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**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**CM No.24618-CII of 2019 in/and
Civil Revision No.7397 of 2018 (O&M)
Date of Decision: 03.12.2019**

Ujjwal Sahrawat

.....Petitioner

Vs

Brijinder Singh Daulta and others

....Respondents

CORAM: *HON'BLE MR. JUSTICE RAJ MOHAN SINGH*

Present: Dr. Tammanna R. Sahrawat, Special Power of Attorney
for the petitioner.

Ms. Ramandeep Kaur, Advocate for
Mr. Ramesh Sharma, Advocate
for the respondents.

RAJ MOHAN SINGH, J.

[1]. Petitioner has preferred this revision petition against the order dated 11.10.2018 passed by the Civil Judge (Senior Division) Rohtak vide which the application under Order 26 read with section 151 CPC for recording the evidence of defendant No.1/petitioner Smt. Ujjwal Sahrawat and witness Sh. Rup Chand through local Commissioner at Chandigarh was dismissed.

[2]. Petitioner through her special power of attorney submitted that defendant No.1/petitioner is a widow and senior citizen aged more than 66 years of age. She is residing at

Chandigarh. Witness namely Rup Chand was also resident of Chandigarh (now he has died on 01.01.2019). Petitioner has also moved a civil misc. application No.24618-CII of 2019 for appointment of a Commissioner for recording the deposition of the petitioner along with two other defendant witnesses at Chandigarh. The second witness is sought to be examined by way of commission, who is an officer from the office of Sub-Registrar, Chandigarh, where the Will dated 16.06.1993 executed by late mother of the petitioner was registered.

[3]. Special power of attorney of the petitioner further submitted that examination of witnesses by the commission in terms of Order 26 Rule 4, Order 5 Rule 4 and Sections 75 and 76 CPC can be ordered by this Court keeping in view the cumulative effect of ailments i.e. pathophysiology. Petitioner cannot undertake long journey as the same may have some adverse effect on her health.

[4]. On the other hand, learned counsel for the respondents by referring to interlocutory orders on record submitted that the defendant-petitioner is involved in delaying the disposal of the suit by adopting such tactics.

[5]. Notice of motion was issued on 19.11.2018, when the prayer was made for examination of petitioner and Mr. Rup

Chand Advocate i.e. the only surviving attesting witness of the registered Will by the Commissioner. Mr. Rup Chand, Advocate has died on 01.01.2019. In terms of Section 69 of the Evidence Act, son of Late Rup Chand, Advocate can be examined for the identification of his signature appearing in the capacity of attesting witness of the Will. Mr. Dinesh Kumar Chaudhary, Advocate son of Mr. Rup Chand, Advocate is also practising in the District Court, Chandigarh and Punjab and Haryana High Court at Chandigarh. He has also expressed his inability to move out of the Chandigarh to a distant place like Rohtak which is situated about 250 kms. from Chandigarh.

[6]. In addition to the aforesaid, the petitioner has sought indulgence of this Court to allow examination of officer from the office of Sub-Registrar, Chandigarh by the Commission in the context of registered Will dated 16.06.1993 in order to save time and process of the Court in summoning the summoned witness from the office of Sub-Registrar, Chandigarh.

[7]. Petitioner is more than 66 years of age. The Commission can be appointed to examine witness at a distance place from the jurisdiction of the Court. The witnesses are lawfully residing out of the jurisdiction of the Court at Rohtak. Therefore, as per ordinary course of their lives and business prospects, they cannot be compelled to come over to a distant

place at great expense to attend the trial and to give evidence. It would be oppressive and unfair. Illness, infirmity and compulsions of the witnesses would sufficiently deter and prevent them from giving the evidence at a distance place. The provision has been made to answer such type of situations. Reference can be made to **Ramakrishna Kulvant Rai vs. F.E. Harcastle And Co. (P) Ltd., AIR 1963 Mad 103; CR No.394 of 2013** titled '**Amarjit Kaur vs. Ravinder Singh Gill and others**', decided on 28.05.2013 and **CR No.870 of 2012** titled '**Abnash Kaur and another vs. Surinder Singh Sandhu and others**' decided on 10.02.2012. In case of practising Advocate, the hardship of the Advocate can be felt while moving out of place of practice.

[8]. In the light of provisions of Order 28 Rules 4 & 19, Order 26 Rule 4-A CPC, it cannot be appreciated that the statements of witnesses have to be tendered by way of affidavit in the Court and no Commission could be appointed for recording their statement. Under Order 28 Rule 4(3) CPC, the Court or the Commissioner as the case may be shall record the evidence in writing or mechanically in the presence of the Judge or of the Commissioner, as the case may be, and where such evidence is recorded by the Commissioner, he shall return such evidence together with his report in writing, signed by him to the

Court, appointing him and the evidence taken under it shall form the part of the record of the suit. The Commissioner may record such remarks as it thinks material, respecting the demeanour of any witness while under examination.

[9]. In any case, the suit has to be decided on merits. The examination of official witness from the office of Sub-Registrar (if he/she is a summoned witness in the list furnished before the Court) would in any case will not tilt the balance in favour of the respondent. Sh. Rup Chand, Advocate attesting witness to the Will in question has already died and his son is also a practising Advocate in Chandigarh. In case of a practising Advocate, the process can be resorted to in terms of Order 26 Rule 4 read with Order 5 Rule 4 and Sections 75 and 76 CPC. Petitioner is an old ailing person and her examination by a Commission would also be in the interest of the justice and fair play. Examination of summoned witness from the office of Sub-Registrar, Chandigarh would in any case prevent delay in leading the evidence.

[10]. For the reasons recorded hereinabove, I accept the present revision petition along with the civil misc. application No.24618-CII of 2019. The impugned order dated 11.10.2018 passed by the Civil Judge (Senior Division) Rohtak is set aside. Normal consequences to follow.

December 03, 2019

(RAJ MOHAN SINGH)
JUDGE

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Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No