
(2006) 08 AP CK 0040
In the Andhra Pradesh High Court
Case No : CRP No. 3028 of 2006

Shaik Rafath Begum

APPELLANT

Vs

T.V.R. Anjaneyulu (died) per LRs. and Others

RESPONDENT

Date of Decision : 18-08-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 3A
Evidence Act, 1872 — Section 120

Citation : AIR 2007 AP 23 : (2006) 6 ALD 769

Hon'ble Judges : C.Y. Somayajulu, J

Bench : Single Bench

Advocate : M.V. Suresh, for the Appellant; R. Radha Krishna Reddy, for the Respondent

Judgement

C.Y. Somayajulu, J.—In the suit for perpetual injunction filed by the revision petitioner, she gave her affidavit in lieu of the chief-examination and was cross-examined in part. Later she did not appear before the Court on the ground of sickness and so her Counsel filed a memo informing the Court that as revision petitioner is unable to attend the Court in view of her sickness her evidence may be eschewed and her husband who is also her Power of Attorney, may be examined as a witness on her behalf. Thereafter, respondent filed a memo contending that inasmuch as Power of Attorney cannot be a substitute for the party, permission to examine her general Power of Attorney as a witness on her behalf cannot be granted to the revision petitioner in view of the ratio in Janki Vashdeo Bhojwani and Anr. v. Indusind Bank Limited and Ors. 2005 (3) ALD 43 (SC) and Ravula Needlamma Vs. Sandaiah, . Accepting the contentions raised in the said memo, the learned trial Judge, by the order under revision, directed the revision petitioner to give evidence in the first instance before she examines her Power of Attorney as her witness. Hence, this revision by the plaintiff.

2. The contention of the learned Counsel for the revision petitioner is that inasmuch as the revision petitioner can prove her case by examining other

witnesses also and not necessarily by examining herself as a witness, and since the worst that can happen to her is the Court drawing an adverse inference against her, for not giving evidence in support of her case, if circumstances so warrant, and since the Court has no power to direct a party to give evidence as a witness on her behalf and since the husband of revision petitioner is competent to speak on behalf of his wife in view of Section 120 of Evidence Act, the trial Court was in error in directing the revision petitioner to give evidence, before she examines her witness. Relying on *Garigipati Kesava Rao Vs. Prathipati Srilakshmi*, , the learned Counsel contended that in view of Rule 3A of Order 18 CPC, when a party can even after examining witness seek permission of the Court to give evidence at a later stage, and when CPC does not mandate that a party has to give evidence as a witness in support of his case, Court has no power to direct a party to examine himself as a witness in the first instance before examining his or her witnesses. Reliance is also placed on *Mallipudi Babu Rao Vs. Mallipudi Prameela Kumari*, , where it is held that a party to the suit can appear and act through a Power of Attorney holder and that a Power of Attorney is competent to give evidence on behalf of the party, and the relevancy and the effect of the evidence of Power of Attorney would depend on the facts of each case. The contention of the learned Counsel for the respondent is that in view of the observation of the Apex Court in *Janki Vashdeo Bhojwani's* case (supra), Power of Attorney of a party cannot be a substitute for the party, and so the Court has ample power to direct the party to give evidence as a witness initially and so there are no grounds to interfere with the order under revision more so, because Section 120 of the Evidence Act does apply to this case as the respondent is intending to examine her husband not in his capacity as her husband but in his capacity as her Power of Attorney.

3. Though Rule 3-A of Order 18 CPC directs the party, wishing to examine himself as a witness, to give evidence as a witness in the first instance before he examines other witnesses, it vests the Court with the power to permit a party to the suit to give evidence as a witness on his behalf at a subsequent stage, by recording reasons therefor. Therefore a party not giving evidence as a witness in the first instance, would be running the risk of the Court refusing permission to give evidence as a witness at a later stage, and depending on the facts and circumstances of the case such party may also be facing her peril of the Court drawing an adverse inference for not giving evidence as a witness on his behalf. No provision of law which empowers the Court to direct a party to the suit to follow a particular order of examination of his witnesses or which empowers the Court to compel a party to give evidence, is brought to my notice. Since a fact in issue can be proved by a party either through his evidence or through the evidence of his witness, party to the suit has the option or freedom of choice as to how he should prove his case. So it is not within the purview of the Court to give a direction to the party to give evidence as a witness in the first instance, before examining witnesses on his behalf.

4. Question whether the evidence of the witness examined by the party proved

the case of the party concerned or not can be decided by the Court only at the time of disposal of the case after considering the entire material on record. Since a Power of Attorney is competent witness to state the facts within his personal knowledge if and when he states any facts which are not within his personal knowledge, and if he gives hearsay evidence, the opposite party can raise an objection on the ground of its being hearsay evidence. The Court, by recording the objection, can decide whether the evidence being given is hearsay or not.

5. The Court without giving an opportunity to the person to go into the witness box and give evidence, cannot decide whether that person is a competent witness or not. Since the Power of Attorney is competent to give evidence with reference to the facts within his knowledge, whether the evidence of the Power of Attorney can be taken into consideration for giving a finding on the issues framed or not, can be decided only at the time of disposal of the case but not at the stage of recording his evidence and so, in my considered opinion, the trial Court was in error in giving a direction to the revision petitioner to go into the witness box before she examines her husband as a witness.

6. I am not able to agree with the contention of the learned Counsel for the respondent inasmuch as the revision petitioner wants to examine her husband in his capacity as her Power of Attorney but not in the capacity as her husband, Section 120 of the Evidence Act does not apply to the facts of this case. Merely because a wife gives Power of Attorney to her husband, the relationship between them as husband and wife does not cease to exist, and so such Power of Attorney would still continue to be her husband. At the cost of repetition I must state that question whether the evidence given by the husband, as a Power of Attorney, is useful for deciding the issues in the suit or not has to be decided by the Court at the time of disposal of the case, but not at the stage of recording evidence. So the trial Court was in error in directing the revision petitioner to give evidence in the first instance before she examines her other witness.

7. For the above reasons the order under revision is set aside. The trial Court shall record the evidence of the Power of Attorney (husband) of the revision petitioner. If and when an objection is raised with regard to admissibility of the evidence of the Power of Attorney on the ground of its being hearsay or otherwise, the trial Court shall record the objections and give its findings on such objections. If the revision petitioner were to file an application to examine herself as witness at a later stage, the trial Court should decide the said application on its merits without being influenced by the observations made in this order. Parties are directed to bear their own costs in this revision.