

**(1999) 09 BOM CK 0037**

**In the Bombay High Court**

**Case No :** Civil Revision Application No. 100 of 1999

Shri Humberto Luis and another

APPELLANT

Vs

Shri Floriano Armando Luis and another

RESPONDENT

---

**Date of Decision :** 08-09-1999

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 2, Order 18 Rule 3A, Order 3 Rule 1, Order 3 Rule 2, Order 3 Rule 3  
Evidence Act, 1872 — Section 118, 60  
Trade Marks Act, 1940 — Section 76

**Citation :** (2000) 1 ALLMR 648 : (2000) 2 BomCR 754 : (2000) 1 MhLj 690

**Hon'ble Judges :** R.M.S. Khandeparkar, J

**Bench :** Single Bench

**Advocate :** J.E. Coelho Pereira, A. and S. Karpe, for the Appellant; Sudesh Usgaonkar, for the Respondent

---

## **Judgement**

This Judgment has been overruled by : Janki Vashdeo Bhojwani and Another Vs. Indusind Bank Ltd. and Others, AIR 2005 SC 439 : (2005) 123 CompCas 154 : (2005) 3 CTC 128 : (2004) 10 JT 264 : (2005) 140 PLR 1 : (2004) 10 SCALE 244 : (2005) 2 SCC 217 : (2004) AIRSCW 7064 : (2005) 3 Supreme 275

R.M.S. Khandeparkar, J.—This Revision Application arises from order dated 6th April, 1999 passed in Special Civil Suit No. 153 of 1993 by Civil Judge, Senior Division, Margao. By the impugned order, the Trial Court has held that the recognised agents cannot step into the shoes of the plaintiff on the basis of Power of Attorney and secondly has directed the plaintiff in the suit to step into the witness box in order to prove their case.

2. The facts relevant for the decision are that the petitioners have filed a suit against the respondents for cancellation of a gift deed in relation to and for partition of the suit property. The suit is contested by the respondents. When the matter came up for hearing, the plaintiffs in the suit were sought to be represented by their Power of Attorney as the witness on their behalf by virtue of

a deed of Power of Attorney executed by the plaintiffs in favour of such person. After the examination-in-chief of such person being recorded partly, the matter was adjourned to further date on which day, the respondents who are the defendants in the suit sought to raise an objection that the holder of Power of Attorney is not entitled to depose for and on behalf of the plaintiffs. Reliance was sought to be placed on a decision of the Rajasthan High Court in the matter of Ram Prasad Vs. Hari Narain and Others, .

3. The Trial Court placing reliance upon the judgments in the matter of Samdukhan Vs. Madanlal and Others, , The Anglo French Drug Co., (Eastern) Private Ltd. Vs. R.D. Tinaikar, and in the matter of Aswin Shambhuprasad Patel and Others Vs. National Rayon Corporation Ltd., held that adducing of evidence on behalf of the principal on the strength of the Power of Attorney amounts to pleading the case for the party and the P.W. 1, having entered the witness box on behalf of the plaintiffs in capacity of holder of the Power of Attorney, has actually performed the act of pleading for and on behalf of the plaintiffs.

4. Upon hearing Shri J.E. Coelho Pereira, Senior Advocate appearing for the petitioners and Shri Sudesh Usgaonkar, appearing for the respondents and on perusal of the records and various decisions cited across the bar, it is evident that in terms of order III of Code of Civil Procedure, the parties to litigation are authorised to be represented by their agents for various purposes. In terms of Rule 1 thereof any appearance, application or act in or to any Court, required or authorised 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 in any such appearance shall, if the Court directs, be made by the party in person. In terms of Rule 2, the recognised agents of the parties by whom such appearances, applications and acts may be made or done are the persons holding Powers of Attorney, authorising them to make and do such appearances, applications and acts on behalf of such parties, as also in case persons carrying 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 the matters connected with such trade or business only, where no other agent is expressly authorised to make and do such appearances, applications and acts. In terms of Rule 3, process served on the recognised agent of a party shall be as effectual as if the same had been served on the party in person, unless the Court otherwise directs. It also provides that the provisions for the service of process on a party to a suit shall apply to the service of process on his recognised agent.

