

IN THE HIGH COURT AT CALCUTTA
TESTAMENTARY and INTESTATE JURISDICTION
ORIGINAL SIDE

Present:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

G.A. No. 3659 of 2017

With

T.S. No. 25 of 2016

In the goods of:

Usha Kanta Das (Deceased)

And

Amiya Kanti Das & Anr.

Vs.

SM. Sefalika Ash

For the Plaintiff/Respondent : Ms. Sutapa Sanyal, Adv.
Mr. Niladri Banerjee, Adv.
Ms. Tina Bhattacharya, Adv.

For the Defendant/Petitioner : Mr. Radha Nath Nandy (In-person)

Heard on : 06.06.2018, 19.06.2018, 27.07.2018,
27.11.2018, 07.01.2019.

Delivered on : 21.02.2019.

Moushumi Bhattacharya, J.

1. This is an application filed by one Radha Nath Nandy for leave to appear in person on behalf of the defendant/caveatrix.

2. The dispute relates to two Wills both allegedly executed by one Usha Kanta Das. The first Will was executed on 10th September, 1965 in which Amiya Kanti Das and Amar Nath Ash (now deceased) were made the joint executors. The testator (Usha Kanta Das) then substituted the first Will with the last and final Will dated 3rd October, 1975, which was registered with the Registrar of Assurances, Calcutta. In the last Will dated 3rd October, 1975, the testator replaced the name of his son-in-law, Amar Nath Ash (now deceased) and included his wife Smt. Ushabari Devi (now deceased) as the joint executor along with his son Amiya Kanti Das, the plaintiff no.1. It was specified in the last Will that in the event of the death of Ushabari, she shall be substituted by Jyotsna Das, the wife of Amiya Kanti Das for discharging the duty of an executor. After the death of Usha Kanta Das, the plaintiff, on coming to know of the existence of the Will dated 3rd October 1975, applied for grant of probate with the consent of both Shefalika Ash and Prativa Nandy. Shefalika Ash (defendant) and Prativa Nandy are the daughters of the deceased, Usha Kanta Das. After a considerable delay of about 5 years thereafter, the plaintiffs came to know that Shefalika Ash had filed an affidavit in support of a caveat on 19th December, 2012. The application for grant of probate being P.L.A no. 53 of 2010 was thereafter converted into the present testamentary suit. Issues were framed in the suit and after examination of the plaintiffs' first witness (Amiya Kanti Das), the claim of the plaintiffs was dismissed by a judgment dated 8th November, 2016. An appeal was preferred therefrom by the plaintiffs and by an order dated 26th April, 2017, the suit was remanded for adducing the evidence of Rabindralal Ghosh, the

attesting witness to the Will, who the plaintiffs had intended to produce before the Trial Court. Both the plaintiffs and the caveatrix, namely, Shefalika Ash were represented by their advocates during these proceedings. The plaintiffs then applied for framing of additional issues before the learned Judge, who was hearing the suit. At this stage, Mr. Radha Nath Nandy (the applicant herein) expressed his intention to argue the matter on behalf of the defendant/caveatrix, Shefalika Ash. By an order dated 16th November, 2017, passed by the Hon'ble Justice Sahidullah Munshi, such liberty was denied on the ground that Order III Rules 1 and 2 of The Civil Procedure Code, 1908 (CPC) does not give any scope to a party to represent a litigant if the concerned party is not an advocate. Mr. Radha Nath Nandy, was however, given leave to file an appropriate application for this issue to be considered. Mr. Radha Nath Nandy thereafter filed two applications under Order III Rules 1 and 2 of the CPC and another application for rejection of the plaint.

3. The issue in the instant application is whether Mr. Radha Nath Nandy has a right of audience before this court.

4. Mr. Radha Nath Nandy appearing in person, submits that he is the constituted attorney of Shefalika Ash, the defendant/caveatrix and has been authorized to act and argue, including signing affidavits, applications, etc as a "recognized agent" under Chapter I of the Original Side Rules of this court. Mr. Nandy cites Chapter XII of the Original Side Rules in relation to indigent persons in pursuance of his right to argue. Mr. Nandy cites a host of orders passed by different High Courts (without placing them individually) on the point of rights

conferred by a power of attorney and that a holder of a power of attorney can appear, plead and act on behalf of the party who has given the power of Attorney. Mr. Nandy urges that he is otherwise competent and entitled in law to appear, argue and plead on behalf of the caveatrix. He also relies on Order III Rules 1 and 2 of the CPC to contend that as a recognized agent he is authorized to appear and act on behalf of the caveatrix by reason of holding the power of attorney extended in his favour.

