District: Dhaka

IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(CIVIL REVISIONAL JURISDICTION)

Present

Mr. Justice Sardar Md. Rashed Jahangir

Civil Revision No. 3657 of 2024

In the matter of :

Md. Samsul Islam Khan
… Petitioner
-Versus-
Md. Motiar Rahman Molla and others
…Opposite parties

Mr. Ehsan A. Siddiq, Advocate with
Mr. Syfullah Al Muzahid, Advocate
…For the petitioner

Mr. Md. Shamsuddin, Advocate
…For the opposite party No. 1

Heard on:30.01.2025, 06.02.2025 and 12.02.2025
Judgment on: 19.02.2025.

Rule was issued on leave pursuant to an application under section 115(4) of the Code of Civil Procedure calling upon the opposite party No. 1 to show cause as to why the judgment and order dated 28.04.2024 passed by the Additional District Judge, Eighth Court, Dhaka in Civil Revision No. 258 of 2022 affirming

the Order No. 53 dated 27.10.2022 passed by the Senior Assistant Judge, Seventh Court, Nawabganj, Dhaka in Title Suit No. 39 of 2021 rejecting the application of the petitioner to strike out the deposition of the P.W. 1 from the record should not be set aside and/or such other or further order or orders as to this Court may seem fit and proper.

The present opposite party No. 1 as plaintiff filed Title Suit No. 224 of 2013 against the petitioner and others before the Joint District Judge, Fifth Court, Dhaka for declaration of title and for further declaration that R.S. khatian No. 106 corresponding to plot No. 338 was wrongly prepared in the name of the defendant, Samej Uddin Bepari. The suit was transferred to the Senior Assistant Judge, Seventh Court, Nababganj, Dhaka and has been renumbered as Title Suit No. 39 of 2021.

The case of the plaint briefly are that the scheduled property was originally belonged to Nazibullah Mollah and the C.S khatian was duly prepared in his name. Nazibullah Mollah died intestate leaving behind 3(three) sons, Kalimuddin Mollah, Joinuddin

Mollah and Ali Hossain Mollah and one daughter, Rahimon Nesa. The undivided 2.18 acres of land of Nazibullah Mollah through an amicable partition having been distributed to his sons and daughter, accordingly, each of the sons got .62 decimals and daughter got .31 decimals of land. Ali Hossain Mollah, son of Nazibullah Mollah died intestate leaving behind one son, Kadom Ali Mollah and 3(three) daughters, Aymon Nesa alias Omarjan, Rahatun Nesa and Ayshatun Nesa. Rahimon Nesa died intestate leaving behind 2(two) sons, Sheikh Lal Masud, Sheikh Salam and one daughter Nayonjan. Sheikh Salam died intestate leaving behind 4(four) sons, Sheikh Ibrahim, Sheikh Banamali, Sheikh Kanu and Sheikh Mohon. The heirs of Rahimon Nesa intended to sell their share and accordingly, 2(two) sons of Kadom Ali Mollah, namely, Motiar Rahman Mollah and Sonamoddin Mollah through registered saf-kabala deed No. 1581 dated 04.02.1970 purchased .4 decimals of land of Rahimon Nessa in plot No. 263 within the scheduled property. Ayshatun Nesa, daughter of Ali Hossain Mollah sold out .2 decimals of land of S.A. plot No. 263

to brother Kadom Ali Mollah through registered saf-kabala being No. 2940 dated 17.05.1955. Rahatun Nesa, another daughter of Ali Hossain Mollah sold out .2 decimals of land of S.A. Plot No. 263 through registered kabala No. 5313 dated 28.08.1961 to Kadom Ali Mollah. Sona Mollah and Matiar Rahman Mollah, sons of Kadom Ali Mollah also purchased .2 decimals of land of S.A. plot No. 263 from Aymon Nesa, daughter of Ali Hossain Mollah through registered deed No. 98 dated 03.10.1953. Kadom Ali Mollah and his sons in the manner as aforesaid became owner of .29 decimals of land of S.A. plot No. 263 corresponding to R.S. plot No. 338 and through amicable partition among the heirs of Kadom Ali Mollah, Motiar Rahman Mollah got the entire .29 decimals of land and thereby possessing the same peacefully and uninterruptedly. On 25.11.2012, when the plaintiffs went to the local Tahsil office to pay rent, was informed that the entire property of R.S. Plot No. 338 of R.S. khatian No. 106 has been wrongly recorded in the name of defendant. The defendant has no right, title and possession over the suit land. Due to wrong

recording, cloud has been created upon the title of the plaintiff. Hence, he filed the suit.

