



adducing evidence. Hence, the 4th defendant has executed a power-of-attorney deed dated 27.09.2019 in favour of the petitioner for adducing evidence and the petitioner seeks leave of this Court to adduce evidence in the capacity of the power-agent of the 4th defendant. The petitioner avers that the petitioner is a competent person to testify on behalf of the 4th defendant and on the aspects of the sale deeds executed in favour of the 4th defendant and on account of the illness of the 4th defendant, the petitioner prays for allowing this application and to permit the petitioner to testify on behalf of the 4th defendant.

The averments of the respondent in brief:

2. The respondent denies the averments of the petitioner in toto and avers that the power-of-attorney deed is not valid in the eyes of the law and that the petitioner cannot act or testify on behalf of the 4th defendant. The respondent avers that the 4th defendant is unaware of the details of the suit properties and has been evading to subject herself from the cross-examination. The respondent avers that the 4th defendant failed to appear before this Court on multiple hearing to adduce evidence and has now filed this application through her husband only to delay the proceedings. The respondent avers that the petitioner has not stated anything about the proof affidavit filed by the 4th defendant and has sought himself to testify on behalf of his wife which is neither permissible nor sustainable. The respondent avers that the averments as to the illness of the 4th defendant is entirely false and no documentary evidence has been produced by the petitioner to support the same. The respondent avers that the agent is entitled to testify only the facts which are within his knowledge and cannot testify on all the facts on behalf of the principal and this application is filed only to prolong the proceedings and evade from cross-examination. Hence, the respondent seeks for dismissal of the application.



Point for consideration:

3. Whether this application is liable to be allowed?

Evidence:

4. Neither of the parties to this application has adduced any oral or documentary evidence.

Discussion:

5. This Court, having considered the arguments advanced on both sides and thoroughly examined the pertinent case records, proceeds to delineate its findings by the following discussion. This suit has been instituted for partition and perpetual injunction and for declaration of the sale deed dated 09.03.2005 registered as Doc.No. 537/2005 in favour of the 4th defendant by the 1st to 3rd defendants as null and void. This application has been filed by the husband of the 4th defendant under section 151 of Code of Civil Procedure, 1908 seeking leave of this Court to permit the petitioner to adduce evidence on behalf of the 4th defendant. The petitioner has produced the power-of-attorney deed 27.09.2019 executed in favour of the petitioner by the 4th defendant. A perusal of the power-of-attorney deed shows that the 4th defendant has authorized the petitioner to act on behalf of the 4th defendant in contest of this suit in O.S.No. 112 of 2013 and has also authorized the petitioner to undertake all the proceedings on behalf on the 4th defendant.

6. The respondent has objection to this application that the power-of-attorney deed is not a valid document in the eyes of the law and that the petitioner cannot claim to represent the 4th defendant. Though the respondent avers that it is not a valid document, the respondent has not assigned any reason for the same. However, Honourable Madras High Court in the case of *M. Nachiyappan rep. by power-agent*



P.C. Duraisami v. Chellammal,¹ has held that a power-of-attorney deed executed before notary public is a valid document. Further, the law on the point of representation by the power-agent is well settled. As contended by the learned counsel for the respondent that the power-agent cannot testify about the facts which are within the personal knowledge of the principal or which are not within his personal knowledge and the point of law is settled by the Honourable Supreme Court in the cases of **Janki Vashdeo Bhojwani & Anr. v. Indusind Bank Ltd. & Ors.**,² and **Man Kaur (Dead) by LRs. v. Hartar Singh Sangha**,³ **Vidyadhar v. Manikrao & Anr.**⁴ However, the petitioner herein is none other than the husband of the 4th defendant. Such being the case, section 120 of the Indian Evidence Act, 1872 would also come into play. For better appreciation, the provision is extracted herein under:

“...120. Parties to civil suit, and their wives or husbands. Husband or wife of person under criminal trial. — In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit, shall be competent witnesses. In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness...”

7. The Honourable Madras High Court in the case of **Shenbagavalli & Anr. v. Kallaiselvi**,⁵ dealt in detail with the aspect of spousal competency to testify and answered the substantial question of law *“Is there a burden on the plaintiff to examine herself notwithstanding the fact that her husband has been examined, who is the competent witness for her under Section 120 of the Evidence Act?”* as follows:

1 Judgment of the Honourable Madras High Court dated 19.12.2014 in C.R.P.(PD)No. 1275 of 2012

2 Janki Vashdeo Bhojwani & Anr. v. Indusind Bank Ltd. & Ors., (2005) 2 SCC 217.

3 Man Kaur (Dead) by LRs v. Hartar Singh Sangha., (2010) 10 SCC 512.

4 Vidyadhar v. Manikrao & Anr., (1999) 3 SCC 573.

5 Judgment of the Honourable Madras High Court dated 30.11.2020 in S.A.No.120 of 2008.



“...23. Now if in terms of Sec.106 of the Evidence Act, (where the burden to prove a fact is cast on that person) a litigant-spouse who has the exclusive knowledge of that fact must be examined? When Sec.120, with its unlimited qualification, has granted functional competency to a spouse to speak to hearsay, necessarily it takes within its folds all the facts that also falls within the exclusive knowledge of the other spouse. This is perhaps the most harmonious way of integrating what apparently are conflicting provisions, to fit into a common denominator.

