

Chief Justice's Court

Case :- CONSOLIDATION No. - 534 of 2002

Petitioner :- Syed Wasif Husain Rizvi

Respondents :- Hasan Raza Khan & 6 Ors

Counsel for Petitioner :- S H I Naqvi, R K Upadhyaya, R S Chauhan,
Zishan Ahmad

Counsel for Respondents:- CSC, Ajmal Khan, G M Kamil, Mohd Aslam
Khan, R N Gupta, S K Shukla, Sanjay Bhaseen,
Vivek Kumar Shukla

Hon'ble Dr Dhananjaya Yeshwant Chandrachud, Chief Justice

Hon'ble Devendra Kumar Upadhyaya, J

Hon'ble Rajan Roy, J

(Per Dr D Y Chandrachud, CJ)

This reference to the Full Bench has been occasioned by a referring order of a learned Single Judge dated 2 December 2015. The issue which has been referred for adjudication by the Full Bench is as follows:

“Whether a writ petition under Article 226 of the Constitution can be filed by a power of attorney holder.”

The meaning of a power of attorney

The Powers-of-Attorney Act, 1882¹ was enacted to amend the law relating to powers of attorney. Section 1-A of the Act provides that a power of attorney includes any instrument empowering a specified person to act for and in the name of the person executing it. Section 2 stipulates that the

¹ Act

donee of a power of attorney may, if he thinks fit, execute or do any instrument or thing in and with his own name and signature, by the authority of the donor of the power, and every instrument or thing so executed and done shall be as effectual in law as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof.

The true meaning of a power of attorney finds elaboration in a judgment of the Supreme Court in **State of Rajasthan Vs Basant Nahata**², where the Supreme Court held as follows:

“13. A grant of power of attorney is essentially governed by Chapter X of the Contract Act. By reason of a deed of power of attorney, an agent is formally appointed to act for the principal in one transaction or a series of transactions or to manage the affairs of the principal generally conferring necessary authority upon another person. A deed of power of attorney is executed by the principal in favour of the agent. The agent derives a right to use his name and all acts, deeds and things done by him and subject to the limitations contained in the said deed, the same shall be read as if done by the donor. A power of attorney is, as is well-known, a document of convenience.

* * *

52. Execution of a power of attorney in terms of the provisions of the Contract Act as also the Powers-of-Attorney Act is valid. A power of attorney, we have noticed herein before, is executed by the donor so as to enable the donee to act on his behalf. Except in cases

² (2005) 12 SCC 77

where power of attorney is coupled with interest, it is revocable. The donee in exercise of his power under such power of attorney only acts in place of the donor subject of course to the powers granted to him by reason thereof. He cannot use the power of attorney for his own benefit. He acts in a fiduciary capacity. Any act of infidelity or breach of trust is a matter between the donor and the donee.”

In a subsequent decision of the Supreme Court in **Suraj Lamp & Industries (P) Ltd Vs State of Haryana**³, the earlier decision, noted above, was followed by a Bench of three learned judges. The Supreme Court held thus:

“A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The power of attorney is creation of an agency whereby the grantor authorizes the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by him (see Section 1-A and Section 2 of the Powers of Attorney Act, 1882). It is revocable or terminable at any time unless it is made irrevocable in a manner known to law. Even an irrevocable attorney does not have the effect of transferring title to the grantee.”⁴

In a more recent decent decision, while elucidating the scope of Section 138 of the Negotiable Instruments Act 1881, a Bench of three learned Judges of the Supreme Court in **A C Narayanan Vs State of**

3 (2012) 1 SCC 656

4 Para 20 at page 666

Maharashtra⁵ observed thus:

“The power of attorney holder is the agent of the grantor. When the grantor authorises the attorney holder to initiate legal proceedings and the attorney holder accordingly initiates such legal proceedings, he does so as the agent of the grantor and the initiation is by the grantor represented by his attorney holder and not by the attorney holder in his personal capacity.”⁶

