

(2019) 04 CAL CK 0075

In the Calcutta High Court

Case No : General Application (GA) No. 966 Of 2019, Appeal From Order (APO)
No. 60 Of 2019 With Testamentary Suits (Ts) No. 25 Of 2016

Amiya Kanti Das & Anr

APPELLANT

Vs

Sefalika Ash

RESPONDENT

Date of Decision : 24-04-2019

Acts Referred:

Advocates Act, 1961 — Section 8, 29, 32, 33
Code Of Civil Procedure, 1908 — Section 2(15), 119, Order 3 Rule 1, Order 3 Rule 2,
Order 3 Rule 5, Order 32 Rule 8(f)
Indian Bar Councils Act, 1926 — Section 14

Citation : (2019) 04 CAL CK 0075

Hon'ble Judges : Soumen Sen, J; Ravi Krishan Kapur, J

Bench : Division Bench

Advocate : Radha Nath Nandy, Sutapa Sanyal, Tiana Bhattacharyya, Amit Chowdhury

Final Decision : Disposed Off

Judgement

Soumen Sen, J

The appellant is the son-in-law of the caveatrix.

The appellant is aggrieved by an order passed by Justice Moushumi Bhattacharya in connection with an application filed by the appellant under Order 3 Rules 1 & 2 read with Order 32 Rule 8(f) of the Code of Civil Procedure, 1908 for representing the caveatrix in the probate proceeding.

The probate is in relation to a Will executed by one Usha Kanta Das on 3rd October, 1975, which was registered with the Registrar of Assurances, Kolkata. This is the second Will of the testator. The first Will executed on 10th September, 1965 was revoked and substituted by the second Will in view of the death of one of the named executors in the Will, namely, Amar Nath Ash. Under the first Will, Amiya Kanti Das and Amar Nath Ash (now deceased) were made joint executors. The first Will was also a registered Will. 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 (since deceased) as the joint executor along with Amiya Kanti Das, the plaintiff No.1. It was clearly mentioned in the last Will that in the event of death of Ushabari, she would 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 being aware of the existence of the Will dated 3rd October, 1975, applied for grant of probate with the consent of both Sefalika Ash (defendant/caveatrix) and Prativa Nandy. Sefalika Ash and Prative Nandy are the daughters of the deceased, Usha Kanta Das. After a considerable delay of about 5 years, the plaintiffs came to know that Sefalika 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 marked as a contentious cause and a testamentary suit number was assigned. Issues were framed in the suit and after examination of the plaintiffs' first witness (Amiya Kanti Das), the probate proceeding was dismissed by a judgment dated 8th November, 2016 apparently on the ground that the plaintiffs were unable to produce the attesting witness to prove the Will. An appeal preferred therefrom was disposed of by an order dated 26th April, 2017, remanding the testamentary suit for recording the evidence of Rabindralal Ghosh, the attesting witness to the Will, who the plaintiffs had intended to produce before the learned Single Judge. Both the plaintiffs and the caveatrix, namely, Sefalika Ash were represented by their advocates during these proceedings.

We have called for the original affidavit in support of the caveat. It appears that one Mani Manjusa Nandy, wife of Radha Nath Nandy filed the affidavit on the basis of a power of attorney purported to have been executed by Sefalika Ash in favour of Mani Manjusa Nandy. Mani Manjusa Nandy described herself as the sole executrix of the last Will and testament dated 3rd October, 1975. It is unclear from the reading of the said affidavit in support of caveat as to whether Mani Manjusa Nandy is the caveatrix or she had filed the said affidavit on behalf of Sefalika Ash. We presume from the description of the affidavit as well as from the averment in paragraph 10 of the said affidavit in support of the caveat that the said affidavit was filed by Mani Manjusa Nandy on behalf of Sefalika Ash. It appears that Sefalika Ash by a special power of attorney executed in favour of Mani Manjusa Nandy appointed her to sign all necessary papers and documents and/or file and institute and/or collect all necessary papers and documents from the Court on behalf of the attorney, namely, Sefalika Ash. The said affidavit was affirmed on 19th December, 2012.