24. Now, one circumstance that may still require the litigant-spouse to testify for discharging the burden or the onus, as the case may be, cast on him/her is, when the other spouse who initially steps into the witness box on behalf of the litigant-spouse makes a specific statement as part of the testimony, that the former does not have any specific knowledge about any particular fact, and that the said fact is only within the knowledge of the litigant-spouse. It is in those circumstances, it will become obligatory for a litigant-spouse to testify, and if any abstinence is shown then adverse inference can well be drawn, since the best evidence rule is breached. It may have to be underscored here, the facts that are so required to be spoken must be those that impact the cause of action directly and not too remotely, which would necessarily have to be assessed on the basis of the facts of each particular case.

25. Reverting back to the arguments of the learned counsel for the defendants/ appellants, if only his argument has to be sustained, then he ought to demonstrate that the husband of the plaintiff as P.W.1 has deposed in his cross examination that any of the fact, which according to the defendants is critical to prove their defence, was only within the knowledge of the plaintiff. Nowhere in the entire cross examination of P.W.1 this Court could find any such statement. It may be that the defendants might have issued earlier letters or complaints such as in Ext.A2 or A-4,



are chiefly self serving and they by themselves are inadequate to rebut the presumption under Sec.118(a) of the Negotiable Instruments Act.

26. In the context of what has been discussed, this Court does not find any merit to hold the substantial question in favour of the defendants/appellants and it fails. The appeal is hence dismissed. The judgment and decree dated 31.07.2006 passed by the Principal District Court, Villupuram in A.S.No.34 of 2005 is hereby confirmed. Given the nature of the substantial question which engaged this court, no cost is ordered. Consequently, connected miscellaneous petition is closed...”

8. The above dictum is clear that the husband is a competent witness to testify on behalf on his wife regarding all the facts which are within the exclusive and personal knowledge of himself and his spouse. Hence, the contention of the respondent that the petitioner is not a competent witness merits no acceptance. The respondent has further raised objections that this application has been filed only to evade from the cross-examination. The above precedents are clear that the petitioner can be a competent witness to testify on behalf of the 4th defendant about all the facts and adverse inference can only be drawn when the petitioner pleads no knowledge of a fact which is within the exclusive knowledge of the 4th defendant and the 4th defendant fails to take the witness stand. Such exercise can only be done at the time of disposal of the suit when all the oral and documentary evidences are appreciated. This can only be done when the petitioner is allowed to testify on behalf of the 4th defendant. Further, a perusal of the case proceedings would show that the 4th defendant has not let in any oral evidence through proof affidavit as contented by the respondent, and hence, the objection that the 4th defendant is evading cross-examination merits no acceptance. Further, the objection with respect to the delay in filing this application also does not merit acceptance since the petitioner has filed this application as soon as the opportunities for the evidence of the 1st and 2nd defendants

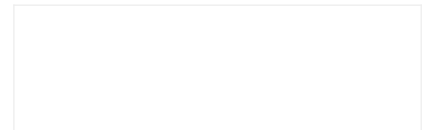


have been closed. Hence, this Court is of considered view that the objections are only perfunctory in nature and the respondent shall not be prejudiced if the petitioner is allowed to testify on behalf of the 4th defendant. Hence, this Court is inclined to allow this application without any cost.

Result:

9. ***As a result, this application is allowed. No cost.***

This order was dictated to the typist and transcribed by her on computer and after rectification of mistakes, pronounced by me in open court on this 28th day of June 2023.



District Munsif
Uthangarai

Annexure

Petitioner side evidence

Petitioner side Witnesses: Nil

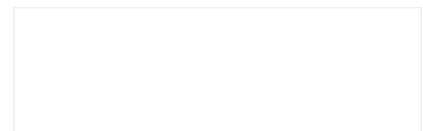
Petitioner side Exhibits: Nil

Respondent side evidence

Respondent side Witnesses: Nil

Respondent side Exhibits: Nil

Court Documents: Nil



District Munsif
Uthangarai