

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 5th November, 2014

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WP(C) No.6792/2014

ANIL K. AGGARWAL

.... Petitioner

Through: Petitioner in person.

Versus

UNION OF INDIA & ANR.

..... Respondents

Through: Mr. Sanjay Jain, ASG with Mr.
Akshay Makhija, Ms. Pallavi Shali,
Advs. for R-1/UOI.
Ms. Anu Bagai, Adv. for R-2.

CORAM:-

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

1. This petition, under Article 226 of the Constitution of India, filed as a Public Interest Litigation (PIL) claims the following reliefs:

“A. issue writ of or in the nature of mandamus and / or any other appropriate writs, orders, directions directing the courts, tribunal and other judicial authorities within the jurisdiction of the Hon'ble High Court of Delhi to appoint notaries registered and holding valid certificate of practice issued under the Notary Act, 1952 to act and function as Commissioner for recording of evidences in any civil or criminal trial; and not to appoint any advocate / legal practitioner or retired or serving judicial officer,

who is not a notary to act and function as Commissioner for recording of evidences in any civil or criminal trial; and

- B. issue writ of or in the nature of mandamus and / or any other appropriate writs, orders or direction to annul and quash all appointments of advocate / legal practitioner or retired or serving judicial officer, who is not a notary, made by any courts, tribunal and other judicial authorities functioning within the jurisdiction of the Hon'ble High Court of Delhi, being illegal and *ultra vires* the Notary Act, 1952 and rules framed thereunder; and
- C. issue writ of or in the nature of mandamus and / or any other appropriate writs, orders or direction to the respondent no.1 to fix the fee payable to the Notary for the act and function as the Commissioner for recording of evidences on the directions of the courts or any other judicial authority; and
- D. pass such other writ/s, order/s or direction/s including the cost of this petition, as this Hon'ble Court deems fit and proper in the facts and circumstances of the case and in the interest of justice."

2. It is the case of the petitioner, i) that in terms of the provisions of the Code of Civil Procedure (CPC), 1908, evidence of witnesses residing within the local limits of the jurisdiction of the Court was to be ordinarily recorded by the Judge in the open Court; ii) however vide amendment with effect from 1st July, 2002 of the CPC by incorporation of Rule 19 to Order XVIII

and Rule 4A to Order XXVI, the Courts were empowered to, instead of examining the witnesses in Court, direct the witnesses to be examined on Commission; iii) that simultaneously to the amendment aforesaid to the CPC, the Notaries Act, 1952 was also amended with effect from 17th December, 1999 adding “to act as a Commissioner and record evidence in any civil or criminal trial if so directed by any court or authority” to the functions prescribed of a Notary; iv) that in the course of his practice as a lawyer before the Civil Courts at Delhi, it has come to the notice of the petitioner that Courts are appointing practicing advocates and retired Judicial Officers as Commissioners for recording of evidence of witnesses, ignoring the provisions of the Notaries Act; v) that only the persons who satisfy the qualifications laid down in the Notaries Rules, 1956 amended in the year 1997 are eligible to be appointed as ‘Notary’; vi) that thus only those persons who are registered as ‘Notary’ under the Notaries Act are competent to function as Commissioners’ for recording of evidence and the Courts cannot appoint just any advocate or retired judicial officer as a Commissioner to record evidence.

3. We have heard the petitioner appearing in person.

4. In our opinion, the petition is not only bereft of any merit but highly misconceived and has been preferred without regard to the relevant provisions and the law.

5. Sections 75-78 read with Order XXVI of the CPC dealing with commissions (to examine witnesses), while empowering the Courts to issue commissions, do not place any limitation qua the person to whom such commission would be issued. All that Rule 21 of Order XXVI titled “To whom commission may be issued” provides is that the commission may be issued to any person whom the Court deems fit to execute the commission. Similarly, Chapter X titled ‘Commission to Examine Witnesses’ of the Delhi High Court (Original Side) Rules 1967, Rule 5 whereof while providing for Commissions for examination of a person within the local limits of the Court, merely provides for the same to be executed by a Commissioner appointed by the Court and does not interfere with the discretion vested in the Court to appoint whomsoever it deems fit as the Commissioner. Similarly, Chapter X-A titled ‘Evidence on Commission at Court’s Discretion’ also does not place any such limitation on the powers of the Court. The Instructions issued by this Court to the Civil Courts in Delhi in Chapter 10 thereof, titled ‘Commission and Letters of Request’ while do

