
(1949) 11 CAL CK 0024
In the Calcutta High Court
Case No : Civil Rule No. 819 of 1949

Sris Chandra Nandy

APPELLANT

Vs

Sm. Annapurna Ray

RESPONDENT

Date of Decision : 04-11-1949

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 1
Evidence Act, 1872 — Section 60

Citation : AIR 1950 Cal 173

Hon'ble Judges : Harries, C.J.;Sanker, J

Bench : Division Bench

Advocate : Sitaram Banerjee and Amarendra Narain Bagchi, for the Appellant;
Chandra Sekhar Sen and Lala Hemanta Kumar, for the Respondent

Final Decision : Allowed

Judgement

Harries, C.J.—This is a petition for revision of an order of a learned Subordinate Judge of Murshidabad directing that the evidence of the plaintiff's husband be taken on commission.

2. The plaintiff who is a lady had already given evidence on commission in the suit and it is suggested that her husband was her legal adviser and a most important witness in the case. The defence were naturally anxious to cross examine this witness in open Court. But an application was made for the issue of a commission on the ground that the witness was unfit to give evidence.

3 An affidavit of the plaintiff was filed in support of the application and a medical certificate of some medical practitioner was also tendered.

4. There can be no doubt that the learned Judge in coming to the conclusion that a commission should issue was influenced by this medical certificate. In his order he states :

"Heard the learned lawyers of both parties and perused the petition of the plaintiff of date supported by a medical certificate. Plaintiff's prayers for

examination of her ailing husband on commission will be allowed."

5. Mr. Banerji on behalf of the petitioner has contended that this medical certificate was inadmissible. The medical man who gave the certificate did not swear an affidavit and a medical certificate tendered in this manner is the worst form of hearsay evidence. By tendering the certificate the plaintiff informs the Court what the doctor says in the matter with her husband. She certainly could not give evidence that a doctor had told her verbally what was in the certificate. Neither can she produce the certificate and make it evidence because it is merely what the doctor had told her in writing. The certificate is wholly inadmissible in evidence. That being so, the very basis of the Judge's order disappears and the order must consequently be set aside.

6. It will be of course open to the plaintiff, if her husband is now unfit to give evidence, to make a fresh application. But before the Court makes an order for the examination of this witness on commission it must have before it admissible evidence. The doctor should be called so that the defence would have an opportunity of cross examining to test his evidence.

7. The result, therefore, is that this petition is allowed and the order of the learned Subordinate Judge is set aside. The rule is made absolute with costs.

8. Let the counter affidavit filed in Court to day be kept on the record.

Sarkar, J.

I agree.