The position in law is that by the execution of a power of attorney, the donor creates an agency by which he authorises the donee to perform certain acts on his behalf. These acts, when performed by the donee, are as effectual as acts which are done by the donor himself. All acts, deeds and things done by the donee subject to the limitations contained in the deed, are as effectual as if they have been done by the donor. The donee acts in place of the donor subject to the limitations on the powers conferred upon him by the deed of attorney. That is why it has been a well settled principle of law that the holder of a power of attorney does not act for his own benefit and acts in a fiduciary capacity for the donor of the instrument. By executing a power of attorney, the donor creates an agency in the donee to act on his behalf. The holder of the power of attorney represents the donor and does not act in his personal capacity.

Allahabad High Court Rules 1952

The Allahabad High Court Rules, 1952⁷ contain in Chapter XXII

5 AIR 2014 SC 630

6 Para 21 at page 640

7 Allahabad High Court Rules

provisions for directions, orders or writs under Article 226 and Article 227 of the Constitution (other than a writ in the nature of habeas corpus). Under Rule 1(1) of Chapter XXII, an application for a direction, order or writ under Article 226 and Article 227 of the Constitution (other than a writ in the nature of habeas corpus) is required to be made to the Division Bench appointed to receive applications. Rule 1(2) stipulates that the application shall set out concisely in numbered paragraphs the facts upon which the applicant relies and the grounds on which the Court is asked to issue a direction, order or writ and has to conclude with a prayer setting out the exact nature of the relief sought. The Rule further stipulates that the application shall be accompanied by an affidavit or affidavits verifying the facts stated therein by reference to the numbers of the paragraphs of the application containing the facts. Such affidavits shall be restricted to facts which are within the deponent's own knowledge and shall further state whether the applicant has filed, in any capacity whatsoever, any previous application on the same facts and, if so, the orders passed.

Chapter IV of the Allahabad High Court Rules provides for affidavits and Oath Commissioners. Rule 9 (2) stipulates that an affidavit filed on behalf of the petitioner(s), appellant(s) or, as the case may be, revisionist(s), shall mention the relationship, association or connection of the deponent with the person on whose behalf it has been filed. Rule 12 stipulates that except on interlocutory applications, an affidavit shall be confined to such facts as the deponent is able of his own knowledge to prove. On an interlocutory application where a particular fact is not within the deponent's

own knowledge but is based on his belief or information received from others, which he believes to be true, the deponent is required to use the expression that he is informed and verily believes such information to be true or words to that effect.

Code of Civil Procedure 1908

The Code of Civil Procedure, 1908⁸ contains provisions in regard to the verification of pleadings on the one hand, and in respect of affidavits on the other.

Order VI Rule 15 of CPC provides for verification of pleadings and is in the following terms:

“15. Verification of pleadings.-(1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.

(2) The person verifying shall specify, by reference of the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.

(4) The person verifying the pleading shall also furnish an affidavit in support of his pleadings.”

Verification must be by a party pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts. Under sub-rule (2) of Rule 15, a person verifying a pleading has to specify with reference to the paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believes to be true.

Affidavits under the CPC are governed by the provisions of Order XIX. Order XIX Rule 3 provides that affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which statements of his belief may be admitted, provided that the grounds thereof are stated. The Allahabad amendment to Order XIX, inter alia, contains the following in Rule 9:

“9. Except in interlocutory proceedings, affidavits shall strictly be confined to such facts as the declarant is able of his own knowledge to prove. In interlocutory proceedings, when the particular fact is not within the declarant's own knowledge, but is stated from information obtained from others, the declarant shall use the expression “I am informed”, and, if such be the case, “and verily believe it to be true”, and shall state the name and address of, and sufficiently describe for the purposes of identification, the person or persons from whom he received such information. When the application or the opposition thereto rests on facts disclosed in documents or copies of documents produced from any Court of Justice or other source, the declarant shall state what is the source from which they were produced, and his information and belief as to the truth of the facts disclosed

in such documents. (22-5-1915).”