containing certain guidelines on who should be appointed as Commissioner, prefaces it with the condition that the said Instructions are administrative and are not to be regarded as binding the discretion of the Civil Courts in making appointments of Commissioners. After laying down the guidelines, the said instructions further state that “the best man for the particular commission should be appointed”, regard being had to the “wishes of the parties” in this regard. The relevant Statutes/ Rules and Regulations having not placed any limitation or condition on the Court as to whom to appoint and whom not to appoint as Commissioner, we are of the view that the question of this Court in exercise of powers under Article 226 of the Constitution of India, placing any such limitations on the Court does not arise. The reliefs sought in the petition are in ignorance of all the aforesaid provisions.

6. An order of the Court in exercise of powers under Order XVIII Rule 19 and Order XXVI Rule 4A of the CPC, of “in the interest of justice or for the expeditious disposal of the case or for any other reason” “instead of examining witnesses in open Court”, issuing a commission and directing the recording of such statement of witnesses on commission is a judicial order.

7. Amendment to the CPC of the year 2002 also amended Rule 4 of Order XVIII of the CPC and sub-Rule (2) thereof provides that the evidence (cross-examination and re-examination) of the witnesses whose evidence (examination-in-chief) by affidavit has been furnished to the Court shall be taken either by the Court, or by the commissioner appointed by it. It further provides that the Court, while appointing the commission shall consider taking into account such relevant factors as it thinks fit. Sub-Rules (3) and (4) of the said Rule 4 provide that the Commissioner shall record the evidence in writing in his presence and may record such remarks as it thinks material respecting the demeanour of any witness while under examination as well as the objection raised during the recording of evidence.

8. The Supreme Court in *Salem Advocate Bar Association Vs. Union of India* (2005) 6 SCC 344, while dealing with the challenge to the constitutional validity of the said amendments to the CPC, held that the power under Order XVIII, Rule 4(2) is required to be exercised with great circumspection having regard to the facts and circumstances of the case and that it is not necessary to lay down hard and fast rules controlling the discretion of the Court to appoint Commissioner to record cross-examination and re-examination of witnesses. Though the Supreme Court noticed that in

some States, advocates are being required to pass a test conducted by the High Court in the subjects of Civil Procedure Code and Evidence Act for the purpose of empanelling them on the panel of Commissioners and praised such practice but refrained from making such a practice mandatory and left it to the High Courts to examine this aspect and decide to adopt or not to adopt such a procedure.

9. Similarly a Full Bench of the High Court of Bombay in ***Harish Vithal Kulkarni Vs. Pradeep Mahadev Sabnis*** AIR 2010 Bombay 178 while answering the reference made by a Single Judge of that Court to the effect “whether the evidence in the civil matters be recorded only through the Commissioner appointed by the Court and only in exceptional cases when the Court thinks fit, in the Court” held /observed that the provisions aforesaid vest a vast discretion in the Court to decide whether cross-examination of a witness shall be conducted in Court or before the Commissioner; the said discretion is a ‘judicial discretion’ to be exercised taking into account such relevant factors as the Court may deem fit after applying its mind as to when and who should be appointed a Commissioner, keeping in view the facts and circumstances of the case and what specific directions are to be issued for cross examination to be conducted before the

Commissioner; it was further held that such discretion has to be exercised in accordance with the settled principles of law. The Full Bench further held that the discretion of a Court is called a 'judicial discretion' and is regulated by well settled principles of law and cannot be taken away particularly when it is unambiguously provided for by the legislature itself. It was further held that "there is inbuilt element of judicial discretion and deprivation of such a power is impermissible in the light of the Scheme of the Code of Civil Procedure and settled canons of law" and that once the legislature has given discretion to the Court to direct recording of cross-examination by the Court itself or before a Commissioner appointed by it, it will not be permissible to lay down any 'straitjacket formula' directing in which case cross examination should be before the Court and in which before the Commissioner.

