

GA No. 1 of 2021
APO No. 7 of 2021
IA No. GA 5 of 2020
CS No. 216 of 2016
IN THE HIGH COURT AT CALCUTTA
In appeal from its
ORDINARY ORIGINAL CIVIL JURISDICTION
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

Government of West Bengal
Versus
Arijeet Doss Mullick & Anr.

Before:
The Hon'ble Justice I. P. MUKERJI
And
The Hon'ble Justice MD. NIZAMUDDIN
Date: 14th January 2021

Appearance:
Mr. Suman Dutt, Sr. Advocate
Mr. Paritosh Sinha, Advocate
Ms. Hashnuhana Chakraborty, Advocate
Mr. Tirthankar Das, Advocate
Mr. A. Mandal, Advocate
for the appellant

Mr. Anirban Ray, Advocate
Mr. Rupak Ghosh, Advocate
Mr. Debmalya Ghosal, Advocate
Mr. Rajesh Upadhyay, Advocate
Mr. Surabita Biswas, Advocate
for the respondent

The Court: This is an appeal by the Government of West Bengal from a judgment and order dated 15th December 2020 made by a learned single judge of this Court appointing a Commissioner for the purpose of recording the evidence of the witness, Arijeet Doss Mullick, who is also the first plaintiff/respondent. He was under cross-examination when this order was made.

But we note that the last cross examination was on 4th September, 2019. The very short question which falls for determination before this Court is whether the Court exercised its discretion properly under Order XXVI Rule 4A of the Code of Civil Procedure, 1908.

Rule 4A is inserted below:

“4A. Commissioner for examination of any person resident within the local limits of the jurisdiction of the Court.—Notwithstanding anything contained in these rules, any Court may, in the interest of justice or for the expeditious disposal of the case or for any other reason, issue commission in any suit for the examination, on interrogatories or otherwise, of any person resident within the local limits of its jurisdiction, and the evidence so recorded shall be read in evidence.”

Under this rule a Commission can be issued only if it is necessary in the interest of justice or for expeditious disposal of the case.

Mr. Suman Dutt, learned senior advocate appearing for the applicant has cited Pushpa Devi Bangur v. M. B. Commercial Co. Ltd. reported in 2016 SCC OnLine Cal 5458 whereas Mr. Ray for the respondent has cited Gautam Kumar Agrahari v. Stock Holding Corporation of India & Others reported in 2016(5) CHN (Cal) 403 and Sajani Devi Bhartia v. Ashrant Bhartia reported in 2014 SCC OnLine Cal 19780.

In Gautam Kumar Agrahari case this Court laid down the following principle:

“11. ... Rule 1 of Order XXVI of the Code of Civil Procedure is a very old provision which provides that a person resident within the local limits of the jurisdiction of a Court may be examined on commission only if he is exempted by law or is sick or infirm and for this reason is unable to attend Court.

... ..

13. Rule 4 provides for issue of a commission to person resident outside its jurisdiction. In such a case there are no conditions mentioned, only on fulfillment of which a commission may issue.

14. Rule 4A was inserted by Act 46 of 1999 with effect from 1st July, 2002. It has made a sea change in the law relating to the issuance of commission. It has vested a large amount of discretion in the Court while issuing a commission order. It may do so in the interest of justice or for expeditious disposal of the suit or for any other reason. “Any other reason” has to be read ejusdem generis with the other part of the

section. Hence, the grounds on which the Court may make an order for commission relate to the cause of speedy justice. A commission may also issue to see that no injustice is done to a party If you consider the changes in Order XXVI with other changes made by the legislature in the Code of Civil Procedure, you will form an impression that the legislature is now conscious of the convenience of the parties and leans in favour of issuance of commission orders for expeditious trial of suits. In the amended Order 18 rule 4, also carried out in 1999 and again in 2002, even cross-examination may be taken by the Commissioner, [see order 18 Rule 4(2)].

15. The above circumstances disclosed in the petition make this a fit case for appointment of a Commissioner to take the evidence of the plaintiff, both examination-in-chief and cross-examination.”

