

Delhi High Court Birla Dlw Ltd. vs Prem Engineering Works on 1 August, 1998
 Equivalent citations: 77 (1999) DLT 171 Author: M Sarin Bench: A Kumar, M Sarin JUDGMENT Manmohan Sarin, J. 1. Appellant has preferred this appeal against the judgment of the learned Additional District Judge, dismissing their suit for recovery. The learned Additional District Judge held that the appellant was entitled to recovery, but dismissed the suit on the ground that the appellant had failed to prove that the plaint had been signed, verified and instituted by a duly authorised person. 2. During the pendency of the appeal, appellant's application for change in name from M/s. India Linoleum Ltd. to M/s. Birla DLW Ltd. had been allowed. 3. The Trial Court record had been called for and has been perused. Learned Counsel for the appellant submitted that the learned Additional District Judge erred in deciding the Issue No. 1 against the appellant, viz. "whether the plaintiff firm is duly incorporated under the Indian Companies Act and the plaint has been signed, verified and instituted by a duly authorised person". 4. At this stage, it may be noticed that the original power of attorney, PW.1/2, is purported to have been executed by Shri M.D. Poddar, Director of the plaintiff Company, on 17.7.1981, in the presence of one Shri G.K. Sureka of Calcutta, on the basis of a Resolution of the Board of Directors of the plaintiff Company dated 14.7.1981. The Power of Attorney, Ex. PW.1/2 carries a notarial endorsement dated 18.7.1981. The notarial endorsement mentions that the notary, after due enquiry, has verified that the signatures on the Power of Attorney are that of Shri M.D. Poddar, Director of the plaintiff company. 5. Learned Counsel for the appellant submitted that the original Power of Attorney had been produced and duly exhibited. The respondent had not objected to the mode of proof. A presumption of validity and due execution of power of attorney under Section 85 of the Indian Evidence Act should have been raised. It was urged that the notarial endorsement mentioned that the notary had duly verified the factum of signatures of Shri Poddar and on this basis the benefit of Section 85 should not have been denied to the appellant. Learned Counsel further submitted that the respondent had, apart from bald denials, not really questioned or objected to the mode of proof of the Power of Attorney. Learned Counsel for the appellant relied on United Bank of India Vs. Naresh Kumar & Others, AIR 1997 SC 3, in support of his contention that procedural defects which do not go to the root of the matter should not be permitted to defeat a just cause. He urged that in this case the liability of the defendant was clear and it would be a travesty of justice if the appellant was to be non-suited due to technical defects. 6. Learned Counsel for the appellant also relied on Gopal Das & Another Vs. Sri Thakurji & Others, AIR (30) 1943 Privy Council 83, in support of his contention that where the objection is not to the inadmissibility of the document but to the mode of proof, the objection should be taken at the trial before the document is marked as an exhibit and admitted on record. 7. Learned Counsel for the respondent, on the other hand, submitted that the Trial Court had rightly returned the finding on Issue No.1 against the appellant. It was urged that the appellant had miserably failed to prove that the plaint had been signed, verified and instituted by a duly authorised person. Learned Counsel relied on Electric Construction & Equipment Co.