One Mr. Tushar Kanti Har, Advocate was appointed by Mani Manjusa Nandy to represent the caveatrix in the probate proceeding. After the matter was remanded, the plaintiffs applied for framing of additional issues before the learned Single Judge. At that stage Mr. Radha Nath Nandy (appellant herein) expressed his desire to argue the matter on behalf of the defendant/caveatrix, Sefalika Ash. By an order dated 17th November, 2016 the Hon'ble Justice Sahidullah Munshi denied such opportunity on the ground that Order 3 Rules 1 &

2 of the Code of Civil Procedure 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 consideration of this issue at the appropriate stage. Mr. Radha Nath Nandy filed two applications, one under Order 3 Rules 1 & 2 of the Code of Civil Procedure and another for rejection of the plaint. The issue before the learned Single Judge was whether Mr. Radha Nath Nandy had a right of audience before the Court. The learned Single Judge upon consideration of the provisions in the Code of Civil Procedure, Advocates Act Bar Council of India Rules, Original Side Rules and various judgments rendered by different high courts on this issue including our High Court has come to the conclusion that Radha Nath Nandy cannot be allowed to appear and act on behalf of the caveatrix under Order 3 Rule 2 of the Code of Civil Procedure and the said application was dismissed.

Being aggrieved by the said decision, the present appeal has been preferred by the appellant.

Mr. Radha Nath Nandy appeared in person and submitted that he is the constituted attorney of Sefalika Ash, the defendant/caveatrix, and has been authorised to act/argue including signing affidavits, applications, etc. as a recognised agent under Chapter 1 of the Original Side Rules of this Court. Mr. Nandy has also referred to Chapter 12 of the Original Side Rules in relation to indigent person in pursuance of his right to argue. Mr. Nandy has referred to a decision of the Hon'ble Supreme Court in Janki Vashdeo Bhojwani Vs. Indusind Bank Ltd reported at AIR 2005 SC 439 to argue that a power of attorney holder can act on behalf of the principal although he may not be allowed to depose on behalf of the principal. It is submitted that the learned Single Judge has completely misdirected its mind in not referring to the said decision and appreciating that Order 3 Rule 2 of the Code of Civil Procedure clearly recognise the principle that the recognised agents of parties may be allowed to appear on behalf of the principal and this right cannot be denied to the applicant.

Per contra, Ms. Sutapa Sanyal, learned Counsel appearing on behalf of the plaintiffs has submitted that Order 3 Rule 2 of the Code of Civil Procedure restricts the power of recognised agents only to appear and make applications and generally acting as a holder of a power of attorney on behalf of the person who has authorised the recognised agent to act on his behalf. Ms. Sanyal submits that Order 3 of the Code of Civil Procedure does not include the right of audience or examination of witnesses which Mr. Nandy seeks to do in the instant case. Ms. Sanyal in support of her submission has referred to the following decisions:-

1. Pannalal and Others versus Deoji Dhanji reported at AIR 1955 MB 109;
2. Aswin Shambhuprasad Patel and other versus National Rayon Corporation Limited reported at AIR 1955 Bom 262;
3. Jivan Lal and Others versus Ram Ratan and Others reported at AIR 1936 Oudh 261;

4. Re: Eastern Tavoy Minerals Corporation Limited reported at Indian Law Reports Volume LXI 324;
5. Hurchand Ray Gobourdhon Das versus The Bengal-Nagpur Railway Company reported at AIR 1916 Cal 181(1);
6. Samduhan versus Madanlal reported at AIR 1959 Raj 35;
7. Moulasab Versus Mohammad Hasim and Others reported at ILR 2003 Kar 1041;
8. P. Thayarammal versus Pitty Kuppuswamy Naidu reported at 46 L.W. 734.

Ms. Sanyal submits that the decisions in Pannalal (Supra) and Jivan Lal (Supra) are relevant and have conclusively decided the issue raised in this appeal as they succinctly explain the scope of Order 3 Rule 1 of the Code of Civil Procedure. Ms. Sanyal concludes her submission by referring to the fact that Sefalika was earlier represented by an Advocate and there is no reason for Mr. Nandy to suddenly make an appearance on behalf of the caveatrix. The said sudden appearance is only a ploy to delay the suit as the executor and the attesting witness are both elderly persons suffering from various ailments.

In deciding the said issue, it may be necessary to refer to Section 29 of the Advocates Act, 1961, Order 3 Rules 1 & 2, Section 2(15), Section 119 of the Code of Civil Procedure and Chapter 1 Rules 1 & 5 of the Original Side Rules of this Court. The said provisions read:-

Section 29, 32 and 33 of Advocates Act:

29. Advocates to be the only recognised class of persons entitled to practise 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 practise the profession of law, namely, advocates.