In Sajani Devi Bhartia case this Court said:

“One does not miss the distinction that is made by the legislature between a witness who resides within the jurisdiction of this Court and the one who resides outside the jurisdiction of this Court. If the Court issues a commission for examination of a witness within its jurisdiction it has to be satisfied that he is sick or infirm or exempted. After the introduction of rule 4A even a witness within jurisdiction can be examined on Commission, for special reasons. When it comes to examination of a person living outside the jurisdiction of the Court, the rules are lenient. In fact, no condition has to be satisfied under Rule 4 before a commission can be issued. In fact, this provision for examination of a witness on commission under Rule 4 was amended by the Amendment of 1976.

The recording of evidence in Court under the Code of Civil Procedure, as amended in 2002 has become lenient. The evidence may not be recorded in Court at all. Order XVIII Rule 4(1) says that the examination in chief of a witness shall in all cases be on affidavit. Order XVIII rule 2 says that cross-examination and re-examination shall be done either before the Court or the Commissioner. The proviso to the sub-Section goes on to enact that the court while appointing a commission under the above sub-rule shall take into account all relevant factors. So much has the importance of live

recording of evidence in the Courtroom been diluted that even cases where demeanor of the witness is crucial or relevant the examination can be made before the Commissioner. The Commissioner has the duty to record the demeanor of the witness. (see Order XVIII rule 4)

It is the duty of the Commissioner to note down any objection taken during examination of the witness for subsequent decision by the Court. Order XVIII Rule 4 was amended with effect from 1st July, 2002. Order XVIII is not followed in our High Court because Chapter XIV of the Original Side Rules, having overriding effect (see Section 4 of the Code of Civil Procedure) says that **“The evidence of each witness shall be taken down by or in the presence and under the superintendence of the Judge or one of the Judges.**

Such evidence shall be taken down ordinarily in a narrative form when in longhand, and in the form of question answer when in shorthand, by such officers of the Court as may be appointed for the purpose, and shall form part of the record”.

“With the advance of technology, in the field of information broadcasting and communication recording of evidence, through video-conferencing was recognized. Such evidence was allowed in the case of *State of Maharashtra v. Dr. Praful B. Desai* with *P.C. Singh v. Dr. Praful B. Desai* reported in AIR (2003) 4 SC 601. In this case, in a criminal proceeding one Dr. Greenberg of New York USA was sought to be examined through video-conferencing. The complaint was against two Indian doctors of negligently causing the death of the complainant’s wife in a Bombay hospital. Prior thereto opinion had been taken by the complainant and his wife from Dr. Greenberg of USA. Whilst lauding the technology of video-conferencing the Supreme Court observed and held the following in paragraph 20 of the report:

“Recording of evidence by video-conferencing also satisfies the object of providing, in Section 273, that evidence be recorded in the presence of the accused. The accused and his pleader can see the witness as clearly as if the witness was actually sitting before them. In fact, the accused may be able to see the witness better than he may have been able to if he was sitting in the dock in a

crowded courtroom. They can observe his or her demeanor. In fact, the facility to playback would enable better observation of demeanor. They can hear and rehear the deposition of the witness. The accused would be able to instruct his pleader immediately and thus cross-examination of the witness is as effective, if not better. The facility of playback would give an added advantage whilst cross-examining the witness. The witness can be confronted with documents or other material or statement in the same manner as if he/she was in court. All these objects would be fully met when evidence is recorded by video-conferencing. Thus no prejudice, of whatsoever nature, is caused to the accused. Of course, as set out hereinafter evidence by video-conferencing has to be on some conditions”.

... ..

“When a witness is resident within the jurisdiction of this Court ordinarily he has to prove sickness or infirmity to avoid deposing in open court and to be allowed to be examined on Commission, unless he shows special circumstances as required in rule 4A. There is no such requirement if the witness resides outside the jurisdiction of this Court. **(Order XXVI rules 1 and 4)**”

It can only be said that by virtue of the amendments to Order XVIII of the Code of Civil Procedure, the right of a party to have a witness examined in Court has been severely curtailed. The effect of *Panchkari Mitra v. Panchanan Saha* reported in AIR 1924 Calcutta 971 has been diminished. Therefore, the dictum laid down in the said case of a valuable right being taken away, by an Order appointing a commission is not longer true.

