

(1958) 04 OHC CK 0014
In the Orissa High Court
Case No : Civil Revision No. 94 of 1956

Sudhansu Mohan Mukherji	Vs	APPELLANT
Union of India (UOI) and Another		RESPONDENT

Date of Decision : 28-04-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 16 Rule 19, Order 26 Rule 4

Citation : AIR 1958 Ori 287

Hon'ble Judges : G.C. Das, J

Bench : Single Bench

Advocate : H. Sen and P.C. Chatterjee, for the Appellant; B.K. Pal, for the Respondent

Judgement

G.C. Das, J.—This is a plaintiff's petition directed against an order of the learned Munsif of Cuttack allowing - second defendant's petition to examine ten witnesses on commission by the small cause court judge at Madras.

2. The plaintiff commenced an action for the recovery of a sum of Rs. 2706-6-0 from the defendants for non-delivery of four bales of yarn which were despatched from Madura to the address of the plaintiff at Cuttack. The whole case of the plaintiff was that it was due to the misconduct and negligence on the part of the railway authorities that he incurred the above loss.

There were two defendants to the action, the first being the Eastern Railway which is now changed to South Eastern Railway and the second being the Southern Railway. The defence of both, the defendants was that there was a theft in the running train and that they handed over the case to the police and the police could not detect. Hence they are not liable for the loss suffered while the goods were in transit.

During the pendency of the suit, the second. defendant filed an application under Order 26, Rule 4 read with Order 16, Rule 19 of the CPC on 1-3-1955, for the examination of ten witnesses on his behalf at Bezwada, which apparently was a

mistake, and consequently the 2nd defendant filed another petition on 21-12-1955, to examine the said witnesses at Madras by the small cause court judge, Madras.

The learned Munsif relying on the provisions of Order 16, Rule 19 read with Order 26, Rule 4, C. P. C., allowed the second defendant to examine all his ten witnesses at Madras on commission by the small cause court judge.

3. Mr. Sen, learned counsel on behalf of the petitioner, contended that the order of the learned Munsif is clearly against the provisions of law and. hence it ought to be set aside. His whole contention was that according to the provisions of Order 26, Rule 4, it is within the discretion of the Court to allow or not to allow a witness to be examined on commission. Thus, the language employed in Order 16, Rule 19 is mandatory but when read with Order 26, Rule 4, it leaves the Court to exercise its discretion.

4. Order 26, Rule 4 reads as follows:

"4 (1) Any Court may in any suit issue a commission for the examination of:

- (a) any persons resident beyond the local limits of its jurisdiction;
- (b) any person who is about to leave such limits before the date on which he is required to be examined in Court; and
- (c) any person who cannot in the opinion of the Court attend without detriment to the public service.

(2) Such commission may be issued to any Court, not being a High Court, within the local limits of whose jurisdiction such person resides, or to any pleader or other person whom the Court. issuing the commission may appoint.

(3) The Court on issuing any commission under this rule shall direct whether the commission shall be returned to itself or to any subordinate Court. Order 16, Rule 19, as is relevant for the-present purposes reads as follows:

"Order 16, Rule 19. No one shall be ordered to attend in person to give evidence unless he resides:

- (a) within the local limits of the Court's ordinary original jurisdiction, or
- (b) without such limits, but at a place less than fifty or (where there is railway or steamer communication or other established public conveyance for five-sixths of the distance between the place where he resides and the place where the Court is situate less than two hundred miles distance from the Court-house."

It is significant that Order 26, Rule 4 uses the expression "may" whereas Order 16, Rule 19 uses the word "shall". Therefore under Order 26, Rule 4. it is at the ". discretion of the Court to issue a Writ for the examination of a party or a witness on commission, Whereas under Order 16, Rule 19 it is mandatory not to compel attendance of a party or a witness on certain conditions.

Mr. Sen relied upon a decision of the Madras High Court reported in *Jagannatha Sastry v. Sarathambal Ammal* ILR 46 Mad 574: (AIR 1923 Mad 321) (A). Mr. Justice Wallace held in that case that ordinarily in the case of a witness not under the control of the party asking for the commission, who resides beyond the limit fixed under Order 16, Rule 19(b), Civil Procedure Code, a commission should issue as a matter of right, unless the Court is satisfied that a party is merely abusing its authority to issue process.

It is not for the Court to decide whether the party will be benefited thereby or not; that is a matter entirely for the party. It is clearly the duty of High Court to interfere, even in interlocutory proceedings rather than permit a trial to go on an illegal course, which must entail unnecessary expenses to the parties and useless waste of time.