5. Ms. Sutapa Sanyal, learned Counsel appearing for the plaintiffs submits that Order III Rule 2 of the CPC restricts the power of “recognized agents” to appearing and making applications and generally acting as a holder of a power of attorney on behalf of the person who has authorized the recognized agent. Counsel submits that Order III does not include the right of audience or examination of witnesses, which Mr. Nandy seeks to do in this case. Counsel relies on *Ashwin Sambhuprasad Patel Vs. National Rayan Corporation Limited* reported in AIR 1955 Bombay 262 and on *P. Thayarammal Vs. Pitty Kuppuswamy Naidu* reported in AIR 1937 Madras 937. She further relies on Section 8 of the Indian Bar Councils Act, 1926 which provides for the following.

“8. Enrolment of advocates.-

(1) No person shall be entitled as of right to practise in any High Court, unless his name is entered in the roll of the advocates of the High Court maintained under this Act: Provided that nothing in this sub-section shall apply to any attorney of the High Court.

(2) The High Court shall prepare and maintain a roll of advocates of the High Court in which shall be entered the names of-

(a) all persons who were, as advocates, vakils or pleaders, entitled as of right to practice in the High Court immediately before the date on which this section comes into force in respect thereof; and

(b) all other persons who have been admitted to be advocates of the High Court under this Act: Provided that such persons shall have paid in respect of enrolment the stamp- duty, if any, chargeable under the Indian Stamp Act, 1899 (2 of 1899), and a fee, payable to the Bar Council, which shall be ten rupees in the case of the persons referred to in clause (a), and in other cases such amount as may be prescribed.....”

and on Section 29 of the Advocates Act, 1961, which is;

“29. Advocates to be the only recognized class of persons entitled to practice law.- *subject to the provisions of this Act and any rules made thereunder, there shall, as from the appointed day, be only one class of persons entitled to practice the profession of law, namely, advocates.”*

Based on the above, it is submitted that the right of audience cannot be claimed as a matter of right and counsel relies on *Pannalal Vs. Deoji Dhanji* reported in (AIR 1955 Madhya Bharat 109) and *Jivan Lal Vs. Ram Ratan* reported in (AIR 1936 Oudh 261) to explain the scope of Order III Rule 1 of the CPC.

6. On facts, it is submitted that the caveatrix, Shefalika Ash was earlier represented by advocate and there is no reason for Mr. Nandy to suddenly seek to appear on behalf of the caveatrix. She submits that this is a ploy to delay the suit as the executor and the attesting witnesses are both elderly persons suffering from various ailments.

7. The decisions relied upon by learned counsel for the plaintiffs date back to 1937 to a Full Bench decision of *P. Thayarammal Vs. Pitty Kuppaswamy Naidu* reported in 46 LW 734, where one of the issues was whether an agent with a power of attorney has the right of audience in a court. The facts in that case

involved a widow who had given a power of attorney to one Krishnarmmal who had filed a suit against the widow's sister. The power of attorney authorized the holder (respondent in that case) to appear and plead in court in person on the plaintiff's behalf and to engage advocates. On a subsequent date, one S. Iyengar appeared on behalf of Krishnarmmal on the basis of a Vakalat given by her. The respondent challenged the validity of Iyengar's Vakalat and claimed that by reason of the authority given to him in the power of attorney, the respondent has the same right as a legal practitioner who has been given a Valakat, particularly when the power of attorney authorized him to plead in the court. The judgment delivered by Sir Owen Beasley, C. J, upon considering Order III Rules 1 and 2 of The Code of Civil Procedure, 1908 (CPC), held that the said provisions do not give a recognized agent any right to plead on behalf of his principal either in the Appellate or Original Side of this court. The court further relied on Section 119 of the CPC which provides the following:

"119. Unauthorized persons not to address Court.- Nothing in this Code shall be deemed to authorize any person on behalf of another to address the Court in the exercise of its original civil jurisdiction, or to examine witnesses, except where the Court shall have in the exercise of the power conferred by its charter authorized him so to do, or to interfere with the power of the High Court to make rules concerning advocates, vakils and attorneys."

The second issue considered by the court was whether a power of attorney holder stands in the same footing as that of an Advocate holding a Vakalat wherein upon examining Chapter I of the Original Side Rules, the court held that an agent under a power of attorney has no right of audience in a court of law. The next decision of *Pannalal Vs. Deoji Dhanji* reported in AIR 1955 Madhya Bharat

109 looked into the question whether a Mukhtyar (recognized agent) could be allowed to cross-examine a witness. Again, upon considering Order III Rule 1 of the CPC, the court held that a recognized agent cannot claim a right of audience and further that the distinction drawn in *AIR 1948 EP 61*, between addressing a court and examining witnesses, was not supported by earlier decisions on the subject. The court held that the words used in Order III Rule 1, namely, “appearance”, “application” or “acting” does not include examination and cross-examination of witnesses which requires an audience before a court. In coming to the aforesaid conclusion, the court relied on *Jivan Lal Vs. Ram Ratan reported in AIR 1936 Oudh 261*, which succinctly held that Order III Rule 1 of the CPC does not justify a recognized agent being allowed to argue and plead. The court noted that the word “*plead*” has not been used in Order III Rule 1 of the CPC and cautioned against unqualified persons assuming the role of pleaders.

