

**(1993) 12 KL CK 0018**

**High Court Of Kerala**

**Case No:** Criminal M.C. No. 1313 of 1990

Naushad

APPELLANT

Vs

Naseema Beevi

RESPONDENT

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**Date of Decision:** Dec. 15, 1993

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 3 Rule 4
- Criminal Procedure Code, 1973 (CrPC) - Section 125, 126(2)
- Powers of Attorney Act, 1882 - Section 2

**Citation:** (1994) 1 CivCC 471 : (1994) 1 KLJ 130

**Hon'ble Judges:** K.T. Thomas, J

**Bench:** Single Bench

**Advocate:** N. Haridas, for the Appellant;

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**Judgement**

@JUDGMENTTAG-ORDER

K.T. Thomas, J.

A claim for maintenance for a two year old child (Rasiya Beevi) was made against one Mohammed Sali of Reseena Manzil as per Section 125 of the Code of Criminal Procedure (for short "the Code"), The mother of the child who made the claim said that Mohammad Sali is the father of the child and is hence liable to pay the maintenance allowance. Mohammed Sali is employed in a foreign country. As he wanted to contest the claim he authourised the present Petitioner through a power-of-attorney deed to do the needful. Petitioner as power-of-attorney holder engaged an advocate who entered appearance in the lower-court and applied for adjournment to file a counter statement. But the application was dismissed by the learned magistrate holding that a power-of-attorney holder cannot be permitted to do so in proceedings u/s 125 of the Code. It is the validity of the said order that is being challenged in this Criminal Miscellaneous Case.

2. It is unnecessary now to go into the rival contentions regarding the claim made u/s 125 of the Code. The only question now to be considered is whether a party in proceedings under Chapter IX of the Code can authorise a person through a deed of power-of-attorney to make his appearance. Learned Magistrate pointed out that u/s 126(2) of the Code all evidence in the proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made. But it provides an exception that such evidence can be recorded "in the presence of his pleader" when his personal presence of the party concerned. In justifiable circumstances court is empowered to dispense with his presence in court even when evidence is recordent. But the provision does not permit total absence of the party in the proceedings. It is enough, in appropriate cases, that his counsel is present instead of him. Hence the real question is whether "his pleader" can be authorised by the power-of-attorney holder of the person concerned to appear in court.

3. "Pleader" is defined in Section 2(q) of the Code as a person authorised by or under any law for the time being in force to practice in the court and includes any other person appointed with the permission of the court to act in such proceedings. Section 2k of the Power of Attorney Act 1882 enables a power-of-attorney holder to execute any instrument under his own signature by the authority of the donor of such power. The law declares that every such instrument "shall be effectual in law as if it had been executed by the donoe in the name of the donor thereof"

4. A Full Bench of this Court has held in Balan Nair v. Valsamma 1986 KLT 1378 that the proceedings under Chapter IX of the Code "are essentially civil proceedings and not criminal proceedings." Hence to the extent possible the procedure also must be held as in civil cases. Order 3 Rule 4 of the CPC deals with appointment of pleader. It says that no pleader shall act for any person in any court "unless he has been appointed for the purpose by such person by a document in writing signed by such person...or by some person duly authourised by or under a power-of-attorney to make such appointment". Thus, it is clear that in civil cases a power-of-attorney holder can sign the vakalath of a pleader on behalf of the person concerned if the power given to him includes such act also. When that is the clear position in civil proceedings there is no reason why such position cannot be recognised in proceedings under Chapter IX of the Code as well.

5. This Court has held in Hamsa v. Ibrahim 1993 (2) KLT 698 that even a complainant in a criminal case can appear through a duly constituted power-of-attorney holder. (Of course, the said decision has not pronounced the question whether an accused person can appear through a power-of-attorney holder in criminal case. That is a different question altogether.) I don't find anything legally wrong in permitting a power-of-attorney holder to engage a counsel or a pleader to conduct the case in proceedings under IX of the Code.

6. Whether the personal presence of the party (against whom an order for payment of maintenance is proposed to be made) can be dispensed with or has to be considered and decided by the magistrate de hors the question whether a pleader can be authorised by the power-of-attorney holder of the party concerned.

7. I, therefore, hold that is no legal bar in permitting a duly constituted power-of-attorney holder of a party in proceedings under Chapter IX of the Code to engage a pleader for conducting cases if the power includes the doing of such act also.

In the aforesaid view, I set aside the impugned order and direct the magistrate to proceed further.

Crl.M.C. disposed of in the above terms.