

(1980) 01 OHC CK 0008

In the Orissa High Court

Case No : Civil Revision No's. 30, 31, 64 and 136 of 1979

Manoharlal Arora and Others

APPELLANT

Vs

Atma Prakash Arora and Others

RESPONDENT

Date of Decision : 07-01-1980

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 16 Rule 19, Order 26 Rule 4, 75

Citation : AIR 1980 Ori 57 : (1980) 49 CLT 233

Hon'ble Judges : S.K. Ray, C.J

Bench : Single Bench

Advocate : R.C. Patnaik, P.R. Barik and S.C. Das, In Civil Revn. No. 30 of 1979, A. Mukherjee, in Civil Revns. No. 64 and 136 of 1979, M. Patra, B. Dagara, B. Bramhachari, B. Misra and R. Mohanty, In Civil Revns. Nos. 64 and 136 of 1979, for the Appellant; M. Patra, B. Misra, A. Mukherjee, A.K. Misra, D. Das and N. Mukherjee, In Civil Revn. No. 30 of 1979, M. Patra, B. Misra, P.K. Misra, P.R. Barik, S.C. Das and N. Mukherjee, In Civil Revn. No. 31 of 1979 and R.C. Patnaik and A. Mukherjee, In Civil Revns. Nos. 64 and 136 of 1979, for the Respondent

Final Decision : Allowed

Judgement

S.K. Ray, C.J.—These four revisions have been heard together as they all arise out of different orders passed in the same suit and as they relate to the same topic, namely, examination of witnesses on commission and payment of expenses of the Advocate for the plaintiff as "expenses of commission and will be governed by this common order. The interconnection will be apparent from the enumeration of facts hereinbelow.

2. In Civil Revision No. 30 of 1979, the defendant No. 1 is the petitioner and this Revision is directed against the order of the Subordinate Judge dated 8-1-1979 wherein the petitioner has been directed to pay the costs of the plaintiff as "expenses of commission.

In Civil Revision No. 64 of 1979 the plaintiff is the petitioner and this Revision is directed against the self-same order dated 8-1-1979 allowing the application of

defendant No. 1 to examine 13 witnesses out of 14 witnesses named therein on commission. This Revision is connected with Civil Revision No. 30 of 1979 being in the nature of a counter to the latter and arises out of the same order dated 8-1-1979.

Civil Revision No. 136 of 1979 has been filed by the plaintiff against the order dated 19-12-1978 whereby the trial court allowed the application of defendant No. 2 to examine six of his witnesses on commission on the latter depositing some sums of money towards the expenses of the Commissioner as also of the plaintiff's Advocate. By the said order the trial court also dealt with a similar application by defendant No. 3 (a) who is a Parda Nasin lady and who is residing beyond the jurisdiction of the trial court, praying to be examined on commission and allowed the same on the applicant depositing certain amounts of money towards the remuneration and expenses of the Commissioner as also the expenses of the Advocate appearing for the plaintiff.

Civil Revision No. 31 of 1979 has been filed by defendants 2, 3 (a) and 3 (b) against the order dated 5-1-1979 rejecting their applications to reduce the quantum of costs directed to be paid to the plaintiff and to meet the expenses of the Commissioner which had been earlier fixed by order dated 19-12-1978.

The plaintiff in the suit is the petitioner in Civil Revisions 64 and 136 of 1979 and is the opposite party No. 1 in the other two Revisions, Defendant No. 1 is the petitioner in Civil Revision No. 30 of 1979 and opposite party No. 1 in Civil Revisions 64 and 136 of 1979 and opposite party No. 2 in Civil Revision No. 31 of 1979. Defendants 2, 3 (a) and 3 (b) are petitioners in Civil Revision No. 31 of 1979 and are respectively opposite parties 2, 3 and 4 in Civil Revisions 30, 64 and 136 of 1979.