5. There can be no dispute that this Court in the matter of Anglo French Drug Co. v. R.D. Tinaikar (supra) has held that the word "act" appearing in Order III, Rule 1 of CPC is not such as would include the act of pleading and is intended to cover only such acts as are capable of being done in the act of acting for a litigant. The

Court has further held that the word "act" in Order III, Rule 1 of CPC is preceded by the words "appearance and application" and the term "act" appears to have been used in the technical sense and not in the ordinary sense as is being referable to any action by any party. The said observations, however, were made while dealing with an appeal u/s 76 of the Trade Marks Act, 1940 wherein the question raised for consideration was as regards the right of a Registered Trade Marks agent to plead before the Registrar of Trade Marks.

6. Equally, it is true that this Court in the matter of *AS. Patel and others v. National Rayon Corporation Ltd.* (supra) has held that the expression "appearance, application or act" in or to any Court in Order III, Rule 1 of CPC does not include pleading and that 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 Order III does not deal at all. Again, these observations were in a matter wherein the petitioners therein had given a general Power of Attorney to one Shambuprasad in a Civil Revision Application and when the matter came up for hearing before the Court, the said Attorney Shambuprasad wanted to address the Court on behalf of the petitioners therein. The question, therefore, which arose for consideration in the said case was whether the holder of Power of Attorney could have addressed the Court on behalf of his principal. In other words, the question was whether a constituted Attorney could plead in the Court on behalf of the party to the case.

7. Considering the questions which arose for determination before the Court in both the above referred decisions, it was held that the expression "act" in Order III, Rule 1 of CPC does not permit the holder of Power of Attorney to plead on behalf of some other person who is a party to the proceedings in the Court. Both the decisions are in relation to the right to plead or right to address the Court on behalf of some other person. Time and again, the Apex Court and this Court has held that right to address the Court is a privilege assured to the members of the Bar in terms of the provisions of the Advocates Act and, therefore, the provisions of CPC empowering others to represent the litigants cannot be interpreted to annul the provisions of the Advocates Act, 1961. Both the decisions of this Court referred to above do not relate to the matter relating to entitlement of a holder of the Power of Attorney from a party to the proceedings in a Court to depose or give statement on oath before such Court on behalf of such party to the proceedings.

8. The learned Advocate has brought to my notice decision of a Single Judge of this Court in the matter of *Jacinto Pereira and others v. Baboi Naik and others*, reported in 1999(2) G.L.T. 186. The decision is clearly distinguishable. That was a case where it was not disputed that a constituted Attorney cannot appear in the capacity of the party who constituted such Attorney but can appear only as a witness and further in view of specific statement on behalf of the concerned Advocate for the plaintiff to the effect that plaintiffs do not wish to examine themselves as the witnesses in the suit, the constituted Attorney was allowed to

be examined as the witness for the parties. It cannot be forgotten that a decision on the basis of a concession on a question of law made by a Counsel cannot be understood to lay down a binding proposition of law. Every decision is to be read and understood bearing in mind the law laid down by the Apex Court in the matter of Union of India (UOI) and Others Vs. Dhanwanti Devi and Others, . Considering the fact that the said decision was given on concession made by the Advocate for the parties and in the circumstances of the peculiar facts of the case, it cannot be said that the said decision lays down the law to the effect that the holder of Power of Attorney cannot appear on behalf of the principal to depose before the Court.

