

(1989) 10 BOM CK 0005

In the Bombay High Court

Case No : Chamber Summons No. 1125 of 1989 in Suit No. 1211 of 1985

I. C. Corporation

APPELLANT

Vs

Daewoo Corporation and others

RESPONDENT

Date of Decision : 27-10-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 16 Rule 19(b), 76(1)

Citation : (1989) MhLj 1136

Hon'ble Judges : G.H. Guttal, J

Bench : Single Bench

Advocate : J.I. Mehta with P.M. Amin and T.K. Cooper, For defendants Nos. 1 and 2 instructed by M/s. Ambubhai and Diwanji, M.O. Chinoy with J.D. Dwarkadas and J.P. Awasia instructed by M/s. Little and Company, for the Respondent

Judgement

G.H. Guttal, J.—This Chamber Summons by the Defendants Nos. 1 and 2, Corporations having their registered offices in Korea, is for the issue of a commission or a letter of request for examining their witnesses by names, H. K. Chae and J. B. Lee who are currently residents of Seoul, Korea.

2. The question of issuing a commission to examine a witness resident out of India is not always easy. The interests of justice, the Court's power created by the Code of Civil Procedure, the principles which govern the exercise of discretion, and a host of complex factors must enter the final verdict. Yet, to begin with, the principles which emerge from an analysis of the scheme of the CPC must form the primary foundation of a decision. A brief analysis of the scheme of the CPC in regard to the issue of commissions is, therefore, of importance. Commissions are issued to examine any person or to do other acts such as local inspection, examination of accounts, making partition and so on (Section 75 of the Code of Civil Procedure). A commission for examination of a witness may be issued "to any Court (not being a High Court) situate in a State other than the State in which the Court" of issue is situate. But the Court to

which commission is issued must be a Court "having jurisdiction in the place in which the person to be examined resides" (Section 76(1) of the Code of Civil Procedure). The reference to a "State" and "the Court having jurisdiction in the place in which the witness resides" are clear indications of the legislative intent that section 76(1) applies only if a witness to be examined resides within India. If this were not so, the words "a State other than the State in which the Court of issue is situated" and the reference to the jurisdiction of such Court would be redundant. It is an established rule of interpretation of statutes that no words should be so construed as to render them redundant.

Having defined the Court's authority to issue commissions to examine witnesses within India, the CPC proceeds to lay down what should be done if the witness to be examined on commission resides "at any place not within India" (Section 77 of the Code of Civil Procedure). Section 77 is a special provision relating to issue of commission to examine a witness residing outside India. Unlike section 76(1), section 77 empowers the Court in India to issue "a letter of request to examine a witness residing at any place not within India". The letter of request may be issued "in lieu of issuing a commission". The words "in lieu of" mean instead of. This, therefore, makes it clear that in the case of a witness residing at a place not within India, the Court may not issue a commission but instead, may, issue a letter of request.

3. The detailed procedure in respect of issue of commissions to examine witnesses laid down in Order XXVI of the Code categorises the persons who may be examined on commission and the conditions necessary for issue of commission to examine such witnesses. Categories created by Order XXVI of the Code are :

- (i) a witness not resident within the local limits of jurisdiction of the Court of issue (Rule 4(1)(a) of Order XXVI of the Code),
- (ii) a witness resident within the local limits of the jurisdiction of the Court of issue but who is exempted by the Code from attending the Court or who is unable to attend the Court from sickness or infirmity (Rule 1 of Order XXVI of the Code),
- (iii) a witness resident within the local limits of the jurisdiction of the Court of issue but who "is about to leave such limits (Rule 4(1)(b) of Order XXVI of the Code),
- (iv) a witness resident within the local limits of the Court of issue but who is a public servant (Rule 4(1)(c) of Order XXVI of the Code).

Thus, it is clear that rules 1, 2, 3 and 4 of Order XXVI of the Code which create the categories of witnesses who may be examined on commission are intended to apply to witnesses resident within the local limits of the jurisdiction of the Court of issue. These rules do not contemplate issue of commissions for examination of witnesses residing outside India.