3. The plaintiff instituted Title Suit No. 81 of 1973 for dissolution of partnership and accounts. The partnership firm was operating in the name of Manoharlal and Company. On 12-5-73 when the suit was filed the plaintiff obtained an ex parte order of injunction and inventory by which the business of the firm was allowed to be run by defendants 1 and 2 at Calcutta and Cuttack respectively under orders of the court. A set of interrogatories were sought to be delivered to the plaintiff, but that was refused. Defendant No. 1 made an application on 3-1-79 for examination of some of his Witnesses named therein on commission. He named 14 witnesses in his application for examination on commission. By order dated 8-1-79 the learned Subordinate Judge allowed the prayer for examination of 13 witnesses on commission and rejected the prayer in respect of one witness, namely, Satrughna Sahu, He also directed defendant No. 1 to deposit Rs. 10,000/- to meet the expenses of the Commissioner as well as of the Advocate of the plaintiff for attending Commissioners' residence. The order dated 8-1-1979 is subject-matter of two revisions, namely, Civil Revisions Nos. 30 and 64 of 1979.

After commencement of trial of the suit, two applications were filed, one by

defendant No. 2 for examination of six witnesses residing beyond the ordinary original jurisdiction of the court on commission and the other filed by defendant No. 3 (a) for being examined on commission. By order dated 19-12-78 the trial court allowed both the applications and called upon them to pay some expenses to the plaintiff and this order is subject-matter of Civil Revision No. 136 of 1979. On 20-12-78 defendants 2, 3 (a) and 3 (b) made applications for scaling down the amount directed to be paid to the plaintiff as expenses on commission. By order dated 5-1-79 these petitions were rejected and the said order is subject-matter of Civil Revision No, 31 of 1979.

4. The witnesses 1 to 5 in the list of defendant No. 1 are family members of the plaintiff. Defendant No. 1 failed to furnish the list of witnesses which he now furnishes for being examined on commission when the suit was opened for trial under Order 16 Rule 1 C. P. C. It was for the first time after a number of witnesses were examined on the side of the plaintiff that defendant No. 1 filed his application dated 3-1-1979 to examine 14 witnesses on commission. The plaintiff objected to the defendant No. 1's prayer on these grounds as also on the ground that the plaintiff, if compelled to go out to those far off places, will be done to death and that the attempt to examine some of the family members of the plaintiff as witnesses on the side of the defendants is for the purpose of humiliating the plaintiff and, as such, the move of defendant No. 1 to examine them on commission lacks bona fides.

The trial court, in facts, has found that the defendant No. 1 made his application for examining his 14 witnesses on commission long after the plaintiff had examined a number of his witnesses and that he has failed to explain by cogent reasons as to why he defaulted in filing his list of these witnesses when the suit was opened for trial or even on the day following. He also believed that the plaintiff was under a reasonable apprehension of being committed to death and that, accordingly, to compel him to go outside Cuttack would raise reasonable apprehension of death or bodily injury to him. He has also recorded a finding that witnesses Nos. 1 to 5 as per list of defendant No. 1 are the family members of the plaintiff. Despite all these findings, the trial court has allowed the prayer for examination of witnesses on commission on the sole ground that defendant No. 1 has a right to examine the witnesses Nos. 1 to 13 on commission since they are residents beyond the jurisdiction of the court. For self-same reasons and despite similar objections of the plaintiff, the application of defendant No. 2 for examination of four witnesses on commission has been allowed.

5. The points which arise for consideration, after hearing learned counsel for all parties, are: (1) whether on a true construction of Order 16 Rule 19, C. P. C. the defendants 1 and 2 have a right to demand that their witnesses enumerated in their lists residing without the local limits of the court's ordinary original jurisdiction must be examined on commission, (2) whether in allowing the examination of witnesses on commission, the trial Court is justified in directing defendants to pay expenses of the plaintiff and his counsel to enable the plaintiff

to effectively cross-examine the witnesses, and, (3) whether the trial Court is justified in allowing defendant No. 3 (a) to be examined on commission.