Precedent

In 1910, the Calcutta High Court held in **Padmabati Dasi Vs Rasik Lal Dhar**⁹, that the provisions of Order XIX Rule 3 of the CPC must be strictly observed, and every affidavit must expressly state how much is the statement of the deponent's **knowledge** and how much is the statement of his **belief**, and the **grounds of belief** must also be stated with sufficient particularity. This statement of law in the judgment of the Calcutta High Court was affirmed in a judgment of a Constitution Bench of the Supreme Court in the **State of Bombay Vs Purushottam Jog Naik**¹⁰. While dealing with the verification of affidavits, the Supreme Court held that the verification must be modelled on the lines of Order XIX Rule 3 CPC whether or not the Code applies:

“... Verification should invariably be modelled on the lines of Order 19, Rule 3 of the Civil Procedure Code, whether the Code applies in terms or not. And **when the matter deposed to is not based on personal knowledge the sources of information should be clearly disclosed. We draw attention to the remarks of Jenkins C.J. and Woodroffe J. in 'PADMABATI DASI v. RASIK LAL DHAR,' 37 Cal 259 and endorse the learned Judges' observations.**”¹¹ (emphasis supplied)

Agents and Pleadings

Order III of the CPC provides for recognized agents and pleaders.

9 (1910) ILR 37 Cal 259

10 AIR 1952 SC 317

11 Para 16 at page 319

Rule 1 provides that 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 recognized agent, or by a pleader appearing, applying or acting, as the case may be, on his behalf. Under Rule 2 of Order III, recognized agents of parties by whom such appearances, applications and acts may be done or made, include persons holding powers of attorney, authorising them to make and do such appearances, applications and acts on behalf of such parties.

Hence, it is evident from the provisions of Order III Rule 1 of the CPC that an appearance, application or act in or to any Court which is required to be made or done by a party in the Court, can be effectively made or done by the party in person or by a recognized agent. A recognized agent, for that purpose, includes a person who holds the power of attorney. This is a specific application, as if it were, of the provisions contained in Sections 1-A and 2 of the Powers of Attorney Act 1882.

These provisions would indicate that there is no prohibition on an application seeking a writ under Article 226 or Article 227 of the Constitution being pursued by a litigant through the holder of a power of attorney. The donee of a power of attorney is no more than an agent of the donor. The donee represents the donor and does not pursue the proceeding in his own independent capacity. He acts for and on behalf of the donor and is subject to the limitations which are contained in the instrument by which he is authorised to act on behalf of the donor. The donee acts for and on behalf

of the donor, in the name of the donor and not for himself. His persona is as an agent of the donor and is subject to the limitation created by the deed by which he is authorised.

But the cause for the present reference is on a discord noted in two judgments of the Division Bench of this Court, to which it is now necessary to turn.

The first of those two judgments is a judgment of the Division Bench in **Dr Prabhu Nath Prasad Gupta Vs State of U P**¹². In that case, the petitioner, who was working in a hospital, was granted residential accommodation. Upon being transferred to another hospital, he did not vacate the house, upon which an order was passed requiring him to vacate. The order was served on his mother. Writ proceedings were instituted before this Court by the mother of the person to whom the house was allotted and upon whom the order for vacating the house had been issued. This was hence a case where a writ petition to enforce a right personal to the allottee of government accommodation was filed **not** by that person or in his name but by someone else namely, by his mother. This was held to be impermissible. The Division Bench placed reliance upon the judgment of the Constitution Bench of the Supreme Court in **Charanjit Lal Chowdhary Vs Union of India**¹³, where it was held that the legal rights which can be enforced in the exercise of writ jurisdiction must ordinarily be the rights of the petitioner who complains of the infraction of such rights and approaches the Court for relief. The exception which is made is in the case of a writ of

12 2003 (52) ALR 520

13 AIR 1951 SC 41

habeas corpus or a writ of quo warranto.

