

**IN THE COURT OF THE PRL.CIVIL JUDGE & JMFC,
KUNIGAL.**

**Present:- Sri Sagar G Patil B.A., LL.B.
Addl.Civil Judge & JMFC, Kunigal.**

Dated:- This the 7th day of September 2015

OS 420/2013

PLAINTIFF/S : Naseemunnisa
V/s

DEFENDANT/S : Naseera Khanam & others

PARTIES TO I.A.

Applicant/s : Naseemunnisa
V/s

Opponents/S : Naseera Khanm & Others

ORDER ON IA Under Order 3 Rule 2 CPC.

The plaintiff /applicant has filed this application under order 3 Rule 2 of CPC seeking permission to adduce evidence through his Special Power of Attorney by name Anwarpasha.

2. The plaintiff sworn to an affidavit in support of I.A and stated that now the suit is posted for plaintiff's evidence

and she is not keeping good health and unable to stand for a longer period. Hence, she is unable to attend the court regularly. Therefore, she executed the special power of attorney in favour of her husband Anwarpasha. He is conversant with the facts and circumstances of this case. Hence prayed to permit her to lead her evidence through his special power of attorney holder.

3. The defendants have filed their objections and denied the contents of the affidavit filed in support of the I.A. They further contended that the plaintiff has filed this suit for the relief of declaration on the basis of the registered will dated 15.03.2013. Hence, her evidence is very much necessary. The S.P.A holder cannot depose the facts as to execution of alleged will. Therefore, he is not competent person to depose on behalf of the plaintiff. In support of his objections he placed reliance on the decision of Hon'ble Supreme Court in Janki Vashdeo Bhojwani and another V/s Indusind Bank Limited and others, Wherein Hon'ble Supreme Court held that :-

A) Civil procedure code (5 of 1908), Order 3, rule 1 & 2 – power of attorney holder – cannot depose in place and instead of principal.

4. In view of above facts and circumstances the following points arise for my consideration: -

“Whether the Plaintiff has made out grounds to permit her to lead her evidence through her Special Power of Attorney?

5. My answer to the above point is in the **Affirmative** for the following :-

REASONS

6. The Power of attorney holder of a party only on the ground that he holds his Power of Attorney, cannot be said to be in the category of persons who are incapable of being witnesses as provided by Section 118 of the Evidence Act. The provisions of order 3 envisage that the parties to the suit required to appear either in person, by recognized agent or by pleader. Therefore, the parties to the suit have got statutory right to appear in person or through agent. In the present suit the plaintiff is the propounder of the will and it is well settled

that the will has to be proved by examine at least one of the attesting witnesses. The evidence of propounder is not necessary to prove the will unless suspicious circumstances appear. Hence, with due respect the above decision of Hon'ble Supreme Court is not applicable to the facts of the case. If the plaintiff has not chosen to remove those suspicious circumstances by leading cogent evidence, the suit fails. It is for the plaintiff to face the risk. Hence, the opponent is not entitled to oppose the same. **Therefore, I proceed to pass the following :-**

ORDER

The application filed by the Plaintiff under order 3 Rule 2 of CPC is hereby allowed and the plaintiff is permitted to adduce his evidence through his Special Power of Attorney holder.

(SAGAR G PATIL)
Addl. Civil Judge & JMFC,
Kunigal