

(1940) 02 PAT CK 0019
In the Patna High Court

Mrs. Zohada Begum Saheba

APPELLANT

Vs

Haji Dawood Ayed, Firm and Others

RESPONDENT

Date of Decision : 05-02-1940

Acts Referred:

Citation : AIR 1940 Patna 437

Hon'ble Judges : Rowland, J;Agarwala, J

Bench : Division Bench

Judgement

Agarwala, J.—This is an application by defendant 1 against an order of the Subordinate Judge of Dhanbad refusing to accede to her request to issue a commission for the examination of her husband as at witness on her behalf. The application was made in a suit in which defendant 1 is being sued for breach of contract. The ground on which the Court below has Rejected the application is that the husband of defendant 1 will be an important witness in the case and it is, therefore, desirable that the Court should have the advantage of watching his demeanour while deposing. The husband of defendant 1 is at present serving as a Deputy Magistrate in Orissa, more than 200 miles from the Court where the suit is pending in Dhanbad. Order 16, Rule 19, therefore, is a bar to the Court obtaining the presence of the witness by summoning him. Order 26, Rule 4 confers upon the Court a discretion to permit witnesses to be examined on commission. The only question therefore is whether the Court has acted with material irregularity in the exercise of its jurisdiction in refusing the application of defendant 1.

2. In Vidyapurna Thirthaswami and Another and Sitamma Vs. Subraya and Another, a Division Bench held that "a party to a suit has a right to the issue of a commission to examine a witness beyond the prescribed distance."

This decision was followed by a single Judge of the same Court in Jagannatha Sastri v. Sarathambal Ammal AIR (1923) Mad 321. On behalf of the opposite party, it was con-"tended that defendant 1 has acted mala fide and that her conduct shows her intention of delaying the hearing of the suit. This contention is

based on the fact that in October the husband of defendant 1 applied for leave, apparently with the object of proceeding to Dhanbad to be examined as a witness, and that although his application for leave was refused defendant 1 took no steps to apply for a commission until 16th January 1940.

3. It appears however that in December negotiations for compromising the suit were in progress and that after those negotiations had fallen through the husband of defendant 1 wrote to the latter's pleader at Dhanbad on 3rd January 1940, again stating that he would be unable to obtain leave to leave the district and therefore instructing the pleader to apply for his examination on commission. It does not therefore appear that the conduct of defendant 1 displays any negligence in this matter. In view of this fact and of the importance of the examination of the husband of defendant 1 and of the fact that he is performing public duties in Orissa, we consider that the Court acted with material irregularity in refusing the application.

4. I would therefore set aside the order of the Court below and direct the issue of a commission for the examination of the husband of defendant 1. The parties will bear their own costs of this application.

Rowland, J.

5. I agree.