

(1955) 10 OHC CK 0006
In the Orissa High Court
Case No : Civil Revision No. 98 of 1955

The Union of India (UOI)

APPELLANT

Vs

Natabarlal Jayashankar

RESPONDENT

Date of Decision : 10-10-1955

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 4, Order 26 Rule 15, Order 26 Rule 4, 115

Citation : (1956) 22 CLT 72

Hon'ble Judges : Panigrahi, C.J.; P.V.B. Rao, J

Bench : Division Bench

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

Final Decision : Allowed

Judgement

Panigrahi, C.J.—This revision is directed against an order of the Subordinate Judge, Cuttack, refusing to issue a commission for the examination of the defendant's witnesses at Bezwada -- a place 500 miles away from the Court at Cuttack where the suit is pending for trial. The suit was laid for recovery of damages for loss and short delivery in respect of a consignment of twenty bales of cotton yarn booked from Ambasamudram on the Southern Railway to Cuttack.

The plaintiffs case is that the consignment was found tampered with and cut with sharp instrument and resewn when he took open delivery on 9-1-1953. He complained that he suffered heavy loss due to "non-delivery and pilferage" on account of the gross negligence and misconduct of the defendant. The defendant is the Union of India representing the Eastern and Southern Railways, over whose lines the consignment travelled.

The defendant pleaded that the consignment was received at Bezwada on 14-12-1952, but was looted by a riotous mob, that 14 bales out of the 20 were recovered after the looting and ten of these were found in a tampered condition. As the loss was due to circumstances beyond the control of the defendant, the

defendant pleaded that he was not liable for the loss caused to the plaintiffs as it was not due to any negligence or misconduct on the part of the Railway Administrations concerned.

The defendant further avers that there was no loss between Bezwada and Cuttack. The written statement was filed on 19-7-1954 and issues were settled on 30-7-1954, on which date the Court posted the suit for fixing a date for trial, to 6-9-1954. The suit was then posted for trial to 22-11-1954. Prior to that date, on 1-11-1954, the defendant filed a petition under Order 26, Rule 4, Civil P.C. praying that the 13 witnesses mentioned in his petition may be examined on commission by the District Munsif, Bezwada.

In the affidavit filed by the defendant it is stated that these witnesses ordinarily resided more than 200 miles away from the Court at Cuttack and that it would entail heavy expense to bring them to Cuttack over a distance of more than 500 miles for purposes of examination. It is further stated that it would cause serious dislocation in the administration of the Railway and considerable inconvenience to the public if these witnesses are compelled to attend the trial at Cuttack.

Of the thirteen Witnesses, three belong to the police department and the rest are employees of the Southern Railway, working in different capacities in different stations. The plaintiff filed a counter alleging that the witnesses being all employees of the defendant, against whom allegations are made in the plaint for non-delivery and tampering, this privilege of examination on commission should not be extended to them, particularly as this will entail hardship and loss to the plaintiff, a business firm.

2. The learned Subordinate Judge negated the contention of the defendant (petitioner) that he was entitled, as a matter of right, to have an order in his favour as prayed for. He held that since all the witnesses were under the direct control of the defendant the Court would not be justified in using its discretion in his favour. He further held that he was inclined to take this view specially because the defendant was not prepared to pay anything towards the expenses of the plaintiff for attending the examination of the witnesses on commission at Bezwada.

3. Mr. Pal appearing for the petitioner points out that a number of similar suits estimated at 200 against the same Railway Administration are pending in different Courts in India, arising out of losses caused by riots and looting, and it is impossible for the defendant to produce in the different Courts the witnesses and records relating to the rioting. It is stated in his affidavit that the Courts at Amritsar, Bombay, Betul and Delhi and other Courts have already granted permission for the examination of such witnesses on commission at Bezwada.

I am inclined to agree with the view taken by the learned Subordinate Judge that the privilege of permitting a party to examine himself or his witnesses on commission is a matter which rests on the judicial discretion of the Court trying a suit.

The language of Order 23, Rule 4, Civil P. C., would itself support this view. It says:

"Any Court may in any suit issue a commission for the examination of any person resident beyond the local limits of its jurisdiction, and any person in the service of Government who cannot in the opinion of the Court attend without detriment to the public service".

But there is a distinction between a plaintiff asking to be examined on commission and a defendant making such a request. The Court will not regard the case of the defendant with the same strictness as the case of the plaintiff who has chosen his own forum. What is essential is that the Court before allowing evidence to be taken on commission has to satisfy itself that the application has been made in good faith and not for the purpose of delay and embarrassment.

In *Ross v. Woodford* 1894 1 Ch 38 (A) Chitty J. tersely put the law in the following words:

"The point is whether by refusing the defendants' application I am to compel them either to give up their case or come here at great expense and inconvenience to attend the trial".

It was further observed:

"There are many cases where the Court has been very reluctant to accede to applications by a plaintiff to take evidence abroad, because the tribunal has been chosen by the plaintiff himself. So too, with regard to the case of a plaintiff asking for a commission to examine himself, the Court has full discretion, but it exercises that discretion strictly, and does not grant an application unless a very strong case is made out.