6. I will proceed to consider the first of the three points indicated above. The provisions relating to examination of witnesses on commission are in Order 26 and Order 16 Rule 19 C. P. C. Rule 1 Order 26 deals with issuance of a commission for examination of any person resident within the local jurisdiction of the Court issuing commission and Rule 4 thereof deals with examination of witnesses who reside beyond the local limits of jurisdiction of the Court. All these provisions underwent amendment in 1976. By this amendment, one proviso was inserted in Rule 1, two provisos were inserted in Rule 4 of Order 26 and one proviso in Rule 19 of Order 16. Rule 19 of Order 16 runs as follows:--

"No one shall be ordered to attend In person to give evidence unless he - resides-

(a) within the local limits of the Court s ordinary original jurisdiction, or

(b) without such limits but at a place less than one hundred or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate) less than five hundred kilometres distance from the Court house :

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 first proviso to Rule 4 (1) of Order 26 runs as follows :--

"Provided that where, under Rule 19 Order XVI, a person cannot be ordered to attend a Court in person, a commission shall be issued for his examination if his evidence is considered necessary in the interests of justice:"

Rule 1 of Order 26 deals with issuance of commission for examination of any person which includes both a witness and a party. The proviso to Rule 1 also states that unless the court "thinks it necessary", no commission shall issue. When commission is issued, reasons must be recorded for issuing the same.

7. Reading Order 26 Rule 4 along with Order 16 Rule 19 the legal position which emerges is that any court may, in any suit, issue a commission for the examination of a witness resident within the local limits of its Jurisdiction, if it, for reasons to be recorded, thinks it necessary so to do. A commission may also issue for examination on commission of any person resident beyond the local limits of a court's jurisdiction but where, however, the witness resides without such limits suit at a place one hundred kilometres or more away from the court house, or at a place five hundred kilometres or more From the court house where five-sixths of the distance between the place where he resides and the place where the court is situate is covered by railway or steamer communication or other established public conveyance, a commission shall not issue For

examination of such witness, unless the court considers that his evidence is necessary in the interest of justice. Though the power to issue a commission has been conferred u/s 75 of the Code of Civil Procedure, it is nevertheless discretionary and is subject to the conditions and limitations as have been prescribed under the Rules, namely, Order 26. Issuance of a commission, however, has been made mandatory in cases where a witness cannot be ordered to appear in person, but his evidence, in the opinion of the court, is necessary in the interest of justice, that is to say, unless the court is satisfied that there is compelling necessity to examine such a witness. Thus, the normal rule is that a commission should not issue for examination of a witness who can be ordered to attend in person to give evidence in the court, unless there are special reasons for it like serious illness or other kinds of ailment or infirmity or similar other grounds or where a person cannot be ordered to attend court to give his evidence. There can, therefore, be no insistence, as of right, by a party to have a commission issued for examination of a witness merely because he is outside the jurisdiction of the court.

8. Applying these principles to the instant case it will be noticed from the impugned orders that the learned Sub-Judge proceeded on the footing that as the witnesses named in the respective petitions of defendants 1 and 2 cannot be ordered to attend in person to give evidence, a commission must be issued for their examination. He has completely omitted to take cognizance of the precondition embodied in the first proviso to Rule 4 of Order 26 before he felt bound to issue a commission. That pre-condition is that he must consider that the evidence of these witnesses is necessary in the interest of justice. Due to this lacuna alone the impugned orders dated 8-1-79 in Civil Revision No. 64 of 1979 and dated 19-12-1978, subject-matter of Civil Revision No. 136 of 1979, are bound to be quashed and the matter is bound to be remitted to the Sub-Judge for reconsidering the matter in the light of the first proviso to Rule 4 of Order 26. Consequently, that part of the order which is subject-matter of Civil Revision No. 30 of 1979 is also bound to be set aside. As a consequence of quashing the order dated 19-12-1978, Civil Revision No. 31 of 1979 must necessarily become infructuous and, therefore, be quashed.

9. The next aspect to consider is whether the bar contained in Rule 19 of Order 16 against directing a witness to attend in person to give evidence applies. If the bar does not apply and the witnesses sought to be examined on commission by defendants 1 and 2 could be summoned to appear in court in person, the order for issuance of commission for their examination would on this ground also be liable to be quashed. This calls for interpretation of Clause (b) of Rule 19 of Order 16. This Clause (b), as already stated, has a proviso appended to it by 1976 amendment. The object and reason for this amendment reads as follows:--

"In view of the improved facilities for transport, Rule 19 is being amended to increase the distance specified therein and also to provide that where air transport is available and the air fare is paid to the witness, he may be required

to attend in person irrespective of the distance of the place from which he is called upon to appear."

