AIR 2005 SC 439. Interpreting Rules 1 and 2 of Order III, CPC, their Lordships in paragraph 13 of the report held as follows:-

13. “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 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.”

7. On a conspectus of the said judgment, it is evident that if the power of attorney holder has done some acts pursuant 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. He also cannot depose for the principal in respect of the matter which only the principal can have personal knowledge and in respect of which the principal is entitled to be cross examined.

8. I have given my anxious consideration to the rival contentions of the parties and carefully perused the impugned order. In view of the authoritative pronouncement of the Hon'ble apex Court in the case of **Janki Vashdeo Bhojwani** (supra), the order dated 4.12.2008 passed by the learned Civil Judge (Sr. Division), Bolangir is not sustainable in the eye of law and the same is liable to be quashed.

9. Accordingly, the order dated 4.12.2008 passed by the learned Civil Judge (Sr. Division), Bolangir is quashed. The writ petition is allowed. There shall be no order as to costs.

.....

Dr. A.K.Rath, J.