But the case is entirely different when it is the defendant's application, and particularly that of defendant lawfully resident out of the jurisdiction, according to ordinary course of his life and business; and to compel these defendants to come over here at great expense to attend the trial or give up their case would be oppressive and unfair, and in my opinion it would be wrong to apply to the case of a defendant the principles that are applicable to the case of a plaintiff asking for a commission to examine himself".

4. It was, however, strongly contended by Mr. Sen appearing for the opposite party that the matter being discretionary, this Court should not interfere with the exercise of that discretion by the Subordinate Judge in refusing the defendant's application. Undoubtedly it is a matter of discretion, but so it is in almost every case in which a Judge is called upon to give his decision. The question here is whether the learned Subordinate Judge has weighed all the circumstances of the case in arriving at his conclusion.

It is impossible to lay down precisely any rule as to the cases in which this Court

should interfere in discretionary matters. But where it appears clear that the correct principle has not been applied in exercising the discretion and where there is reason to think that it is likely to lead to miscarriage of justice, this Court has not only the right, but is also under a duty, to interfere so that justice may be done to both parties.

It is of course not relevant to consider whether the defendant being a Railway Administration cannot, in all human probability, bring all the witnesses to Court. Far more important is the question whether it would not involve inordinate delay and expenditure to a party. The question does not depend upon the mere capacity of the one or the other party to produce his witnesses, but whether the trial of the suit is not likely to be delayed in securing the attendance of the witnesses, one of whom lives 1200 miles and the rest more than 500 miles beyond the jurisdiction of the Court trying the case.

It is with a view to avoid dislocation of public service that Order 26, Rule 4. Civil P. C. vests the discretion in the Court to facilitate the examination of a person in the service of Government on commission. Rule 19, Order 16 of the Code also provides that no person who does not reside within the local limits of the Court's ordinary jurisdiction, or within a distance of 200 miles from the courthouse, shall be compelled to attend in person to give evidence. It is on this provision that Mr. Pal relies for his contention that he is entitled, as of right, to ask for the examination of his witnesses on commission, and that this is not a matter of discretion,

5. We would set aside the order of the learned Subordinate Judge because he appears to have overlooked the significance of Rule 4 of Order 26 and has not properly weighed the circumstances of the case while exercising his discretion. In *Emanuel v. Saltykoff* (1892) 8 TLR 331 (B) Lord Esher M.R., discussing the circumstances in which a Court of Appeal would interfere with the exercise of the lower Court's discretion observed:

"Each case must depend on its own circumstance and no rule as to the exercise of the discretion should be laid down. If this Court saw that the discretion had been wrongly exercised, if it saw that the case in all its hearings was not laid before the Court below if it saw that the Court had misapprehended an important part of the case, this Court would interfere."

I am alive to the fact that in this case as well as in the other case cited by me earlier the defendant was a foreigner. But these principles have been followed in Indian Courts. See -- "*Adamji v. Yusuf* 16 Ind Cas 750 (C) A.R.P.R. *Viswanathan Chetty Vs. M.N.M. Somasundaram Chetty*, *Kumar Sarat Kumar, Ray Vs. Ram Chandra Chatterjee*, and "*Akbar Ali v. Herbert Francis* AIR 1925 Pat 125 (F). In 16 Ind Cas 750 (Cal) (C) a suit for accounts was laid at Cuttack against the defendant who was residing in Colombo.

Mookerji J. observed that it would obviously be unfair to compel the defendant to come from Colombo to Cuttack to be examined in Court, or practically abandon

his defence. Mr. Pal relied on the cases reported in *Jagannatha Sastry Vs. Sarathambal Ammal and Others*, and "*M. Borrayya v. K. Ramakoti Sastri* AIR 1949 Mad 468 (H) and contended that the defendant was entitled, as a matter of right, to ask for examination of His witnesses on commission, but I am not prepared to go to that length as the balance of authority is in favour of the view that the Court has always the discretion to disallow a party's application to have his evidence recorded in commission. The only question whether the discretion has been properly exercised in a particular case after due regard had been paid to the circumstances of that case.

6. Mr. Sen strongly urged that in this particular case the witnesses should be examined in open Court so that the Court may observe their demeanour and form its opinion as to their veracity, he cited a few reported cases in support of this argument, but I find that in each of those cases the decision rested on the oral testimony of a solitary witness or party, and it was accordingly held that examination *viva voce* would be the more proper method. See -- "*Satischandra Chatterjee v. Satishkantha Roy* AIR 1923 P. C. 73 (I) and "*Mowji v. Nemchand* 23 Bom 626 (J).

It is true that where there is likely to be a sharp conflict of testimony, the Court should always insist on the examination of a witness in open Court. But that rigorous test does not apply to the circumstances of the case before us. The only issue sought to be proved in this case is that relating to the rioting and loss of packages from railway wagons through looting, and this is sought to be established not only by oral testimony but by a number of contemporaneous documents prepared by the employees of the Railway Administration and the police department.