"32. Power of Court to permit appearances in particular cases - Notwithstanding anything contained in this Chapter, any Court, authority, or person may permit any person, not enrolled as an advocate under this Act, to appear before it or him in any particular case.

33. Advocates alone entitled to practice. - Except as otherwise provided in this Act or in any other law for the time being in force, no person shall, on or after the appointed day, be entitled to practice in any Court or before any authority or person unless he is enrolled as an advocate under this Act."

Section 2(15) of CPC

2. Definitions. - In this Act, unless there is anything repugnant in the subject or context, -

...

(15) "pleader" means any person entitled to appear and plead for another in Court, and includes an advocate, a vakil and an attorney of a High Court;

Order III Rule 1 & 2 of CPC

ORDER III

RECOGNISED AGENTS AND PLEADERS

1. Appearances, etc., may be in person, by recognised 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 recognised 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. Recognised agents. - The recognised 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, where no other agent is expressly authorized to make and do such appearances, applications and acts.

Section 119 of Code of Civil Procedure

"119. Unauthorised persons not to address Court. - Nothing in this Code shall be deemed to authorise 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 authorised him so to do, or to interfere with the power of the High Court to make rules concerning advocates, vakils and attorneys."

Original Side Rules - Chapter 1, Rules 1 & 5.

1. (i) In these rules, unless the context otherwise requires, -

(a) "Acting" includes filing an appearance or any pleadings, application, affidavit, report, return, deposition or any act (other than pleading) required or authorised by law to be done by a party in the Court, any person (or by recognised agent) or by an Advocates;

(b) "Advocate" means a person who is an Advocate within the meaning of the Advocates Act, 1961;

(c) "Court" means the High Court at Calcutta in its original jurisdiction and includes a Judge sitting in Court;

(d) "Judge" means a Judge sitting in chambers;

(e) "Registrar" means the Registrar of the Court in its original jurisdiction.

(ii) The General Clauses Act, 1897 (Act X of 1897), shall apply for the interpretation of these rules.

...

5. An Advocate shall not be entitled to act in the Court unless he has filed the 'Vakalatnama' and an Advocate shall not be entitled to appear and plead before the Court unless he has filed the Vaklatnama or is instructed by an Advocate who has filed the same; provided that the Court may for any special reason permit any other person to appear before it in a particular cause.

The question that has arisen for consideration is whether Mr. Radha Nath Nandy is entitled to appear and argue on behalf of the caveatrix, Sefalika, authorising him now to appear and act on her behalf. 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 question is no more *res integra* and seems to have been settled by long catena of decisions beginning with the judgment of the Calcutta High Court in the case of *Hurchand Ray Gobourdhon Das versus The Bengal-Nagpur Railway Company* reported at (1914)19 CWN 64. We are supported by so high an authority as Lawrence Jenkins C.J. who held that a recognised agent as such has no right of audience. This classic one line judgment has completely summarised the law on this point. In *Hurchand* (Supra), an application for revision on behalf of the plaintiff was filed against an order of Babu Rajani Kanta Chatterjee, Small Cause Court Judge at Sealdah, dated the 12th of May 1914. The petitioner instituted a suit, in the Court of Small Causes at Sealdah, for the recovery of Rs.100, being the value of the goods entrusted to the opposite party for carriage from Chajaria station on the Railway line of the opposite party to Shalimar and for delivery there to petitioner. The plaintiff was represented in the suit by his authorised agent Babu Satish Chandra Singh who did not engage any pleader for the plaintiff. The Vakil who appeared for the defendant opposite party at the trial took a preliminary objection that the authorised agent had no power to plead and examine witnesses on behalf of the plaintiff. The objection was upheld by the Small Cause Court, the Judge being of opinion that though under Or.III, r. 1, a recognised agent can indeed appear, act and apply on behalf of the plaintiff or defendant by whom he has been authorised to do such things, "the law does not give him the power to plead on behalf of his principal". This view is affirmed by Jenkins C.J by the classic one liner "A recognized agent as such has no right of audience." This view was followed by Justice Buckland in *In re Eastern Ravoy Minerals Corporation Ltd.* reported at Indian Law Reports Volume LXI 324 corresponding

to AIR 1934 Cal 563, in which His Lordship following Hurchand (Supra) held that Order 3 Rule 1 of the Code of Civil Procedure does not confer on a recognised agent the right of audience and therefore declined to hear Mr. Harcourt who claimed right of audience on behalf of the company by virtue of a power of attorney executed in his favour by two directors of the company.