The principle enunciated in **Charanjit Lal Chowdhary** was followed in a judgment of the Constitution Bench of the Supreme Court in **Calcutta Gas Company Ltd Vs State of West Bengal**¹⁴ where it was held as follows:

“...Article 226 confers a very wide power on the High Court to issue directions and writs of the nature mentioned therein for the enforcement of any of the rights conferred by Part III or for any other purpose. It is, therefore, clear that persons other than those claiming fundamental rights can also approach the Court seeking a relief thereunder. The Article in terms does not describe the classes of persons entitled to apply thereunder; but it is implicit in the exercise of the extraordinary jurisdiction that the relief asked for must be one to enforce a legal right. In *State of Orissa v. Madan Gopal*, 1952 SCR 28: (AIR 1952 SC 12) this Court has ruled that the existence of the right is the foundation of the exercise of jurisdiction of the Court under Art. 226 of the Constitution. In *Charanjit Lal Chowdhari v. Union of India*, 1950 SCR 869: (AIR 1951 SC 41), it has been held by this Court that the legal right that can be enforced under Art. 32 must ordinarily be the right of the petitioner himself who complains of infraction of such right and approaches the court for relief. We do not see any reason why a different principle should apply in the case of a petitioner under Art. 226 of the Constitution. **The right that can be enforced under Art. 226 also shall ordinarily be the personal or individual right of the petitioner himself, though in the case of some of the**

14 AIR 1962 SC 1044

writs like habeas corpus or quo warranto this rule may have to be relaxed or modified.¹⁵ (emphasis supplied)

These principles which have been laid down by the judgments of the Constitution Benches of the Supreme Court elucidate the binding position in law. The right which is sought to be pursued in the exercise of writ jurisdiction under Article 226 of the Constitution is a right personal to the petitioner. The only exception which is contemplated, is in the case of a writ of habeas corpus or in a writ of quo warranto. The exception in the case of a writ of habeas corpus is necessitated in order to protect the value which the common law and the Constitution place on personal liberty which enables a writ to be moved by a person other than a person whose right is sought to be espoused. Similarly, the object and purpose of a writ of quo warranto is to protect a public office from a usurper who is continuing in the office in breach of the qualifications or eligibility prescribed for holding such an office of a public nature. The Division Bench of this Court, when it decided the case of **Prabhu Nath Prasad Gupta** (supra) was not really called upon to decide whether a writ petition could be instituted through the holder of a power of attorney. That was a case where an order of eviction was sought to be challenged not by the person to whom an accommodation had been allotted and who was sought to be removed but by his mother. This was clearly not permissible since the petitioner who had moved those proceedings was not espousing a case personal to her nor was she authorised to do so as an agent of the person who was directly affected.

¹⁵ Para 5 at page 1047

This decision of the Division Bench in **Prabhu Nath Prasad Gupta** holds, however, that it becomes immaterial whether the power of attorney holder or someone else files a case in his name for the person aggrieved or the person aggrieved files a case through the power of attorney holder, and the petition itself would not be maintainable. With great respect, we are unable to agree with this statement of law contained in the judgment of the Division Bench. We clarify that there can be no dispute about the principle which has been laid down by the Division Bench to the effect that the petitioner in the exercise of the writ jurisdiction under Article 226 of the Constitution must pursue a claim, right or cause of action personal to him or her. However, when the petitioner seeks to do so through the holder of a power of attorney, the donee of the power of attorney is no more than an agent who acts for and on behalf of the donor, for the reason that the donor is, for some reason, unable to present himself or herself before the Court in order to pursue the proceedings. The donor of the power of attorney may be incapacitated from doing so temporarily for reasons or exigencies, such as exigencies of service or station or, for that matter, an ailment which immobilizes him or her from pursuing the proceedings personally. The important point to be noted, as a matter of principle, is that when the donor authorises the donee to act on his or her behalf, the donee acts as an agent and is subject to the limitations which are created by the instrument by which he is authorised. The donee does not pursue a claim or right personal to him but it is the donor who espouses his own personal right through the holder of a power of attorney.