The plaintiff does not allege that the witnesses to be examined to prove the fact of looting were themselves guilty of fraud or misconduct. The mere fact that the witnesses are employees of the Railway Administration is not sufficient to draw the inference that they are not likely to speak the truth. The defendant is an impersonal body, and it is preposterous to suggest that the witnesses are likely to be influenced or depose falsely.

In cases where the trial is held by a Judge with the aid of a Jury, the examination of a witness in open Court would be necessary and desirable so that the jury may form its own opinion as to whether the witnesses are deposing truthfully or not. But in a suit for damages for short delivery the only material issue to be tried is whether the defendant is exempted from statutory liability on account of some happening which was beyond his control.

Whether the alleged rioting and looting took place or not is a notorious fact and there must be some unimpeachable evidence of such a happening. Whether the particular packages were stolen and later retrieved must be capable of proof by documents as well as oral evidence. Apart from this, what the defendant prays for is merely to have his witnesses on this point alone examined on commission

at Bezwada.

In view of this the objection raised by the plaintiff loses all force. It will be open to the Munsif at Bezwada to observe the demeanour of the witnesses who would appear before him, and note down his own impressions. I am not, therefore, prepared to yield to a fanciful argument like this based on lack of opportunity to observe the demeanour of witnesses.

7. The next point that requires consideration is whether in the event of a commission being allowed the plaintiffs should be put in possession of funds for going to Bezwada and attend the trial, Order 23, Civil P.C. is very comprehensive and furnishes a complete Code in Itself. Rules 15 to 18 lay down certain general provisions for the expenses of the commission.

The expression "expenses of the commission" used in Rule 15 would indicate that all reasonable expenses of the Commissioner, including his remuneration and incidental expenses incurred by him are to be provided for by the Court and to be paid into Court by the party at whose instance or for whose benefit the commission is to be issued. I am unable to find any provision which would warrant the view that the plaintiff's expenses also should be provided for by the Court.

The rules to be followed for the examination of witnesses on commission are prescribed at page 130 of the General Rules and Circular Orders, Vol. 1 (Civil). Rule 20 provides for the scale of remuneration besides the incidental" expenses of the commission, though the Court's discretion to alter the scale is not fettered. It may be noticed, however, that there is no rule that-enables the Court to prove for the expenses of the plaintiff opposite party,

Mr. Sen, however, drew our attention to the case reported in Kumar Sarat Kumar, Ray Vs. Ram Chandra Chatterjee, where a sum of Rs. 1000/- was directed to be deposited to the credit of the plaintiff. But this case is clearly distinguishable on facts as the petitioner undertook to deposit that sum. The question whether In every such case the Court is bound to call upon the defendant to make a deposit to the credit of the plaintiff was never raised in that case and there was no occasion to decide it independently.

There are two decisions of the Patna High Court where the Court directed the costs of the issue of a commission, in Fariduddin Ahmed Vs. Abdul Wahab, Adami J, directed that the costs of the commission to the plaintiff to be deposited as a preliminary to the petitioner should be deposited by the opposite party before the commission issued.

Similarly in Ghanshyam Das Agarwala Vs. Kisturibala Debi and Another, Agarwala J. upheld the order of the lower Court that the defendant should pay the plaintiffs Rs. 200/- as costs for attending the commission. Both these are single Judge decisions and do not decide any question of principle. I have not been shown any decision directly favouring the view advocated by Mr. Sen. It may be that in a

particular ease such an order may be justified by having regard to the status of the petitioner. But such an order is wholly unnecessary in this particular case as the defendant is the Union of India.

It is open to the plaintiff to engage a counsel at Bezwada or take a counsel from Cuttack to Bezwada. It appears from the records that the managing partner of the plaintiff-firm is himself an Advocate. I do not, therefore, apprehend any serious inconvenience to the plaintiff by his being required to attend the examination at Bezwada. Any costs incurred therefore would form part of the costs of the litigation and would be recoverable by the plaintiff in the event of his success in the suit.

I was inclined at one stage to adopt the course taken in the two Patna cases cited above. But I do not think that on principle the plaintiffs are entitled to such an order. I should not be understood, however, as laying down a universal rule that in no case should the Court provide for the expenses of the opposite parties in matters like this. It may be necessary to provide for the payment of expenses of the opposite party in cases where a commission for local investigation is issued as was done in *Nripendra Bhusan Roy and Others Vs. Raja Pramatha Bhusan Deb Ray*, .

8. In the view I have taken of the circumstances of this case, the petitioner is entitled to have the witnesses examined on commission at Bezwada. But I would insist that all the witnesses should be produced on the day fixed by the Munsif, and their examination should proceed from day to day without a break, so that the plaintiff may not be put to unnecessary trouble and expense. If the petitioner is unable to produce any of his witnesses he must take the consequence of losing the benefit of the examination of that witness on commission at Bezwada, and he must either be produced at Cuttack or the plaintiff should be paid all his reasonable expenses for his Journey to and from Bezwada in that connection.

9. I would accordingly set aside the order of the learned Subordinate Judge and allow this revision with costs. Hearing fee Rs. 50/- (Rupees fifty only).

P.V.B. Rao, J.

10. I agree.