To the same effect is the decision of the Calcutta High Court reported in *Mohitosh Ghose Vs. Molin Behari Dutt*, ; In *Satis Chandra v. Satish Kantha* AIR 1923 PC 73 (C), the principal defendant was to be examined on commission. Lord Atkinson held that nothing could be more unsatisfactory than this mode of procedure. The principal defendant gives his evidence before the plaintiff's case has been opened or the evidence of their witnesses given.

The Court which has to decide has no opportunity of judging the veracity of the witness from his conduct and demeanour. All the advantage of confronting a witness accused of a fraud, with his accusers is lost. Evidence taken on commission should only be permitted to be used where the witness is proved to be too ill to give his evidence in Court or is absent or for other sufficient reasons.

In the case of *Mowji Dharamsey v. Nemchand Naranji* ILR 23 Bom 626 (D), Mr. Justice Starling held that it is not in the interests of justice that these witnesses should be examined in the way it is proposed, and that using a judicial discretion, it is the duty of the Court to refuse to grant the commission asked for. In coming to the above conclusion Starling, J. relied upon the decision in *Berdan v. Greenwood*, (1880) 20 Ch. D. 764 (E), in which Baggallay, L. J. observed as follows:

"We must regard the interests of justice, the interest of the defendants as well as that of the plaintiff and of course we must consider the nature of the issues which are raised in the pleadings. One can well imagine the extreme importance to the defendants, in a case of this kind, of having the fullest opportunity of thoroughly investigating the claim and testing by cross-examination the witnesses who are called.

I am very unwilling to express any opinion upon the question which has been so much argued, the credibility of General Berdan, but in considering whether the examination of a witness should be taken by commission, we must have regard, at any rate, to the possibility of his not being a credible witness. If the witness is a credible witness, it is hardly material whether he gives his evidence viva voce in Court or before a commission, or by affidavit, or in any other form.

But we must assume the possibility of his not being a credible witness, and then it becomes of the most extreme importance that the jury or the Court which has to decide the question should have the opportunity of seeing the demeanour of the witness, and observing the way in which the various questions which are put to him in cross-examination are answered."

Lord Justice Cotton in that case expressed the View:

"But we ought to consider not merely what the plaintiff's case requires, but what justice to the defendant as well as to the plaintiff requires. And in such a case as this it is in my opinion, eminently important that the demeanour of the witness should be seen and his precise answers to the questions put to him should be heard by the Judge or the Judges and jury, who have to decide the case, and that the defendant should have the fullest opportunity of cross-examining him, they being really only able to do that effectually when the witness is in Court, and his demeanour, and the way in which he answers the questions can be judged of by the judge and the jury."

With great respect I am in entire agreement with their Lordships of the court of appeal in England which enunciates succinctly the underlying principle of examining witnesses on commission. Mr. Pal appearing on behalf of the opposite parties contends that the mandatory provision as laid down in Order 16, Rule 19 should govern the provision as laid down in Order 26, Rule 4 of the Civil Procedure Code, and he tried to make a distinction between the plaintiff and the defendant being examined on commission. For that purpose, he relied upon two decisions reported in *Borayya v. Ramakoti Sastri* AIR 1949 Mad 468 (F),- and *Kumar Sarat Kumar, Ray Vs. Ram Chandra Chatterjee*, . Those are cases in which the defendant or a single witness of the defendant were to be examined on commission; and the Court had to exercise its judicial discretion in those matters. Mr. Pal has not been able to show any case in which the entire body of witnesses (ten witnesses in this case) on behalf of the second defendant were to be examined on commission, and the Court is deprived of marking the demeanour of the witnesses in the witness box and the manner of their reply whether in examination in chief or in cross-examination, as has been observed by Cotton, L. J. in the case cited above.

Further, in my opinion, the plaintiff would be put to unnecessary expenses and there would be a useless waste of time. I have looked into the list of witnesses as furnished by the second defendant. Except the Sub-Inspector of Police, the rest of the witnesses, that is nine witnesses are the employees of the Southern Railway (defendant 2), and they are either clerks or guards of goods train.

I am not convinced that their absence from the headquarters would be in any way detrimental to the administration of public service. Accordingly, I would set aside the order of the learned Munsif and direct that the defendant should examine his witnesses in Court in the presence of the plaintiff at Cuttack. The learned trial judge, however, will not insist upon the second defendant to produce

all his witnesses on pne and the same date.

The second defendant will produce such witnesses as are available for examination in Court without detriment to the exigencies of public service, and the trial court will give reasonable accommodation to the second defendant for examination of the rest of the witnesses.

5. In the result, the order of the learned Munsif dated 16-1-56 is set aside, and the Rule is made absolute; but in the circumstances there would be no order for costs.