But then the Legislature, consistently with the provisions of section 77 of the Code, has enacted a special provision in Rule 5 of Order XXVI of the Code (Rule 5 of Order XXVI of the Code. - "5. Where any Court to which application is made for the issue of a commission for the examination of a person residing at any place not within India is satisfied that evidence of such person is necessary, the Court may issue such commission or a letter of request"). Under Rule 5, the Court may issue for examination of a witness residing not within India, either a commission or a letter of request if the evidence of such witness is necessary.

4. It is urged on behalf of the Defendants Nos. 1 and 2 that having regard to the first proviso to Rule 4(1) of Order XXVI of the Code and the circumstances of this case, commission "shall be issued". The proviso was introduced by the CPC (Amendment) Act, 1976 (Act No. 104 of 1976) which came into force on 1st February 1977. The substance of the proviso is this :

If, under rule 19 of Order XVI of the Code, a person cannot be ordered to attend the Court in person, "a commission shall be issued for his examination if his evidence is necessary in the interest of justice

The question then is whether the two witnesses resident of Seoul in Korea, are witnesses who "cannot be ordered to attend a Court in person" within the meaning of Rule 19 of Order XVI of the Code.

5. The argument is based on the assumption that Order XVI of the Code is intended to govern summoning and attendance of a witness resident outside India. As I will presently point out, the assumption is unfounded.

Summons is required to be served in accordance with Order V of the Code (Rule 8 of Order XVI of the Code) which lays down the procedure for service of summons. Rule 10 of Order XVI lays down the procedure where witness fails to comply with the summons. The Court is empowered to issue proclamation requiring such witness to attend to give evidence. The Court may also issue a warrant for the arrest of such person. This procedure is inconsistent with the assumption that a witness resident outside India is subject to the process of Courts in India.

6. Rule 19 of Order XVI of the Code defines limits of the Court's power to order a person to attend in person to give evidence. In order that a person can be so ordered, two conditions need to be fulfilled :

Firstly, he must be resident of a place within the local limits of the Court's ordinary original jurisdiction (Rule 19(a) of Order XVI of the Code).

Secondly, where he resides outside "such limits", his place of residence must be within the stipulated distance from the Court-house. His residence and the Court-house must be connected by a public conveyance system (Rule 19(b) of Order XVI of the Code).

But having regard to growth of modern communication systems, a proviso was

introduced by the CPC (Amendment) Act, 1976. The proviso lays down that if transport by Air is available between the place where witness resides and the place where the Court is situated, the witness may be ordered to attend the Court in person (Proviso to Rule 19 of Order XVI of the Code. - "Provided that where transport by Air is available between the two places mentioned in this Rule and the witness is paid the fare by air he may be ordered to attend in person). The words "within the local limits of the Court's ordinary original jurisdiction" and "'without such limits" together with reference to the availability of "railway or steamer communication" or "established public conveyance" carry only one meaning : The witness must be resident within India. There cannot be a railway communication between India and the foreign country separated by the ocean. Nor can the steamer communication from the port of India to a port of a foreign country be called "steamer communication" in relation to the Court-house and the place of residence of the witness. International steamer communication or International Air communication cannot be understood to mean the communication between the residence of a witness and the place where the Court is situated. The common sense view is that the modes of communication specified in Rule 19 of Order XVI of the Code are modes of communication between places in India. The place where the witness resides must, in the context of the scheme of Order XXVI of the Code, be his place of residence within India. To construe that the witness referred to in Rule 19 of Order XVI includes a witness residing out of India is to distort the plain intendment of law.

In my opinion, the provision of Order XVI of the Code, especially Rule 19, has no application to witnesses residing out of India. They are applicable to witnesses residing within India. It follows that the first proviso to Rule 4(1) of Order XXVI whereunder "commission shall be issued" has no application to a witness residing out of India.