We may also refer to the Division Bench judgment of the then Oudh High Court reported at AIR 1936 Oudh 261 (Jivan Lal and Others versus Ram Ratan and Others) in which the application filed by Jivan Lal, one of the applicants, praying that his special agent Munshi Shiam Bihari Lal be allowed to argue the appeal on his behalf under Order 3 Rule 1 of the Code of Civil Procedure was denied on the reasoning that the expression 'any appearance, application or act' under Order 3 Rule 1 mean, 'no more than that he can appear, make applications and take such steps as may be necessary in the course of the litigation for the purpose of the case of his principal being properly laid before the Court.' Their Lordships further observed that a recognised agent cannot be allowed to argue and plead. Thereafter it proceeds to consider CPC and observed: it may be noted that Section 2, Clause (15) of the Code of Civil Procedure defines a 'pleader' as meaning 'any person entitled to appear and plead for another in Court, and includes an advocate, a vakil and an attorney of a High Court.' It is significant that the word 'plead' has not been used in Order 3 Rule 1 of the Code of Civil Procedure. The absence of that word in this rule seems clearly to imply that it was not intended that a recognised agent should be allowed to plead for his principal. We also feel that if such a practice were countenanced, the result of it would be to allow unqualified persons under the garb of special agents to assume the roll of pleaders and begin regular practice as such. This view also appears to be supported by the decision of Jenkins, C.J. and N.R. Chatterjea, J., in 19 CWN 64, in which it was held that a recognised agent as such has no right of audience.

The decision of the Full Bench of the Madras High Court in the case of M. Krishnammal vs. T. Balasubramania Pillai reported at AIR 1937 Madras 937 is also apposite in this context where the Full Bench has held that the power of attorney which empowered the attorney to swear affidavits, to file necessary petitions and to verify and sign the same, to appear and plead in Court in person on his behalf, to engage advocates if necessary and to sign in their vakalats, to do all acts necessary in the conduct of the above proceedings and in furtherance thereof, did not empower such a person to conduct proceedings in the Court in the same category as a vakalat to legal practitioner in the following words :-

"But quite apart from that difficulty, there is no warrant whatever for putting a power of attorney given to a recognised agent to conduct proceedings in Court in the same category as a vakalat given to a legal practitioner, though probably the latter may also be described as a power of attorney."

Chief Justice Chagla of Bombay High Court in A.S. Patel vs. National Rayon Corporation reported at AIR 1955 Bombay 262 in a similar situation has beautifully summarised the law in the following words:-

"The contention put forward by Mr. Bengeri before me is that 'pleading' is included in the expression, 'appearance, application or act in or to any Court.' In my opinion, it is clear that 'pleading' would not be included in any of these expressions. The right of audience in Court, the right to address the Court, the right to examine and cross-examine witnesses, are all parts of pleading with which O.III does not deal at all. The deals with restricted class of acts in connection with the litigation in Court and it is with regard to that restricted class of act that O.III permits recognised agents to be appointed."

Chagla, C.J. specifically expressed his disagreement with the judgment of Justice Teja Singh in the case of G.G. in Council vs. Bhagwan Sahai, reported at AIR 1948 EP 61 who had taken a view that a recognised agent had the right on behalf of the party to examine and cross-examine witnesses. The view expressed was:

"Therefore, the proviso makes a distinction between appearing, pleading or acting and appearing or acting. Whereas a party may not only appear to act but he may also plead, a recognised agent as defined in R.2, O.III can only appear or act and not plead. Therefore, as far as the districts are concerned, a recognised agent has no right to plead by reason of the proviso to S.9, and, as I have already pointed out, right of audience is a natural and necessary concomitant of the right to plead, and therefore if a recognised agent has no right to plead, it follows that he has no right of audience in Court. Therefore, as far as the question that directly arises for my decision as raised by Mr. Bengeri is concerned, there is no doubt that even on a strict construction of O. III, R. 1, and even assuming that the provisions of O.III, R.1, apply to the High Court, Shambhuprasad has no right of audience in this Court, as the right of audience does not form part of an appearance, application or act in or to any Court."

