

Form No. J (1)

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION

Present:

The Hon'ble Justice Biswajit Basu.

C.O. 1921 OF 2021

EXIDE INDIA LIMITED
versus
URMILA PASARI & ORS.

For the petitioner:

Mr. Shakti Nath Mukherjee, Sr. Adv.,
Mr. Ayan Banerjee,
Mr. Amit Kumar Nag,
Mr. Pijush Agarwal,
Mr. Maharnab Roy,
Ms. Utsha Dasgupta,
Mr. Raunak Bose.

For the opposite party nos. 1, 2 &3:

Mr. Jayanta Kumar Mitra,
Mr. Suddhasatva Banerjee,
Ms. Radhika Singh.

Heard on:

25.11.2021

Judgment on:

26.11.2021

Biswajit Basu, J.

1. The revisional application under Article 227 of the Constitution of India is at the instance of the defendant no. 1 in a suit for eviction and is directed against the order dated October 05, 2021 passed by the 4th Court of

learned Civil Judge (Senior Division) at Alipore, District-24 Parganas (South) in the said suit being Title Suit No. 17170 of 2014.

2. The learned Trial Judge by the order impugned has allowed an application filed by the plaintiffs/opposite parties for recording the evidence of the first witness of the plaintiffs on commission. The plaintiffs in the said application stated, inter alia, that the plaintiff no. 1 is a senior citizen and is suffering from various kinds of co-morbidities, as such, during this period of ongoing Covid-19 pandemic it would not be safe for her to come to the Trial Court for adducing evidence.

3. The petitioner objected to the said prayer of the plaintiffs on the ground that despite having such alleged co-morbidities, the plaintiff no. 1 came to the Court premises before the Notary Public to swear affidavit on number of occasions. The learned Trial Judge, considering the age and to minimise the exposure of the said witness in the public place allowed the said prayer of the plaintiffs.

4. Mr. Shakti Nath Mukherjee, learned senior counsel appearing on behalf of the petitioner strenuously argues that illness and infirmity is the sine qua non to allow recording of evidence of a witness on commission under Order XXVI Rule 1 of the Code of Civil Procedure but recording of the evidence of the said witness on commission has not been prayed for on the said ground as has been recorded in the order impugned. He further submits that no doubt Order XXVI Rule 4A of the Code has been introduced in the Code by the Amendment Act of 1999 to vest wide discretion upon the

Court to allow recording of evidence on commission in appropriate cases but the present case is not one of such nature where the discretion so vested can be exercised. His another ground of challenge to the order impugned is that the medical certificate produced by the plaintiffs to substantiate their claim that the plaintiff no. 1 is suffering from different co-morbidities was relied on by the learned Trial Judge without affording opportunities to the petitioner to verify the said certificate.

5. Mr. Jayanta Kumar Mitra, learned senior counsel appearing on behalf of the plaintiffs/opposite parties on the other hand submits that Order XXVI Rule 4A has been incorporated in the Code to vest wide power upon the Court to issue commission for recording evidence of a witness in a demanding situation. Prevailing Covid-19 pandemic is one of such situations where the Court is obliged to exercise the power so vested in it. He further submits that proof of co-morbidities of the said witness is not of much importance as the said witness is susceptible to infection due to her age, which alone satisfies the requirement for exercise of power under Order XXVI Rule 4A of the Code. Mr. Mitra, to buttress his aforesaid submission relies on the following decisions of this Court in the case of **GOUTAM KUMAR AGRAHARI vs. STOCK HOLDING CORPORATION OF INDIA LIMITED AND ORS.** reported in **2016(5) CHN (CAL) 403** and in the case of **GOVERNMENT OF WEST BENGAL vs. ARIJEET DOSS MULLICK AND ORS.** reported in **MANU/WB/0026/2021**.

6. Having heard the learned counsel for the parties and on going through the materials-on-record, it appears that it is an admitted position that the

plaintiff no. 1 is aged about 70 years. No doubt that normal situation is resuming slowly but the threat of Covid-19 pandemic has not gone away totally. I am not at all impressed by the submission of Mr. Mukherjee that infirmity or sickness of the said witness since has not been pleaded and/or proved, the commission cannot be issued to record the evidence of the said witness. The newly inserted Rule 4A of Order XXVI of the Code does away with the limitation imposed upon the Court for exercise of their power under Rules 1 and 4 thereof. The powers given under Rule 4A can be exercised notwithstanding anything contained in said Rule 1 or Rule 4. The new rule allows greater discretion upon the Court for issuance of commission for the examination, interrogatories or otherwise, the Court under said Rule 4A can issue the commission if the same would serve the interests of justice and may allow an expeditious disposal of the case. The aforesaid decisions cited by Mr. Mitra are apposite in the present context.

7. The verification of the prescription of the doctor produced by the plaintiffs in support of their prayer for examination on commission under the facts and circumstances of the present case is of no relevance. The learned Trial Judge, to avoid exposure of the said witness to the general public, has allowed recording of the evidence of the said witness on commission in exercise of his discretion, this Court does not find any reason to interfere with it.

8. The present suit is pending since 1982, the Hon'ble Supreme Court in Civil Appeal No. 1005 of 2020 arising out of the said suit by an order dated February 04, 2020 directed that the eviction suit shall be decided

expeditiously, preferably within a maximum period of six months from the date of receipt and/or production of the said order before the Court below. Despite such direction the suit is still pending.

9. In view of the aforesaid direction of the Hon'ble Supreme Court, all endeavour should be made for disposal of the said suit without any further delay. The Commissioner is directed to complete recording of the evidence of the said witness in one sitting; however, in the event for any unavoidable reason, if the same cannot be recorded in one sitting, it must be concluded on the immediate next sitting and in doing so, the Commissioner shall not allow the prayer of the parties for any unnecessary adjournment.

The learned Trial Judge is requested to expedite the disposal of the suit in accordance with law.

The revisional application has no merit. C.O. 1921 of 2021 is dismissed without any order as to costs.

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(BISWAJIT BASU, J.)