7. The argument of Mr. Mehta, learned Counsel for the defendants Nos. 1 and 2, that if the case is covered by the first proviso to Rule 4(1) of Order XXVI, there is a legal right to have a commission issued to examine the witness falling in clauses (a) and (b) of Order XVI, Rule 19 of the Code, is founded on the decision of Delhi High Court in *Mrs. Sunita Jagmohan Verma vs. Jagmohan Verma*, AIR 1985 Del. 1 . Relying upon *Jagannatha Sastry Vs. Sarathambal Ammal and Others*, , the Delhi High Court held that ordinarily in the case of a witness, not under the control of the party asking for the commission, who resides beyond the limit fixed under Order XVI, Rule 19(b) of the CPC "a commission should issue as a matter of right" unless the Court is satisfied that a party is merely abusing its authority to issue process. The judgment of Madras High Court in *Jagannatha Sastry* (*supra*) has been expressly dissented from by a Division Bench of this Court in *Dhanbai Burjorji Cooper vs. Bablibai Shapurji Sorabji*, 36 (1934) B.L.R. 272. This case is of relevance because it arose out of an application for issue of commission to examine a witness residing in a foreign country, viz. Goa. The Division Bench of this Court held that the view expressed in *Jagannatha Sastry* (*supra*) that a party has a statutory right to an order for taking evidence on

commission is not well-founded. It was held that "the Court therefore has to consider what is the right thing to do on the particular facts of each case, and, in my view, it is impossible to say that a party asking for a commission is entitled as of right to an order". This is also the view of Rajasthan High Court in *Satyanarain Vs. Bajranglal*, . In *Shah Velji Nagji Vs. Hevkuberbai and Others*, the Gujarat High Court, too, rejected the broad proposition enunciated by Jagannatha Sastry's case". It should be borne in mind that Jagannatha Sastry's case concerned witnesses residing within India. Even if the propositions laid down by Jagannatha Sastry's case were correct, it cannot be extended to a case of witness residing out of India.

8. No doubt, the case of *Dhanbai Burjorji Cooper* (supra) arose out of the contention that an order rejecting an application for appointment of commission is a judgment within the meaning of the Letters Patent. The contention arose because, according to the appellant, on the authority of Jagannatha Sastry (supra), Order XXVI, Rule 4 creates statutory right to have a commission issued. The Appellant proceeded to urge that since such statutory right was determined by rejecting the application for appointment of commission, the order appealed from was a judgment. The relevance of the case of *Dhanbai Burjorji Cooper* is not that it rejected the right to have a commission issued in certain circumstances. Its significance is that Madras view in Jagannatha Sastry (supra) was rejected. It is the Madras view that was relied upon by counsel for the defendants Nos. 1 and 2. Since the Madras view that "a commission should issue as a matter of right" has been rejected by this Court, it is not possible to uphold that argument based on the rejected view. There are additional factors which make the case of *Mrs. Sunita Jagmohan Verma* (supra) inapplicable to the facts of this case. Firstly, in that case the witnesses were resident within India. The extension of the decision to witnesses outside India is erroneous. Secondly, it was accepted that issue of commission was discretionary. Thirdly, unlike this case, the facts of the case of *Mrs. Sunita Jagmohan* show that not much turned on the demeanour of witnesses sought to be examined on commission.

9. For the reasons which I have stated in the foregoing paragraphs, Order XVI of the Code, as indeed all the provisions of the Code in regard to issue and service of summons, applies to witnesses within India. The first proviso to Rule 4(1) of Order XXVI refers to a person who "cannot be ordered to attend a Court in person". No person who is not resident within India "can be ordered to attend a Court in person". The person who "cannot be ordered to attend in person" referred to in the first proviso to Rule 4(1) of Order XXVI must necessarily be a person resident within India. For the reasons stated in paragraphs 5 and 6 above, Order XVI of Rule 19 applies to persons resident within India. The argument of learned Counsel for the Defendants Nos. 1 and 2 based on the assumption that the first proviso to Rule 4(1) of Order XXVI applies to witnesses resident outside India, is thus unfounded. *Dhanbai Burjorji Cooper* (supra) need not be called in aid of the proposition that there is no statutory right to an order for taking evidence of a witness residing out of India on commission. The first

proviso to Rule 4(1) of Order XXVI does not apply to witnesses outside India. For this reason, there is no legal or statutory right in a litigant to have his evidence taken by a commission. What a litigant does have is the right to apply to the Court to issue commission or letter of request for examination of his witness residing out of India.