The salient point decided by Chief Justice Chagla are :-

- i) The expression "appearance, application or at in or to any Court in O.3, R.1 Civil P.C. does not include pleading. The right of audience in Court, the right to address the Court, the right to examine and cross examine witnesses, are all parts of pleading with which.
- ii) Order 3 does not deal with rights of parties who appear in person in Court and it cannot be disputed that a party in person has the right of audience in Court. Order 3 merely deals with recognised agents and pleaders. It dos not even deal with the right of pleaders to plead, because the right of a pleader to plead arises independently of O.3.
- iii) Clause 10, Letters Patent, expressly provides that the right to act no less than the right to plead is only conferred upon advocates, vakils and attorneys, and the only exception made in cl.10 is that the suitor himself may appear, plead and act either on his own behalf or on behalf of a co-suitor.
- iv) The expression "right to practise" in S.8 Bar Councils Act is an expression

much wider than the right to plead. It includes both pleading and acting, and the Bar Councils Act has conferred that right only upon those persons who have been enrolled as Advocates of the High Court. Therefore, S.8, Bar Councils Act really is in conformity with cl. 10, Letters Patent, and there again S.8 seems to provide expressly otherwise than what O.3, R.1 enacts. Therefore, again, it is possible to take the view that as far as the High Court is concerned, under S.8 of the Bar Councils Act the right not only to plead but to act is restricted to those who are enrolled by the High Court and that right cannot be conferred upon recognised agents.

This view of Justice Chagla has been followed in a large number of decisions including a Division Bench judgment of the Bombay High Court, Nagpur Bench in Varsha A. Maheshwari, Parijat Enterprises, through Power of Attorney, Ajay Maheshwari Vs. Bhushan Steel Limited, New Delhi and another reported at 2011(3) Mah LJ 666. Similar views have been expressed by other High Courts in the case of Pannalal and Others versus Deoji Dhanji reported at AIR 1955 Madhya Bharat 109, Samduhan versus Madanlal reported at AIR 1959 Raj 35, Moulasab Versus Mohammad Hasim and Others reported at ILR 2003 Kar 1041 and P. Thayarammal versus Pitty Kuppaswamy Naidu reported at 46 L.W. 734.

The expression 'appearance, application or act' does not, as already stated, include the right to plead. It has accordingly been held that a recognised agent has no right of audience, and cannot plead (Eastern Tavoy Mineral Corporation AIR 1934 Cal 563, Harchand Ray v. B.N. Rly. Co. (1915)19 Cal WN 85; Aswin Shambu Prasad Patel v. National Rayon Corpn. Ltd., AIR 1955 Bom 262; Samdukhan v. Madanlal, AIR 1959 Raj 35; The Anglo-French Drug Co. v. V.R.D. Tinaikar AIR 1959 Bom 21, Pannalal v. Deoji Dhanji AIR 1955 MB 109. The contrary view taken in Governor-General v. Bhagwan Sahai, AIR 1948 EP 61 has been dissented from in later decisions and cannot be regarded as good law.

In Harishankar Rastogi vs. Girdhari Sharma & Anr. reported at AIR 1978 SC 1079, the Supreme Court held that a private person who is not an advocate has no right to barge into court and claim to argue for a party. He must get the prior permission of the Court for which the motion must come from the party himself. The Supreme Court further observed that the Court may even after grant of permission withdraw it half-way through if the representative proves himself reprehensible. In a later judgment in T.C. Mathai vs. District & Sessions Judge reported at (1999) 3 SCC 614, the same view was expressed. The Supreme Court further approved the judgment of the Full Bench of the Madras High Court in M. Krishnammal (Supra) where the observations made that 'though stated sixty years ago, would represent the correct legal position even now.'

In the case of Sanjay R. Kothari & Ors. vs. South Mumbai Consumer Disputes Redressal Forum and Ors. reported at AIR 2003 Bom 15, it has been held that:

"It is now well settled position of law that the right conferred on advocate under the provisions of the Advocates Act is a statutory right and not a fundamental

right guaranteed under the Constitution. A person who is not an advocate cannot practise law. Any person other than party to the proceedings or advocate cannot claim right of audience before the Court, tribunal or authority unless it is provided by law or such person is specifically permitted by such court, tribunal or authority. This in sum and substance is the scheme of Sections 29, 32 and 33 of the Advocates Act, 1961 and Section 14 of Bar Councils Act, 1926."