Accordingly, the words "one hundred" and "five hundred kilometres" were substituted for the words "fifty" and "one hundred miles" respectively in Clause (b) and the proviso was inserted. On a plain reading of Clause (b) it is clear that no person shall be ordered to attend in person to give evidence unless he reside within the ordinary original jurisdiction or within one hundred kilometres from the courthouse, or where he lives within five hundred kilometres from the court house, five-sixths of that distance between the place where he resides and the place where the court is situate is covered by railway or steamer communication or other established public conveyance. If the witness resides five hundred kilometres or more away from the courthouse, then he cannot be compelled to appear even though five-sixths of that distance is covered by the communications referred to in Clause (b). Then the proviso has been inserted which is in the nature of an exception to the prescribed limitations of Rule 19. It provides that irrespective of the distance between the place of residence of the witness and the place where the court is situate, the witness may be ordered to attend court if the two places are connected by air transport and the witness is paid the air fare. This appears to me to be the true meaning of this proviso. The witnesses sought to be examined on commission are residing at New Delhi, Indore, Madras, Jagdhari (Haryana), Calcutta and Cuttack. Of the 14 witnesses mentioned in the application of defendant No. 1, one belongs to Calcutta. Since Calcutta, where the witness resides is less than 500 kilometres from Cuttack where the court is situate and the two places are connected by railway, he was liable to be summoned to attend court and the Sub-Judge was not justified in directing issue of a commission for his examination. That order so far as that Calcutta witness is concerned, is liable to be vacated on that ground alone. Defendant No. 1 may take steps for summoning him to appear in court. The other places where witnesses reside are Delhi, Indore, Madras and Jagdhari which are respectively at a distance of 2068 KMs, 2546, KMs, 1224 KMs and 1949 KMs from Bhubaneswar and transport by air is not available between those places and Cuttack. The court is situate at Cuttack, about 22 KMs from Bhubaneswar. These data were supplied by Mr. Mohanty and have been accepted as correct by the opposite parties. Accordingly, the proviso to Rule 19 of Order 16 does not apply. In view of the finding of the Sub-Judge that no sufficient reasons were given by defendant No. 1 for having defaulted to cite these witnesses earlier, and that he has adopted this manoeuvre for putting the plaintiff to humiliation and harassment, and in view of his refusing to allow Satrugna Sahu to be examined on commission on the sole ground that he resides within seven kilometres from the place where the courthouse is situate, it appears that he allowed the prayer of defendant No. 1 solely on the ground that since the witnesses lived beyond the prescribed limit of Rule 19 and cannot be ordered to attend court, defendants 1 and 2 had a right to ask for their examination on commission. As already stated, as the mandatory pre-condition

of considering if their evidence was necessary in the interest of justice has not been fulfilled, the impugned orders dated 8-1-1979 and 19-12-1978 are bad in law. I would, therefore, set aside those orders and direct him to consider whether the examination of those witnesses is necessary in the interest of justice before deciding to issue commission for their examination as is indicated in first proviso to Rule 4 of Order 26.

I would, however, also indicate here that in case the Sub-Judge decides to issue commission after coming to a conclusion that the examination of those witnesses is necessary in the interest of justice, he would re-examine the question as to whether the defendants 1 and 2, at whose instance commission is being issued, can be directed to pay the expenses of the plaintiff and his counsel in addition to the expenses of the Commission or as part thereof. In this connection he will give special attention, inter alia, to the decisions of this Court, namely, the decisions in the cases of Rajendra Jha v. Suresh Jha (Civil Revn. No. 206 of 1979, decided on 27-8-1979), Anil Kumar Das v. Orissa Cement Ltd. (1979) 47 CLT 277 and Union of India v. Natabarlal Jayashankar AIR 1956 Orissa 65

10. Since I am setting aside all the impugned orders, subject-matters of these four revisions, and remitting the entire matter back to the trial court for reconsideration, it is unnecessary to adjudicate upon the other two points now.

11. In net result, since the two main orders dated 8-1-79 and 19-12-1978 are set aside, all the Civil Revisions are allowed, but there will be no order for costs.

All the Civil Revisions are allowed and matters remanded. No costs.