10. Section 77 and Rule 5 of Order XXVI of the Code are the provisions which come into play where the witnesses are resident out of India. The Court "may issue" a commission or letter of request for the examination of such witnesses. Therefore, the question always is of exercise of discretion.

11. Dhanbai Burjorji (supra) and Khanjan Lal Sewak Ram Vs. Commissioner of Income Tax, U.P., were, no doubt, cases of witnesses resident out of India. Both these cases highlighted discretionary nature of the power to issue commission. But the principles which should govern the exercise of such discretion do not emerge from them. It is necessary to identify the principles which should guide the Court in the exercise of discretion.

The exercise of discretion should be based on the balancing of the effect of examining a witness in the Court and outside the Court. Examination of a witness by a commission or of a letter of request has three consequences :-

- (i) If the Defendant's witnesses are examined on commission, the Plaintiff is denied the right to cross-examine the witnesses before the Judge who has seen the witnesses of the Plaintiff in the box.
- (ii) The Judge is denied the advantage of observing the demeanour of the witness.
- (iii) The system of questioning, the cross-examination, rules of evidence of another country may place one or the other party at a serious disadvantage.

12. The disadvantage evident from the three consequences set out above is the first principle that should be considered in exercising discretion. Consider how this principle is likely to affect this case.

Dr. H. K. Chae is alleged to be the author of telex message (Exh. "D-D dated 23rd September, 1982 and the receiver of telex messages Exhs. "E-1", "I-1" and "Q-1" (part).

Mr. J. B. Lee, the then Manager of the Defendants Nos. 1 and 2 at Bombay, is alleged to be the author of the letters (Exhs. "J-1", "J-2", "J-3", "W-1" and "Z-1") and the telex message (Exh. "A-2"). There are other documents which bring out circumstances important to both sides. The conduct of the Defendant No. 1 and the Defendant No. 2 in writing these documents or their conduct after receiving such other documents is all important. The Plaintiffs attribute to these witnesses specific role in the transaction on which the case is based. The circumstances in which the parties were introduced, what considerations determined the exchange of letters and telex messages, what was discussed by

the parties, whether the ships were supplied and a host of complex facts, fall for consideration.

Therefore, the testimony of Dr. H. K. Chae and Mr. J. B. Lee promises a quality, complexion and sound that no Court should miss. The meaning of the documents, the reactions of the witnesses and their responses are so important that the documents will be dead letters without the life giving testimony of these witnesses. I certainly wish to see them in the box as I did watch the Plaintiffs' witness. The roles played by them make it essential to record their testimony in my presence.

The force of judicial authorities establishes the importance of observing the demeanour of a witness, especially in cases of disputes of the nature and dimensions revealed by this case. The duty of a Court to observe the demeanour of a witness is an important element in evaluating the testimony (*Langen vs. Tate*, Law Reports (1883) 24 Ch. D 522). A great deal must necessarily depend on the impression that the Court obtains on the weight of the testimony of witnesses, when he is cross-examined. I should be most reluctant to allow the testimony of such important witnesses to be recorded before a commission. The duty of forming an impression of the weight of the testimony cannot be delegated to a commission.

I have heard the Plaintiffs' witness Prakash (P.W.I) who created impressions, good or bad. If I do not have the same advantage in respect of the testimony of Dr. H. K. Chae and Mr. J. B. Lee, it will work great disadvantage to the Plaintiffs and the Defendants. The issue of a commission will deny to the Defendants the opportunity of presenting through the vibrant living testimony, their version on vital questions. If the Defendants' witnesses are examined by a commission, what I will be called upon to read during the arguments, is the lifeless record of the words of these witnesses.

13. The importance of the demeanour of witnesses in such cases has been recognised in English Cases like *Ammar vs. Ammar*, (1954) 2 The All England Law Reports 365, *Langen vs. Tate* (supra) and *In re Boyse Crofton vs. Crofton*, Law Reports (1882) 20 Ch.D: 760.

14. It may be argued that if a witness is not willing to come to this Court to testify and if this Court's writ does not run in Korea, the refusal to appoint commission may appear oppressive and the Defendants may have to give up their case. This introduces the second principle which should be applied in such case, viz. the incapacity of a witness to come to India. This is a valid principle if such incapacity arises because of indigent circumstances, sickness and the like. But such is not the case here. As I will point out a little later, the only witness who has made the affidavit is the President of a Company in Korea and is in a position to come to testify. I must caution that unwillingness of a witness is not a sound reason for issuing a commission.