Ltd. Vs. Jagjit Works, 1984 RLR 549, and Syndicate Bank Vs. M/s. S.A. Trading Corporation & Others, 1990 (3) Delhi Lawyer 356, to which we will have occasion to refer a little later. 8. We have perused the Power of Attorney on record as well as the evidence recorded in support thereof. The original Power of Attorney is stated to be executed by Shri M.D. Poddar in the presence of one Shri G.K. Sureka. It is based on a Resolution of the Board of Directors dated 14.7.1981. Appellant has neither produced on record the Resolution of the Board of Directors which authorised Shri M.D. Poddar to execute the Power of Attorney, nor Shri M.D. Poddar or Shri G.K. Sureka appeared as witnesses to prove the execution of the said Power of Attorney. Mr. Saraogi, on behalf of the plaintiff, in his statement, did not depose anything about either being familiar with the signatures of Shri Poddar or the said Power of Attorney having been executed by Shri Poddar in his presence. The Power of Attorney was routinely tendered in evidence and exhibited. The question that comes up for consideration is whether a presumption of its due execution and validity can be raised under Section 85 of the Indian Evidence Act? A Division Bench of this Court had occasion to consider this aspect in Electric Construction & Equipment Co. Ltd. Vs. Jagjit Works (supra). The Division Bench observed as under : "It is useful to note that Section 85 raises a presumption about the execution of a POA provided two conditions are satisfied. Firstly, it must be executed before a Notary Public and secondly. It must be authenticated by him . In this case, there is no authentication at all. There is no statement of facts by the Notary Public regarding the manner of execution or the persons executing the document. If reference is made to the judgments cited before us, the contrast is striking. In the case of the City Bank, the authentication made by the Notary Public in New York covers nearly two printed pages of the Report and quotes extensively the circumstances in which the General POA was executed. Similarly, in the case of the National & Grindlays Bank Ltd., the authentication shows that the seal of the Bank was impressed on the POA in the presence of the Notary and the same was the genuine seal of the Bank. Thus, it was the authentication that proved both the execution as well as the due authentication of POA and, therefore, satisfied the test laid down in Sec. 85 of the Evidence Act." In Syndicate Bank Vs. M/s. S.A. Trading Corpn. & Ors. (supra), a Division Bench of this Court while dealing with the question of proof of Power of Attorney, where presumption under Section 85 of the Evidence Act could not be raised, observed as under : In case the person who has conferred the Power of Attorney has not got it executed, so as to enable him to raise the presumption which may be raised in terms of Section 85 of the Evidence Act, then he is left with no option, but to prove the same in accordance with law. This is done by proving the resolution of the Board of Directors of the company, which gives its officers power to grant Power of Attorney to persons the company considers worthy of it, and also prove the factual execution of the Power of Attorney by the empowered officer or officers. This proof has to be tendered in Court by proving the passing of the resolution by the company in accordance with sections 193 and 194 of the Companies Act, 1956. In the instant case, the Power of Attorney, admittedly, was not executed in the presence of the

Notary. The Power of Attorney is stated to be dated 17.7.1981 while the notarial certificate is dated 18.7.1981. It clearly shows that the Power of Attorney was not executed before the Notary. The endorsement by the Notary, stating that he had verified the signatures to be that of Mr. M.D. Poddar, is vague. It does not disclose the basis of such verification. In these circumstances, it cannot be said that the twin requirement of execution and authentication by the Notary are met so as to draw the presumption of validity under Section 85 of the Indian Evidence Act. 9. From the foregoing it is clear that the plaintiff has failed to produce or prove the Resolution of the Board of Directors, authorising Shri M.D. Poddar to execute the Power of Attorney. The Power of Attorney itself has not been proved. Mere exhibition of the same would be of no avail. 10. We have also perused the plaint in question to see whether the plaintiff could avail of the benefit of the provision under Order XXIX of the Code of Civil Procedure, which enables a Director or Principal Officer of the Corporation to sign and institute the plaint. In the instant case there is no averment in the plaint that Shri Saraogi is either the Principal officer or the Director of the Plaintiff Company. He is merely described as a constituted attorney on the basis of the Power of Attorney, which we have held as not proved. Even in the verification, the rank or position of Mr. Saraogi with plaintiff has not been stated. Accordingly, the benefit of Order XXIX of the Code of Civil Procedure, which would enable a Principal Officer or Director of the Company to sign and verify the plaint is also not available in the instant case. 11. We are fully conscious of the observations of the Apex Court in *United Bank of India Vs. Naresh Kumar & Others* (supra) that where suits are instituted or defended on public corporations like Bank, public interest should not be permitted to be defeated on mere technicalities. Further, that procedural defects, which do not go to the root of the matter, should not be permitted to defeat a just cause. The present case is between two private parties, where the appellant had instituted a suit for recovery of an advance of Rs. 31,586/- lent to the respondent together with interest on 2.5.1988. The said suit was dismissed on 4.7.1992 and the present appeal was preferred on 1.9.1992. The appellant was fully conscious of the defects and the short-comings of his case, specially after the impugned judgment. Yet the appellant took no-steps to file any application on record under Order XLI, Rule 27, CPC for leading additional evidence to prove either the Power of Attorney or the Resolution of the Board of Directors. 12. In view of the foregoing discussion, we do not find any merit in the appeal and the same is dismissed, but with no order as to costs.