9. Order XVIII, Rule 2 of CPC provides that on the day fixed for the hearing of a suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove. Rule 3-A of the said Order XVIII which was inserted by way of amendment, by Act 104 of 76, provides that where a party himself desires to appear as the witness, he shall do so before any other witness on his behalf is examined, unless the Court for the reasons to be recorded permits him to appear as his own witness at a later stage. The provisions contained in Rule 2 and Rule 3-A of Order XVIII of CPC clearly disclose that it is neither mandatory for the party to litigation to appear in person in order to state his case before the Court nor it is necessary to examine himself in support of his case. It is entirely in his discretion to examine himself as the witness or not. In case he desires to examine himself, he should appear before examining other witnesses on his behalf, unless otherwise specifically permitted by the Court for justifiable reasons. The provisions contained in Rule 2 to the effect that the party shall state his case and produce his evidence in support of the issues which he is bound to prove are to be interpreted harmoniously and without ignoring the other provisions of the Civil Procedure Code. It cannot be forgotten that the provisions of CPC are related to the procedure in the Court and it is always to be remembered that the procedure is meant to assist the Court to arrive at a correct decision in a matter before it on the basis of all the material placed before it. The rules of procedure cannot be interpreted so as to create undue hardship to the parties to the proceedings in rendering necessary assistance to the Court for arriving at the truth. The Apex Court in the matter of Ganesh Trading Co. Vs. Moji Ram, has clearly held that a procedural law is to facilitate and not to obstruct the course of substantive justice.

10. Bearing in mind the well settled principle of law that the procedural law is to facilitate the course of substantive justice and reading harmoniously the provisions contained in Rule 1 of Order III of CPC with the provisions in order XVIII thereof, it is clear that there is no restriction imposed upon the holder of Power of Attorney of a person to depose on behalf of the person giving such power. The competency of such person to depose on behalf of the party to the litigation has not been curtailed in any manner by the said provisions of law. The competency of witness is dealt with in section 118 of the Evidence Act. Section

118 of the Evidence Act clearly provides that all persons shall be 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. The explanation clause to the said section provides that a lunatic is not competent to testify unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them. Therefore, the only text of competency is the capacity to understand the questions and to give rational answers. However, 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. Moreover, it would be in the realm of credibility of such testimony and not relating to the competency of a person to depose of behalf of some other person.

11. Even in the case of *Samdukhan v. Maddanlal* (supra) the Rajasthan High Court has held that the words "any appearance, application or acts" in Order III, Rule 1 of CPC do not include pleadings and recognised agent holding a General Power of Attorney therefore cannot be allowed to plead and argue for his principal under the said rule. In other words, both the decisions of this Court referred to above as well as that of the Rajasthan High Court which has been relied upon by the Trial Court do not in any manner relate to the issue as to whether a person holding a Power of Attorney on behalf of the party to the suit can depose for and on behalf of his principal or not, but they relate to the issue of Power of such Attorney to plead and argue on behalf of the party before the Court. The function of pleading and arguing before the Court on behalf of the parties to the proceedings is the privilege reserved for the Advocates under the Advocates Act, 1961. Therefore, it cannot be concluded that the provisions contained in Order III, Rule 1 of CPC 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 P.W. 1 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 recognised agents cannot step into the shoes of the plaintiff in order to depose on behalf of the plaintiff cannot be sustained and are liable to be set aside.

12. It is true that a learned Single Judge of Rajasthan High Court in *Ram Prasad v. Hari Narain* (supra) has held that the word "acts" in Rule 2 of Order III of CPC does not include the act of Power of Attorney holder to appear as a witness on behalf of party and that the Power of Attorney holder of a party can appear only as a witness in his personal capacity. With respect, I am unable to subscribe to this view. As already held above, the provisions contained in Order III, Rule 2 of CPC cannot be construed to disentitle the Power of Attorney holder to depose on behalf of his principal. The provisions contained in Order III, Rule 2 of CPC do not deal with the incompetency or disentitlement of the Attorney to "act" for the

principal "to depose" on behalf of the latter.

13. As regards the direction given to the plaintiff to step in the witness box in order to discharge the burden of the issues upon him, it is apparent from the provisions contained in Order III, Rule 1 that such a direction 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 direct the party to appear before the Court to discharge the burden of issues which lies on such person. The order in that regard will have necessarily to be speaking order. Undisputedly, the order does not disclose any reason apart from the fact that holder of the Power of Attorney is held to be not competent to depose on behalf of the principal. Once the said finding is set aside, the impugned order does not disclosed any justification for maintaining the direction to the plaintiff to step into the witness box to depose in the matter.

14. In the result, therefore, the petition succeeds. The impugned order is hereby set aside. The Trial Court shall proceed with the matter from the stage where the deposition of P.W. 1 was interrupted after being partly recorded. Rule made absolute in above terms. No order as to costs.

15. Petition succeed.