The suit has been contested by the defendants. During hearing, the P.W. 1, holder of General Power of Attorney (son of the plaintiff) examined in the witness box on behalf of the plaintiff. Challenging the said examination and recording of evidence through the power of attorney holder, the defendant No.2 filed an application before the Senior Assistant Judge, Nababganj, Dhaka for striking out/to expunge the deposition/evidence of P.W.1, stating that under the Code of Civil Procedure as well as relevant laws of the land, the power of attorney holder is not authorized to depose on behalf of the plaintiff.

Learned Senior Assistant Judge after hearing both the parties by his order No. 53 dated 27.10.2022 rejected the application and thereby fixed the next date for cross-examination of P.W. 1.

Having been aggrieved by the aforesaid order of learned Senior Assistant Judge, Seventh Court, Nababganj, the defendant

No. 2 preferred Civil Revision No. 258 of 2022 before the District Judge, Dhaka under section 115(2) of the Code of Civil Procedure. On transfer, the revision was heard by the Additional District Judge, Eighth Court, Dhaka and by his judgment and order dated 28.04.2024 rejected the revisional application affirming those of dated 27.10.2022 passed by the Senior Assistant Judge, Seventh Court, Nababganj, Dhaka in Title Suit No. 39 of 2021.

On being aggrieved by and dissatisfied with the order of learned Additional District Judge, the defendant preferred the revisional application and obtained the Rule.

Mr. Ehsan A. Siddiq, learned Advocate appearing with Mr. Saifullah Al-Muzahid, learned Advocate for the petitioner submits that the word ‘acts’ used in Order III, rule 2 of the Code of Civil Procedure does not contemplate to include any power of attorney holder to appear and depose as a witness on behalf of the principal. He further submits that power of attorney holder of a party can be a witness in his personal capacity, but he cannot be

examined/deposed on behalf of the plaintiff and since, in the instant case, the power of attorney holder of plaintiff has been examined in the witness box on behalf of him, which cannot be allowed and as such, the said evidence is liable to be expunged.

He placed reliance on a judgment of the Supreme Court of India passed in the case of Janki Vashdeo Bhojwani and others Vs. Indusind Bank Limited and others, reported in AIR 2005 SC 439, wherein it was held that the word ‘acts’ used in rule 2 of Order III of the Code of Civil Procedure does not include the act of power of attorney holder to appear as a witness on behalf of a party. In support of the submission, he also referred the case of Rajesh Kumar Vs. Anand Kumar and others, reported in AIR 2024 SC 3017 and the case of Ram Prasad Vs. Hari Narain and others reported in 1997(2) Weekly Law Notes 393.

On the other hand, Mr. Md. Shamsuddin, learned Advocate for the opposite party submits that in the present suit, the subject matter is the ancestral and family property of the plaintiff and the plaintiff being an aged man of 90 years used to look after his

property through his son, Shahidul Islam Mollah some times by appointing him his attorney and since, the family affairs and property has been dealing with by his son, the attorney holder, is quite competent to depose in support of the case of plaintiff. In support of the submission, he referred the case of Lal Miah (Hajee) Vs. Nurul Amin and others, reported in 57 DLR(AD)64 and thereby submitted that both the Courts below considering the facts and circumstances and the concerned provisions of law justly and legally rejected the application for striking out the evidences of the P.W. 1.

Heard learned Advocates, perused the revisional application together with the cited judgments and the provisions of law.

It appears that the P.W. 1, Md. Shahidul Islam Mollah was examined in the witness box on behalf of the plaintiff. It is to be noted here that he is the son of plaintiff and holder of general power of attorney, executed by his father, Motiar Rahman Mollah, the plaintiff herein. After deposition, the defendant No. 2 filed an application before the trial Court on the allegation that a power of

attorney holder cannot be examined in the witness box on behalf of the plaintiff within the authority as stipulated through the word ‘acts’ in rule 2 of Order III of the Code of Civil Procedure. The said application was rejected by the trial Court holding that a general power of attorney holder is quite competent to depose on behalf of the plaintiff. Thereafter, the defendant moved in an unsuccessful revision under section 115(2) of the Code of Civil Procedure before the District Judge, against which the present revision has been filed.

The whole contention of learned Advocate for the petitioner is based upon mainly 3(three) judgments, out of which 2(two) passed by the Supreme Court of India and the other one passed by the High Court (Jaipur Bench). In the case Janki Vashdeo Bhojwani and others Vs. Indusind Bank Limited and others, reported in AIR 2005 SC 439, the Supreme Court of India referring to the judgment of Ram Prasad Vs. Hari Narain and others passed by the Jaipur Bench of the High Court reported in Man/RH/0233/1998[1979(2)Weekly Law Notes 393] held that the

word ‘acts’ used in rule 2 of Order III of the Code of Civil Procedure 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 witness on behalf of the party in the capacity of that party.

