
(1960) 04 P&H CK 0005

In the Punjab And Haryana At Chandigarh

Case No : Civil Revision Case No. 447-D of 1958

Ram Krishna Dalmia and Another

APPELLANT

Vs

Firoze Chand

RESPONDENT

Date of Decision : 21-04-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Evidence Act, 1872 — Section 136, 3

Citation : AIR 1960 P&H 430 : (1960) 62 PLR 697

Hon'ble Judges : A.N. Grover, J

Bench : Single Bench

Judgement

(1) In 1953 the suit out of which the present petition for revision has arisen was instituted by the plaintiff-respondent for recovery of a sum exceeding Rs. 1,00,000/- on the allegation that he had been appointed in June 1950 as an editor of the Times Newspaper for a period of three years but that his services had been dispensed with on 30-9-1950 in breach of the terms of contract of employment.

(2) During the pendency of the suit the defendants appeal for examination of certain witnesses on commission at Bombay. While a witness was being cross-examined certain objections were raised to the questions which were being asked in cross-examination by the learned counsel for the defendants.

A point at once arose as to whether the Commissioner had the power to disallow such questions as he considered irrelevant. It seems that he counsel for the plaintiff represented to the Commissioner that he would like to move the Court issuing the commission and obtain the necessary directions from it. The Commissioner submitted an interim report in which he expressed the opinion that the necessary directions and orders on the point ought to be obtained from the Court.

The plaintiff then presented an application u/s 151 of the CPC for necessary directions from the Court to the Commissioner on the question whether the

Commissioner could or could not decide the relevancy or otherwise of the questions put to the witnesses.

Two matters had to be decided by the Court below. One was the competency and maintainability of an application u/s 151 and the other, the question on which directions had been sought. The trial Court made a fairly detailed order holding that it was not open to the Commissioner to disallow any questions. It appears, however, that no definite or clear decision was given with regard to the competency or maintainability of an application u/s 151 in such matters as also the point whether the Court was competent to give such directions.

(3) The first contention of Mr. A. R. Whig who appears for the petitioners is that the Court could not give any direction in the matter of allowing or disallowing any questions which were being put to the various witnesses during the course of their examination. My attention has been invited to Order XXXI, Rules 1 to 8 as also Rules 16 to 18 for the purpose of showing that no such provision exists according to which the Court can be moved for deciding a question of law to enable the Commissioner to proceed with the recording of evidence, Section 151 also, according to the submission of the learned counsel for the petitioners, cannot be invoked.

A good deal of reliance has been placed on a decision of the Bombay High Court in *Laxmibai Vs. Husainbhai Ahmedbhai*, in which a Commissioner has been appointed to take accounts and the question was whether the Commissioner was not entitled to decide questions of law which might arise while taking the accounts. It was observed by Macleod J. that it was impossible for the Court while giving directions for the taking, for instance, of a mortgage account, to decide all questions of law, since many such questions did not arise until the accounts were filed. According to the learned Judge, the Commissioner often could not arrive at a conclusion without deciding a question of law. He was decidedly of the opinion that as in the High Court Rules there was no rule similar to rule 69 of Order LV of the Rules of the Supreme Court (in England) it was not open to any of the parties to the reference to ask the Judge to give his opinion on questions of law which had arisen in the taking of the accounts.

The learned Judge further observed that it was not in the interests of justice that parties to a reference should be at liberty to stop the proceedings by moving the Court to give its opinion on a point of law which the Commissioner could decide. The correct procedure was that the Commissioner should deal with such questions and the parties objecting to his decision then should proceed in the ordinary course by filing objections to his report. The concluding paragraph in the judgment of Macleod J., deserves to be set out in its entirety:

"But I must not be taken as holding that the Court, once a reference has been made to the Commissioner, loses all control over the proceedings until the Commissioner has made his report. There may be cases in which the Court may find it necessary to withdraw the proceedings from the Commissioner and

resume the hearing itself, but such cases must necessarily be of rare occurrence. It is a different matter to ask the Court to resume the hearing, merely for the purpose of deciding certain questions which come within the powers of the Commissioner."

No cases has been brought to my notice by the learned counsel for the respondent taking a contrary view. It seems to me highly doubtful that any application would lie of the nature that was made in the present case u/s 151 of the Code of Civil Procedure.