8. I have considered the submissions of counsel appearing for the plaintiffs and Mr. Radhanath Nandy who seeks to argue on behalf of the defendant caveatrix. The issue before this court is whether appearance, application or acting by a recognized agent of a party would include within such scope, the right to plead and argue before a court of law as defined in Rule 2 of Order III. In this case, Mr. Nandy is admittedly a power of attorney holder on behalf of the caveatrix and claims a right to argue the case of the caveatrix including examining witnesses in the proceedings on the basis of the authorization arising from the power of attorney. The scope of the rights given to a holder of a power of

attorney/recognized agent would be clarified from a look at some of the other provisions in the CPC and the Original Side Rules. The first of such would be Section 2(15) of the CPC which says that only a pleader would be entitled to appear and plead for another in court and which would include an advocate, a vakil and an attorney of a High Court. The next provision is Chapter I, Rules 1 and 5 of The Original Side Rules. Under Rule 1, “acting” has been defined to include filing application or pleadings, affidavits or any act “*other than pleading*” authorized by law to be done by a party or by a recognized agent or by an Advocate. Under Rule 1 (i) (b), a person qualifies as an “*advocate*” if covered within the meaning of The Advocates Act, 1961. Rule 5 provides, inter alia, that an advocate shall not be entitled to appear and plead before a court unless he has filed a Vakalatnama or is instructed by an advocate who has filed a Vakalatnama. The rights granted under Order III Rule 1 is further clarified by sections 8 and 29 of The Advocates Act, 1961 which provide, inter alia, that no person shall be entitled as of right to practice in any High Court unless his name is entered in the Roll of advocates of the High Court (Section 8) and that there is only one class of persons entitled to practice of law namely, “advocates” (Section 29). Section 119 further prohibits unauthorized persons from addressing court and mentions examination of witnesses in particular.

9. On a conjoint reading of the aforesaid provisions, three propositions emerge; first, Order III Rule 1 specifically excludes the expression “*plead*” from the purview of “appearing” or “acting”. The expression plead, on the other hand,

arises from the definition of “*Pleader*” under section 2 (15) of the CPC. Second, advocates, vakils and attorneys of a High Court have been specifically included in the class of those who are entitled to plead for another before a court. Third, “pleading” as an exclusive domain has been formalized under Chapter I Rule 1 (i) (a) of the Original Side Rules which has specifically excluded “pleading” from “*acting*”. Rule 6 lays down the procedure by which a party can be entitled to act and plead for another. From the decisions cited on behalf of the plaintiffs, it is evident that the courts have stressed on the distinction, namely, that acting and appearing for another will not include a right to plead or argue before a court of law. The anomaly in *AIR 1948 EP 61* was departed from in *Pannalal* and the court followed the decision of the Calcutta High Court in *Harchand Ray Vs. B.N. Rly. Co. reported in AIR 1916 Cal 181 (1) (B)*, where a person holding a power of attorney was not allowed to argue as the court held that a recognised agent had no right of audience before a court. *Pannalal* is important as the Mukhtyar (recognised agent) in that case had sought to examine witnesses, which Mr. Nandy also seeks to do in the instant case.

10. It is clear from the decisions as well as the relevant statutes and Rules, that a special class of persons, namely, Advocates enrolled under The Advocates Act, 1961, have been authorised to plead and argue before a court of law. It should further be noted that the “*special reason*” of permitting “*any other person*” under Rule 5 of chapter 1 of The Original Side Rules relate only to appearance and not pleading. This is in consonance with Rule 1 (i) (a) which specifically

mentions various acts which a person authorized or a recognized agent can do “*other than pleading*”.

11. In view of the above discussion, G.A 3659 of 2017 filed by the defendant for permitting Mr. Radhanath Nandy to appear and act on behalf of the defendant/caveatrix under Order III Rule 2 of the CPC, is dismissed. There shall be no order as to costs.

12. G.A. 3700 of 2017 being an application for dismissal of the Testamentary Suit shall be placed before the appropriate Bench.

Urgent Photostat certified copy of this Judgment, if applied for, be supplied to the parties upon compliance of all requisite formalities.

(MOUSHUMI BHATTACHARYA, J.)