Further contention of the petitioner is that the word ‘acts’ employed in Order III, rule 1 and 2 of the Code of Civil Procedure confines only in respect of the acts authorized to the attorney holder in exercising the power granted by the instrument itself and the stipulation through the word ‘acts’ shall not include deposing in place and instead of the plaintiff in witness box.

I have gone through the entire judgment of Rajesh Kumar Vs. Anand Kumar and others, reported in AIR 2024 SC 3017, Janki Vashdeo Bhojwani and others Vs. Indusind Bank Limited and others, reported in AIR 2005 SC 439 and the judgment of the

High Court of Jaipur in the case of Ram Prasad Vs. Hari Narain and others reported in 1997(2) weekly Law Notes 393.

The provision of Order XVIII of the Code of Civil Procedure, under the heading, 'Hearing of the suit and examination of witnesses', in rule 2(1) it is stated that on the day fixed for hearing the suit, the party having right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove. The aforesaid provision does not contemplate that the plaintiff or the defendant, as the case may be, must depose in person to prove their respective case. The parties are quite competent to prove their case through materials and reliable evidences both oral and documentary within the meaning of the provisions of the Evidence Act, 1872.

It is true as has been held in the Indian judgments that no one can depose or give evidence in support of the matter to which only the principal (herein the plaintiff) has the exclusive personal knowledge or in respect of his 'state of mind', otherwise the evidence so led cannot be relied upon within the meaning of

section 60 of the Evidence Act, 1872. In the case of Rajesh Kumar Vs. Anand Kumar and others, reported in AIR 2024 SC 3017, the Supreme Court of India upon summing up the judgment held that where the law requires or contemplates the plaintiff or other party to a proceeding to establish or prove his claim or case with reference to his 'state of mind' or 'personal conduct', the person concerned alone has to give evidence normally and not an attorney holder. It is further held that there is however a recognized exception to this requirement. Where all the affairs of a party are completely managed, transacted and looked after by an attorney (who may happen to be a close family member), it may be possible to accept the evidence of such attorney. It has been further held that example of such attorney holder may be a son/daughter exclusively managing the affairs as an old infirm parent.

Keeping in mind, the provisions of Order XVIII of the Code Civil Procedure together with the relevant provisions of the Evidence Act, this Court is in agreement with the aforesaid view,

i.e. in an exclusive purpose a power of attorney holder cannot depose on behalf of the principal, where the principal's exclusive personal knowledge is concerned or in respect of something with reference to the principal's 'state of mind' or 'conduct' of course together with the exception. Moreover, the provision of Order XVIII does not contemplate that a plaintiff or defendant is to come before the Court in person to prove his case. It is only provided that the party shall state his case and produce his evidence in support of the issues in controversy which he is bound to prove for establishing his own case.

In the case in hand, the plaintiff is an old aged person about 90(ninety) years (claimed by the plaintiff's side) and his family affairs is normally maintained by his family mets and issue in the case is regarding the statement or evidence of the ancestral property of plaintiff, inherited and purchased through the family line, from the heirs of C.S. recorded tenant (his forefather) and thus, his son can be a competent person to lead evidence in support of acquiring the family property, which is usually dealt

with by the son (P.W.1) of the plaintiff (since the plaintiff is an old man of 90 years). In the case of Lal Miah (Hajee) Vs. Nurul Amin and others, reported in 57 DLR(AD)64, their Lordships of the Apex Court therein repelling the view of the High Court Division that son has not been authorized to give testimony in favour of his mother with reference to section 120 of the Evidence Act, 1872, held that there is nothing in the said section that in Civil Proceeding the parties thereto shall have to come in the witness box to establish their respective case and that testimony of a witness examined on behalf of the parties to prove their respective case would not be the testimony of a competent witness. Meaning thereby, nothing in the said section provided that in civil proceeding the parties thereto shall have to come in person in the witness box to establish their respective case.

In the facts and circumstances, I do not find any reason to strike out or to expunge the evidence of P.W. 1, who is the son of the plaintiff as well as the holder of general power of attorney and competent to give evidence in favour of his father.

Accordingly, I find no reason to interfere into the judgment and order of both the Courts below.

In the result, the Rule is discharged without any order as to cost.

The order of stay granted at the time of issuance of the Rule is hereby recalled.

Communicate the judgment and order at once.

Obaidul Hasan/B.O.