The Madras High Court in *In Re: U.R.M.M.S.S. Subramanian Chettiar and Others*,

considered that the demeanour is not so important as to take away Court's power to appoint commission. But a year later, the same Court in *Muhammad Zackria vs. Abdul Karim Rowther*, 1956 (II) Madras Law Journal 371 accepted the importance of recording testimony in the Court. Therefore, the principle that demeanour is important, was not rejected.

15. Another principle relevant in such cases is the propriety of allowing a commission to examine a witness who is concerned in the various steps of complicated transactions and whether he should not be subjected to cross-examination in accordance with the Law of the country where the trial takes place. The knowledge of the habits and practices of Korean Court or commission being different, the Court should be reluctant to delegate its discretion in judging the effect of the cross-examination to another Tribunal. (*In re Boyse Crofton vs. Crofton*, Law Reports (1882)20 Ch.D. 760)

16. Another relevant factor is the consideration of the objections to the admissibility of the evidence. A commission may not be able to decide the objections to the admissibility of the evidence forthwith or in accordance with the law in India. It will serve no purpose to read during the argument irrelevant answers.

17. Lack of means of a party to produce a witness resident out of India is another relevant factor (*Ammar vs. Ammar*, (1954) 2 The All England Law Reports 365). But in this case, the Defendants Nos. 1 and 2 are admittedly rich and do not claim that they do not have the means to provide the transport to their witnesses. The affidavit of Dr. H. K. Chae, which forms the basis of the Chamber Summons, urges that his employers are not willing to grant him leave of absence. Lack of means is not the reason.

18. On the overall view of the principles set out in paragraphs 11 to 16 above, I think that the witnesses of the defendants Nos. 1 and 2 must come before this Court and testify. A fair decision of this suit involving such complicated transactions, is not possible without hearing their evidence. It is not in the interest of due administration of justice that Dr. H. K. Chae and Mr. J. B. Lee should be examined on commission or on a letter of request.

19. The case for issue of commission is based on the affidavit of Dr. H. K. Chae who was, at the relevant time, the President of the Defendant No. 1 and who is today the President of Sammi Eaton Axles Ltd., Korea. Mr. J. B. Lee has made no affidavit. What Dr. H. K. Chae has sent is a copy of the affidavit and not the original. It was stated at the Bar that affidavit was transmitted to Bombay on Fax machine. That was more than a week ago. So far, the original affidavit has not been disclosed to this Court. For this reason alone, the case for issue of commission can be rejected.

However, the affidavit does not reveal any ground for issue of commission. According to Dr. H. K. Chae "a representative of Daewoo Corporation" contacted him. Who this representative was, is a mystery, no names, no particulars. He

admits "I was aware of the same" meaning thereby the transactions giving rise to this suit. Then he claims "I immediately contacted my present employers viz. Sammi Eaton Axles Ltd." Dr. H. K. Chae is the President of the Corporation. It is surprising that he should claim to be under an employer, just as a Clerk works under an employer. As President, the decision to take leave of absence and testify in this case, can be taken by him. I do not believe that he is required to take leave of absence from "his employers". For the same reason, his claim that his employers are "not willing to grant" him "leave" is untenable. The vagueness of statements made in the affidavit, improbability that he has a employer whose permission he needs and the excuse that the employers are not willing to grant leave are circumstances which do not inspire confidence. I reject them. The "affidavit" is a document of convenience and has been brought forth for the sole purpose of avoiding personal attendance.

20. It has been urged that the affidavit does not comply with Rule 208 of the Rules and the Forms of the High Court of Judicature at Bombay on the Original Side and the law. It is unnecessary to decide this question because what is produced as an affidavit is unreliable. For the same reason, the question of delay and lack of bona fides need not be gone into.

21. For the reasons stated above, the Chamber Summons is dismissed with costs. Further hearing of the case is adjourned to 6th November 1989 at 11 a.m.