Chapter XIV Rule 1 of the Original Side Rules remains a rule more as a result of its escaping the attention of rule makers for amendment, than for anything else. At any rate it remains as a Rule of procedure only, special to this High Court. But of course, subject to Order XXVI.

Therefore, in my opinion, on an application by a person resident outside the jurisdiction of this Court for being examined on commission, this Court has to examine the convenience of the parties. If on consideration of the balance of convenience, it appears, to the court that a witness so

situated should be examined on commission it should pass such an Order. But that order, in my opinion should fully protect the financial interest of the adversary, so that he does not become a loser in terms of money on the examination of a witness outside the jurisdiction of this court, on Commission. In extremely rare cases where the Court does not have confidence in the ability of the Commissioner to note or video record the demeanor of the witness or where even video-recording of the evidence cannot bring out the demeanor which the court would like to see during examination of a particular witness, the Court should refuse such an order.”

In Pushpa Devi Bangur case this Court held:-

“30. The issue of commission is a matter of judicial discretion. The Court, before allowing a prayer for issuing of commission to examine a witness, must consider whether such witness was vital and important.

31. The word ‘may’ in Rr. 1 and 4 means that Court has ‘discretion’ to issue commission and not that it is ‘duty-bound’ to issue it whenever asked for.

... ..

34. The broad principles which must necessarily be kept in mind that exercising discretion in the matter of issuing of commission for the examination of a witness are that the person invoking it must be ***bona fide*** in making the application. The application of the defendant should not be subject to the same amount of scrutiny as that of the plaintiff. The reasons why the witness cannot be examined in Court must be carefully considered. Regard must be had to the conduct of the party and that it must be considered whether the examination on commission would result in manifest injustice to any party or is not calculated to permit the evidence being tested fairly or is likely to prove an abuse of process of Court. Justice above all is a paramount consideration and the discretion must be exercised in furtherance of the same in the particular facts and circumstances of an individual case. The test for rejection of the application should be that the application is not a *bona fide* one.

... ..

38. As held by the Hon'ble Supreme Court in the case of *Salem, Advocate Bar Association, Tamil Nadu v. Union of India* reported in AIR 2005 SC 3353 it has been held that 'will' of the Legislature which has by amending the Code provided for recording evidence by the Commissioner for saving Court's time taken for the said purpose, cannot be defeated merely on the ground that the Court would be deprived of watching the demeanor of the witnesses."

Undoubtedly, the above principles are to be applied in dealing with the application at hand.

Mr. Dutt submitted that the witness was under cross-examination before the onset of the pandemic caused by the Covid-19 virus, the consequent lockdown declared from 24th March, 2020 and the resultant restricted functioning of the Court. An application made by him for the same purpose prior to this period, was withdrawn.

There were two grounds raised in the application for issuance of a Commission. The first one was that the witness was a lawyer and ought not to be called in Court to give evidence. We are not concerning ourselves with that matter. The second point is more important. The point is that because of the pandemic it would be more convenient for examination of the witness on Commission.

In our opinion, this is a very valid point. During this unusual period of time efforts should be made to ensure minimal yet sufficient attendance in Court so that least inconvenience is caused to the health of judges, lawyers, litigants, staff of the Court, witnesses and so on.

When the business of the court is curtailed and there is a huge pendency and continuing accumulation of cases, there is a necessity of finding a way for expeditious disposal of witness action through examination of witnesses on Commission. This is in the interest of justice. The order issuing the Commission, in these circumstances, satisfies both the conditions of Order XXVI Rule 4A.

In our view, the discretion has been rightly exercised by the learned judge.

We find ourselves unable to interfere with the judgment and order dated 15th December 2020. We affirm the same.

We direct the Commissioner to allow a reasonable adjournment to enable the parties to attend the Commission. The time to file the report by the Commissioner is extended by eight weeks from date.

The appeal (APO 7 of 2021) and the connected application (GA 1 of 2021) are accordingly disposed of, after dispensing with all formalities. All undertakings are discharged.

(I. P. MUKERJI, J.)

(MD. NIZAMUDDIN, J.)

R. Bose