10. Once an order appointing Commissioner is a judicial order, the question of this Court, in exercise of jurisdiction under Article 226 of the Constitution of India issuing a general direction as to how the said discretion should be exercised, by directing that only Notaries will be appointed as Commissioner to record evidence, when the legislature has vested the discretion in the Court issuing the Commission or of quashing the

appointment so made, as sought in prayer paragraphs A and B (supra), does not arise.

11. The Supreme Court in *Jasbir Singh Vs. State of Punjab* (2006) 8 SCC 294 has held that the extraordinary power even under Article 227 of the Constitution of India, much less under Article 226, cannot be used to interfere with the judicial functions of a subordinate Judge. Reference in this regard may also be made to the judgment of the Constitution Bench in *Naresh Shridhar Mirajkar v. State of Maharashtra* AIR 1967 SC 1 laying down that a writ would not ordinarily be issued against a judicial order by taking resort to Article 226. Of course subsequently in *Surya Dev Rai Vs. Ram Chander Rai* (2003) 6 SCC 675 the Supreme Court specified the situations in which such a writ may be issued viz. where the order of the subordinate Court is by assuming jurisdiction where there exists none or in excess of its jurisdiction or acting in flagrant disregard of law. We have already noticed above that the law has vested jurisdiction/discretion in the Court appointing the Commissioner to choose the person to whom the commission is to be issued and thus it cannot be said that the order of a civil Court choosing any person as a Commissioner would be without jurisdiction. In fact the Supreme Court in the said judgment further clarified

that ordinarily a writ of certiorari would not be issued against a judicial order.

12. The person to whom commission to record evidence is issued acts as an arm/agent of the Court which has issued the commission. We find a Single Judge of this Court in *Autodesk INC Vs. Arup Das* 205 (2013) DLT 665 to have, while holding so, also observed that the Local Commissioner is appointed by the Court because a Judge, normally, cannot personally step out the precincts of his Court and a Local Commissioner is appointed to act as the eyes and ears of the Court.

13. As far as the reference to the Notaries Act is concerned, the same was enacted to regulate the profession of 'Notaries' and is not concerned with the conduct of the legal proceedings in the Courts in which the need for issuance of a commission to record evidence may arise. Merely because Section 8 thereof, while prescribing the functions of the Notaries, also provides that the Notary may act as a Commissioner to record evidence, does not mean that only a Notary can record evidence.

14. Though the petitioner has not argued but we may also notice that Section 8(1)(e) of the Notaries Act also prescribes administering oath to, or

taking affidavit from any person, as one of the functions of the Notary and Section 9 prohibits practicing as a Notary without holding a certificate issued under the said legislation. We have wondered whether the same can be construed as prohibiting any other person from administering oath or taking affidavit from any person as the person to whom commission under Order XVIII Rule 19 and under Order XXVI Rule 4A of the CPC is issued would necessarily be required to do. We are unable to hold so. The said two provisions can at best be read as of administering oath or taking affidavit as a Notary. The person to whom commission to record evidence is issued, as an agent of the court which had issued the commission, would also be entitled to administer oath.

15. While on the subject we may also notice that the Notaries Rules, while laying down the qualifications for appointment as a Notary, do not prescribe any skill in CPC or Evidence Act. Thus merely because a person has been appointed as a Notary is no test that such a person would be a competent and fit person to record evidence.

16. We may also observe that the petition though filed as a PIL, without any personal interest and without being for the benefit of any person,

however appears to have been filed at the behest of the persons appointed as Notaries who may be apprehending reduction in their work with the recent announcement by the Prime Minister of introduction of the process of self-attestation, and with an intent to corner unto themselves the work of recording of evidence on commission.

17. Resultantly, we dismiss this petition with costs of Rs.2,000/- to the Delhi High Court Legal Services Authority, to be paid within four weeks.

RAJIV SAHAI ENDLAW, J

CHIEF JUSTICE

NOVEMBER 05, 2014
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