In *Hari Om Rajender Kumar v. Chief Rationing Officer* reported at AIR 1990 AP 340 the Andhra Pradesh High Court speaking through M. Jagannadha Rao, J. (as His Lordship then was) held that the right to appear and plead for a principal in Court as also the right to practice are concerned, are governed by Sections 32 and 33 of the Advocates Act. It is held that:

"Now, the Advocates Act, 1961, which is an Act to amend and consolidate the law repeals the above provisions of the Letters Patent and parts of the Legal Practitioners Act. Section 32 of the Advocates Act uses the word 'appear' while Sections 29 and 32 use the expression 'practise'. The word 'practise' includes both acting and pleading and takes in all the normal activities of a legal practitioner. Though Section 33 of the Advocates Act uses the word 'practise', we are here concerned with the word 'appear' used in Section 32. A non-advocate, when he seeks permission to 'appear' cannot, in my view, be permitted to 'address' the court on the strength of the power of attorney."

In a fairly recent decision in *Goa Antibiotics and Pharmaceuticals Ltd. vs. R.K. Chawla and Another* reported at (2011) 15 SCC 449 Section 32 and 33 of the Advocates Act, 1961 came up for consideration on interpretation of Section 33, in paragraphs 3 and 4 it is stated:

"3. A perusal of the above provision shows that only a person who is enrolled as an advocate can practice in a court, except where otherwise provided by law. This is also evident from Section 29 of the Act. A natural person can, of course, appear in person and argue his own case personally but he cannot give a power of attorney to anyone other than a person who is enrolled as an advocate to appear on his behalf. To hold otherwise would be to defeat the provisions of the Advocates Act.

4. Section 32 of the Act, however, vests discretion in the court, authority or person to permit any person who is not enrolled as an advocate to appear before the court and argue a particular case. Section 32 of the Act is not the right of a person (other than an enrolled advocate) to appear and argue before the court but it is the discretion conferred by the Act on the court to permit anyone to appear in a particular case even though he is not enrolled as an advocate."

The reference to *Janki Vashdeo Bhojwani* (Supra) where the Supreme Court held that the right of power of attorney is to appear, plead and act on behalf of the party and can state on oath whatever knowledge he has about the case but he cannot become a witness on behalf of the party and that he can only appear in his personal capacity, has no relevance to the issue before us.

In Janki (supra), the issue before the Supreme Court was whether the Power of Attorney holder can depose in place of the principal. In that context it was observed:

"17. On the question of Power of Attorney, the High Courts have divergent views. In the case of Shambhu Dutt Shastri Vs. State of Rajasthan, 1986 (2) WLL 713 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. 18. The aforesaid judgment was quoted with the approval in the case of Ram Prasad Vs. Hari Narain and Ors., AIR 1998 Raj 185. It was held that the word "acts" used in Rule 2 of Order 3 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."

Justice Bhattacharya has considered the aforesaid provisions and some of the decisions referred to above and on consideration of the said premises and authorities on the subject observed:

"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."

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. 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'."

What emerges from the aforesaid decisions are summarized hereinafter:-

"A non-advocate, when he seeks permission to 'appear' cannot be permitted to 'address' the Court on the strength of the power-of-attorney. The provision of Order 3 Rule 1 which permit appearance, applications or acting in any Court by a power-of-attorney holder on behalf of a principal are subject to the provisions of the Advocates Act 1961 in particular, Sections 32 and 33. In view of legal and professional ethics and conducts and etiquette at the Bar a party cannot conduct his case himself without discharging his counsel appearing for him in the case. The words 'appearance' and 'acting' do not include 'pleading' and a recognised agent who is entitled to appear and act for a party is not entitled to a right of audience [see AIR 1971Delhi 110, (1969)1 Madras Law Journal 207]. A right to examine and cross-examine witnesses is, acting and not pleading. Order 3 does not deal with pleading at all. It deals with a restricted class of acts in connection with the litigation in Court and it is with regard to that restricted class of acts that Order 3 permits recognised agents to be appointed. The power of attorney holder cannot depose in place and stead principal. The provision of Order 3 Rules 1 and 2 of the Code empowers the holder of the power of attorney to 'act' on behalf of the principal. The word 'acts' mention in Order 3 Rules 1 and 2 is confined only to 'acts' done by a power of attorney holder in exercise of power granted to him by virtue of the instrument. The term 'acts', hence does not

include depositing in place and stead of the principal."