(4) The other question, however, is not an easy one and all the relevant provisions have been referred to by the Court below as also by the learned counsel for the petitioners. The argument which is now pressed before me is that it is for the Commissioner to allow or disallow questions and if that view is not to be accepted it would give an opportunity to the parties to put all kinds of scandalous and other question which are prohibited by the relevant provisions of the Evidence Act and indefinite cross-examination may continue, with the result that the Commissioner will be completely powerless to control the proceedings. Order XXVI, Rule 17(1) provides that the provisions of the Code relating to the summoning, attendance and examination of witnesses, and to the remuneration of and penalties to be imposed upon, witnesses, shall apply to persons required to give evidence or to produce documents. Sub-rule (2) provides that a Commissioner may apply to any Court (not being a High Court) within the local limits of whose jurisdiction a witness resides for the issue of any process which he may find it necessary to issue to or against such witness, and such Court may, in its discretion issue such process as it considers reasonable and proper. Mr. Whig relied particularly on Order XVIII, Rule. 11, according to which where any question put to a witness is objected to by a party or his pleader, and the Court allows the same to be put the Judge shall take down the questions, the answer, the objection and the name of the person making it, together with the decision of the Court thereon.

It is submitted that the Commissioner would have the same powers as the Court or the Judge under the aforesaid rule read with Order XXVI, Rule 17. In the first place, Rule 17 does not confer the same powers on the Commissioner as are exercisable by a Judge or even the Court. Only the provisions of the Code mentioned in sub-rule (1) of Rule 17 have been made applicable to persons required to give evidence or to produce documents. The commissioner does not even have the power of summoning a witness or issuing any process against such witness himself. He has to apply under sub-rule (2) of rule 17 to the Court for the issue of such process. But even if it be assumed that the Commissioner enjoys the same power as the Court in the matter of examining he witnesses, Rule 11 of Order XVIII does not confer any power to disallow questions. That power is to be found in Section 136 of the Indian Evidence Act, the relevant part of which is as follows:

"When either party proposes to give evidence of any fact, the Judge may ask the

party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant; and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant and not otherwise." The word "Judge" is not defined in Section 3 of the Indian Evidence Act but the word "Court" is stated to include all Judges and Magistrates and all persons except Arbitrators legally authorised to take evidence. A Commissioner would fall within the definition of the word "Court" but he cannot be regarded to be a Judge and the power of disallowing questions conferred by Section 136 of the Evidence Act is given to the Judge and not to the Court.

The trial Court in the present case took into consideration the definition of the word "Judge" as contained in the Indian Penal Code but it is highly doubtful if that definition would be relevant for this matter. I am, therefore, of the opinion that the statutory provisions do not support the contention that has been advanced by Mr. Whig. Reliance was placed by him on *Laxmibai Vs. Husainbhai Ahmedbhai*, *Nand Kishore Vs. Lala Shiam Sundar Lal*, and *Vavarthar Abdul Wahab Saheb Vs. Pallapotha Kanaka Anjaneyalu and Others*, but there is hardly any decision or discussion contained in these authorities on the point. The view which I am taking, however, is supported by the observations of Chagla J. (as he then was) in *Vithaldas Damodar Vs. Lakhmidas Harjiwan*, that it is well-known that the Commissioner who takes evidence on commission has no authority to reject any evidence. All that he can do is to note the objections taken by counsel appearing on behalf of the party while commission evidence is being taken, and after having noted the objections he has got to record the evidence given by the witnesses. It is only when the evidence is read before the Court and tendered as evidence that the questions of admissibility and relevancy are considered. This view has also the imprimatur of their Lordships of the Privy Council in *Mst. Atkia Begam v. Muhammad Ibrahim Rashid Nawah* AIR 1916 P. C. 250, where at page 251 it was observed as follows:

"As a Commissioner before whom evidence is taken does not rule points as to the admissibility of evidence, it may be impossible to prevent questions and answers such as these appearing on the face of depositions."

It is true as was present to the mind of their Lordships, that this may lead to the extreme situation that the deposition of a particular witness before the Commissioner may get unnecessarily prolonged and irrelevant and scandalous matters may be introduced but if there is any lacuna in the law it is for the legislature to set it right. Normally it is expected that when parties are represented by counsel they would realise their responsibility and not sit on asking scandalous and irrelevant questions.

(5) Although I entertain the same view as the Court below has taken with regard to the scope of the Commissioner's powers in the matter of disallowing questions put to a witness whose deposition is recorded by him, the petition must succeed on the other point that no such directions could be given at this

stage by the trial Court in exercise of its inherent powers u/s 151. The petition is consequently allowed and the order of the Lower Court is set aside. Costs will be costs in the cause. The parties are directed to appear before the trial Court on 3-5-1960.

ED/V.B.B.

(6) Petition allowed.