The decision of the Division Bench in **Prabhu Nath Prasad Gupta** was followed in another decision of a Division Bench in of this Court in **Rustam Khusro Shapoor Ji Gandhi Vs State of U P**¹⁶. In that case, as the judgment of the Division Bench indicates, what was held was that the power of attorney which had been executed was a special power of attorney to execute a formal agreement for sale in favour of three vendees inclusive of various other acts to conduct the proceedings for conversion of the property into freehold before the appropriate authority. The Division Bench held that the power of attorney was made to protect the interest of the alleged purchaser of the property, and since the power of attorney was a special power of attorney to espouse the case of the vendees, the petition was virtually a proxy petition by the holder of a power of attorney. These observations of the Division Bench indicate that the power of attorney was for a specific purpose. The judgment of the Division Bench hence cannot be considered as laying down any principle to the contrary. However, the Division Bench also held as follows:

“...In any event, a further question can arise before this Court whether a writ of certiorari or mandamus can be issued in favour of the Power of Attorney holder, on which there is a direct judgment of this Court being Dr Prabhu Nath Prasad Gupta v. State of U.P. and Others¹⁷, which has held that the writ petition by Power of Attorney holder of the petitioner seeking relief in the nature of writ of certiorari for aggrieved person is not maintainable.”¹⁸

16 2010 (80) ALR 25

17 2003 (52) ALR 520 (SC)

18 Para 6 at page 28

For the reasons which we have indicated, we are unable to subscribe to the above broad proposition which has been laid down by the Division Bench (following the earlier decision) that a writ cannot be filed through the holder of a power of attorney for seeking relief under Article 226 of the Constitution.

The order of referral also adverts to another judgment of a Division Bench in **Gurmeet Kaur Kwatra Vs Vice Chairman, Varanasi Development Authority, Varanasi**¹⁹. The Division Bench held that a writ petition by a power of attorney holder for the purpose of seeking individual relief of an aggrieved person, either in the form of a writ of certiorari or a mandamus or prohibition, cannot be allowed under any circumstances.

For the reasons which we have indicated earlier, we hold that we cannot subscribe to the broad principle of law which has been enunciated in the following decisions:

- (1) Dr Prabhu Nath Prasad Gupta Vs State of U P, 2003 (52) ALR 520;
- (2) Rustam Khusro Shapoor Ji Gandhi Vs State of U P, 2010 (80) ALR 25; and
- (3) Gurmeet Kaur Kwatra Vs Vice Chairman, Varanasi Development Authority, Varanasi, CMWP No 44007 of 1998 (decided on 14 December 2009).

When a writ petition under Article 226 of the Constitution is instituted through a power of attorney holder, the holder of the power of attorney does

¹⁹ CMWP No 44007 of 1998 decided on 14 December 2009.

not espouse a right or claim personal to him but acts as an agent of the donor of the instrument. The petition which is instituted, is always instituted in the name of the principal who is the donor of the power of attorney and through whom the donee acts as his agent. In other words, the petition which is instituted under Article 226 of the Constitution is not by the power of attorney holder independently for himself but as an agent acting for and on behalf of the principal in whose name the writ proceedings are instituted before the Court.

Having held so, we must, at the same time, emphasize the necessity of observing adequate safeguards where a writ petition is filed through the holder of a power of attorney. These safeguards should necessarily include the following:

- (1) The power of attorney by which the donor authorises the donee, must be brought on the record and must be filed together with the petition/application;
- (2) The affidavit which is executed by the holder of a power of attorney must contain a statement that the donor is alive and specify the reasons for the inability of the donor to remain present before the Court to swear the affidavit; and
- (3) The donee must be confined to those acts which he is authorised by the power of attorney to discharge.

For these reasons, we hold and have come to the conclusion that the question referred for adjudication before the Full Bench must be answered in

the affirmative and is accordingly answered, subject to due observance of the safeguards which we have indicated above.

The question of law is answered accordingly. The writ petition shall now be placed before the appropriate Bench for disposal in light of the reference so answered.

Dated:- 22.1.2016

AHA

(Dr D Y Chandrachud, CJ)

(D K Upadhyaya, J)

(Rajan Roy, J)