
(1984) 05 P&H CK 0012
In the Punjab And Haryana At Chandigarh
Case No : Civil Revision No. 931 of 1914

Mrs. Tara Sarup C/O Amartara Industries, Bombay	APPELLANT
Vs	
M/S Piara Singh Gurmail Singh and Other	RESPONDENT

Date of Decision : 28-05-1984

Acts Referred:

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

Citation : (1984) 05 P&H CK 0012

Hon'ble Judges : S.S. Sodhi, J

Bench : Single Bench

Advocate : Lalit Mohan Suri, for the Appellant; S.K. Aggarwal, for the Respondent

Final Decision : Allowed

Judgement

S.S. Sodhi, J.—Challenged in revision here is the order of the Trial Court declining the Petitioner's prayer for examination of witnesses in Bombay on Commission.

2. The witnesses sought to be examined on Commission were those who had been arrayed as Defendants in the suits. The trial Court held that the provisions of Order 26, Rule 4 and Order 16, Rule 19 of the CPC applied to witnesses but not to parties to the litigation. Further, the examination of these witnesses on Commission was also considered unnecessary on the ground of expense and inconvenience. It was also said that by examining the witnesses in Court, the Court would be able to watch their demeanour in the witness-box.

3. In the matter of issuance of a Commission for examination of witnesses, the paramount consideration is always the interests of justice. The discretion of the Court must thus be exercised in the manner that best serves this purpose in the context of the particular circumstances of the case.

4. The suit here is founded upon an arbitration agreement relating to the construction of a cottage in Simla, which the Defendants deny. The arbitrator

appointed under this disputed agreement has given an award against the Petitioner for Rs. 96, 675.24 P. It is the case of the Petitioner that the cottage belongs to her sons and she has no concern with it.

5. Admittedly, all the five witnesses concerned, including the Petitioner, reside in Bombay and are necessary to be examined for a proper adjudication of the suit. There is no material on record to suggest that there was any lack of Bona fides on the part of the Petitioner in seeking their examination on Commission.

6. It is settled law that a Commission can be issued for the examination of any witness even if the witness happens to be a party to the suit. The witnesses sought to be examined in the present as are, no doubt, Defendants in the suit, but they are admittedly lawful residents of a place well beyond the jurisdiction of the trial Court. To compel these witnesses to come to Chandigarh to give evidence, considering the expense and inconvenience involved, would undoubtedly be oppressive and unfair. The trial Court clearly fell in error in holding that a party to a suit cannot be examined on Commission and holding the factors of expenses and inconvenience against the Petitioner in declining her prayer, in so far as the expense is concerned, it may be mentioned that Mr. Lalit Mohan Suri, Counsel for the Petitioner, specifically undertook on her behalf to defray all the necessary expenses of the Commission.

7. There is a right granted to a party to ask for the issue of a Commission to examine a witness residing beyond the limits fixed. Under Order 16, Rule 19, unless the Court is satisfied that the party is merely seeking to abuse its authority to issue process. This was so held by Subba Rao, J. (as he then was) in Subbaraya Padayachi and Anr. v. Ozhandavel Udayar AIR 1949 Mad. 496.

8. As regards watching the demeanour of a witness in the context of the issuance of a Commission for his examination, it would be relevant to refer to In Re: U.R.M.M.S.S. Subramanian Chettiar and Others, where it was observed:

In all cases where a commission is issued, the court cannot observe the demeanour of a witness. The value of "demeanour" has been too much emphasised; demeanour is one of those subtle things which are important only when the evidence is evenly balanced. It also gives no opportunity for either side to cross-examine the Judge who observes the demeanour of the witness and acts on it. So, it is one of the medieval relics which, though they have some value, are not so important as to take away the rights under the Civil P.C. to issue a commission in deterring cases like this.

It will thus be seen that the trial Court on wholly erroneous and untenable grounds declined the prayer of the Petitioner for the examination of the witnesses on Commission.

9. Faced with this situation, Mr. S. K Aggarwal, counsel for the Respondents, sought to contend that the impugned order was not open to challenge in revision as it was not a "case decided" within the meaning of Section 115 of the Code of

Civil Procedure. He sought to rely here on the judgment of this Court in *Harvinder Kaur and Another Vs. Godha Ram and Another*, The case here related to refusal of the trial Court for appointment of a local commissioner under Order 26, Rule 9 of the Code of Civil Procedure. This prayer had been rejected on the ground that the issue concerned could be proved by producing the relevant record and that demarcation was not necessary. It was held that this was not a "case decided" u/s 115 of the Code the Code of Civil Procedure. This case is however, distinguishable on facts from the present case and cannot, therefore, be taken to advance the contention raised. A direct authority in the matter is the judgment of S.C. Mital J in *M/S Goverdhan Dass Gopi Nath, Amritsar v. Smt. Amlak Raj* (1976) 78 P.L.R. 146, where it was held that a revision petition is competent against the order of the trial Court rejecting the application for examination of witnesses on Commission. A similar view was expressed by Chief Justice R.S. Narula in *Pritam Singh v. Smt. Vidya and Anr.* (1976) 78 P.L.R. 87, where it was held that where (he trial Court refuses to exercise jurisdiction vested in it under Order 26, Rule 4 of Code of Civil Procedure, on grounds which are wholly irrelevant, interference in revision with such an order is the duty of the Court. In a recent case. R.N. Mittal J. in *M/S Delta Products (P) Ltd. v. M/S Partap Steel Mills* 1978 H.L.R. 60, interfered in revision with the order of the trial Court declining a Commission for the examination of witnesses residing outside the jurisdiction of the Court.

10. There can, thus, be no manner of doubt that the impugned order was open to challenge in revision u/s 115 of the CPC and amply justifies interference This order is accordingly hereby set aside and it is ordered that the witnesses be examined on commission. The trial Court shall appoint an open Commission for the examination of the witnesses in Bombay. The expenses of the Commission for the recording of the evidence and the production of witnesses before him at Bombay on the date to be fixed by the trial Court in consultation with the Commission, shall be borne by the Petitioner.

11. This revision petition is accordingly accepted. The costs of this petition shall be costs in the suit. Counsel's fee Rs. 300/-.

12. The parties are directed to appear before the trial Court on June 4, 1984.

Petition accordingly.