
(2012) 03 SHI CK 0285
In the High Court Of Himachal Pradesh
Case No : CMPMO 483 of 2011

Sh. Hemant Goel

APPELLANT

Vs

Smt. Dayawanti and Others

RESPONDENT

Date of Decision : 07-03-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 2, Order 26 Rule 4
Constitution of India, 1950 — Article 227

Citation : (2012) 03 SHI CK 0285

Hon'ble Judges : Dev Darshan Sood, J

Bench : Single Bench

Judgement

Dev Darshan Sud, J.—On the request made on behalf of learned counsel appearing for the petitioner, the name of respondent No. 4 is deleted from the array of respondents. The petitioner challenges the order dated 19.9.2011 passed by the learned trial Court rejecting his application under Order 26 rule 2 of the CPC praying for examination of witnesses on commission and order dated 10.10.2011 closing the evidence of the petitioner. I need not go into the details of the entire case. The first point is that by way of the application which is moved under Order 26 rule 2 of the CPC the petitioner sought the issuance of the commission for the examination of the witnesses as mentioned in Annexure P-1. All these witnesses were residents of Delhi. The reason stated by the petitioner was that these witnesses are permanently working/residing there and despite best efforts made by the petitioner, he could not procure their presence in Court. In these circumstances, a prayer was that as these witnesses are material, he be allowed to examine them on commission for which purpose the petitioner will bear the entire expenses. Thereafter, the case was taken up by the Tribunal on 10.10.2011, on which date the evidence of the petitioner was closed. It is these two orders which the petitioner challenges in this petition.

2. At the outset, I observe that two orders cannot become the subject matter of one petition under Article 227 of the Constitution of India as each order itself furnishes a separate foundation and independent cause for challenge. However,

in order not to prolong the proceedings, I am considering both these orders in this petition.

3. Adverting to the first order, which was passed by the learned trial Court, I find that he has taken a hyper technical view of the matter. If the petitioner wanted the assistance of the Tribunal for issuance of the Commission for recording the evidence of witnesses, who are material in this case, the Tribunal should and ought to have exercised its discretion in a judicial manner. It should have invoked the provisions of Order 26 rule 4 of the CPC as the witnesses were residents of Delhi. The Court should also have ascertained the facts as to whether the application was made bonafide that is to say that the application was not made solely for the purpose of obtaining adjournments or as a cloak for prolonging the proceedings. When the evidence was to be recorded on commission, it is but obvious that it is the petitioner, who will bear all the expenditure etc.

4. So far as the relevance of the evidence to be recorded on commission is concerned, as to whether the witnesses are material or not it has to be considered at the time when the evidence itself is evaluated by the Court. In these circumstances, I find that the order which has been passed by the learned Tribunal is against law and it is accordingly quashed and set aside. Consequently, the order dated 10.10.2011 is also quashed and set aside as it seems that this order has been passed on hyper technical grounds only for resisting the number of opportunities granted to the petitioner to produce the evidence. The Court should have been alive to the fact that it is usual that witnesses who reside beyond the territorial jurisdiction of the Court, do not usually attend Court proceedings, their evidence can be recorded on Commission under Order 26 rule 4 of the Code of Civil Procedure. I am not going into that aspect of the matter in detail.

5. Learned counsel appearing for the petitioner submits that out of the list of witnesses, only two witnesses namely Anil Kumar Chaudhary and Ajay Kumar will be examined on commission. All the expenditure for recording the evidence etc. will be borne by the petitioner. Needless to say he will not only reimburse the expenses of commissioner, but also the expenses borne by the other party. The petitioner will also bear the boarding, lodging and travelling expenses. The same shall be deposited by the petitioner before the issuance of commission. The reimbursement of the expenses shall include the travelling by Shatabadi Express, Executive Class from Kalka to New Delhi, local travelling expenses i.e. boarding and lodging, stay at decent hotel and travelling from Shimla to Kalka by taxi and all return fare. Petition stands disposed of.