The right of practice is different from the right of appearance in a particular case. The right of practice is a right of advocates to practice the profession of law before all courts, tribunals, authorities, etc, but the right of appearance to appear in a particular case on the permission granted by the court under Section 32 of the Advocates Act 1961 is an exception to the right of practice by advocates.

While we are in agreement with the views expressed by various High Courts that the power of attorney has no right to address the court, however, at the same time we are of the opinion that there is a discretion in the court in the case of a close relative to permit the power of attorney to address the court. This discretion can be exercised when the court is assured that the relative appearing on behalf of the petitioner is conversant with the law, the facts and is in a position to address and assist the Court. In other words he must inspire confidence in the Court of his ability to address the Court on the issues which arise in the matter.

In the instant case, Sefalika Ash apparently has given a consent to the grant and thereafter she retracted and filed an affidavit in support of her caveat. The affidavit was affirmed by Monimanjusha Nandy, wife of the present applicant under a special power of attorney executed by her mother in her favour. The affidavit was inarticulately drafted. In paragraphs 10 and 11 of the affidavit in support of the caveat, it is stated:-

"10. That the instant Affidavit conferred as 'Special Power of Attorney' to Smt. Monimanjusha Nandy on dated 16.02.2012 to deal with PLA/53/2010 (in Original Side) in the High Court at Kolkata and T/S No. 3268 of 2010 in the City Civil Court at Kolkata to execute all works and deals of necessary papers and documents as my true and lawful attorney to sign all necessary papers and documents on my behalf.

A photocopy of 'Special Power of Attorney' dated 16.02.2012 annexed hereto and marked 'A-3' to this affidavit.

11. That the statements, comments and/or averments, as made and /or contained in the foregoing paragraphs 1 to 10 of this affidavit are all true and correct to the best of my knowledge and belief."

It, thus, appears that Monimanjusha Nandy in the affidavit has claimed that the averments in the said affidavit are true and correct to the best of her knowledge and belief. She is the eldest daughter of the deceased. As a power of attorney holder, she can appear only as witness in her personal capacity and whatever knowledge she has about the case she can state on oath but she cannot appear as a witness on behalf her mother in that capacity. Monimanjusha Nandy can only appear in her own capacity but not as a witness on behalf of Sefalika in the capacity of Sefalika. However, if Monimanjusha as a special power of attorney

holder had rendered some acts in pursuance of the power of attorney she might depose for Sefalika in respect of such acts but she cannot depose for Sefalika in respect of acts done by Sefalika and not by her. Similarly, she cannot depose for Sefalika in respect of matters of which only Sefalika can have a personal knowledge and in respect of which Sefalika is liable to be cross examined. Monimanjusha Nandy has not filed any caveat. The husband of Monimanjusha Nandy has now obtained a power of attorney from his mother in law. The applicant has not affirmed the affidavit in support of the caveat and as such he cannot depose as to facts which are within the knowledge of Monimanjusha. Apart from the aforesaid fact it does not appear that the applicant is well-versed with the case and not a person who has anything to do with the matter. The applicant not only wants to appear and argue on behalf of the caveator/caveatrix but also wants to cross examine the witness of the plaintiff and depose on behalf of the caveatrix. He does not appear to be well-versed with the subject and the law and would not be in a position to assist the court in the matter. In other words he does not inspire confidence in the court of his ability to address the court on the issue which arise in the matter. We feel that the said application was filed to delay the completion of witness action of the plaintiffs. Moreover we could not find from record that the Vakalatnama in favour of Tushar Kanti Har, Advocate has been discharged.

Under such circumstances we dismiss the appeal and affirm the order passed by the learned Single Judge.

We find that the witnesses required to be examined by the plaintiffs in support of the execution of the Will are elderly persons and their evidence need to be immediately recorded otherwise it may cause serious prejudice to the plaintiffs.

We request the learned Single Judge having the determination to conclude the evidence of the plaintiff's witnesses after disposal of the application for framing of additional issues as expeditiously as possible subject to the convenience of the Court.