

IN THE HIGH COURT OF ORISSA AT CUTTACK

CMP NO. 691 OF 2022

Anand Kumar Agrawal **Petitioner**
Mr. Kalinga Keshari Mohapatra, Advocate

-versus-

Rajabala Agarwal **Opp. Party**
Mr. Ajit Kumar Tripathy, Advocate

CORAM:
JUSTICE K.R. MOHAPATRA

ORDER
13.09.2022

Order No.

2. 1. This matter is taken up through hybrid mode.
2. Order dated 4th July, 2022++ (Annexure-1) passed by learned 2nd Additional Senior Civil Judge, Cuttack in C.S. No. 418 of 2011 is under challenge in this CMP for examination of Defendant on Commission.
3. Mr. Mohapatra, learned counsel submits that the Defendant-Petitioner is an old man of 69 years and is suffering from Ankle Spondylites. After closure of the evidence from the side of the Plaintiff, he filed an application to be examined on Commission. Inadvertently the application was filed under Order XXXIX Rule 7 C.P.C., but it should have been a petition under Order XXVI Rule 1 C.P.C. However, learned 2nd Additional Senior Civil Judge without properly considering the prescription of treating physician and that the Petitioner is not in a position to move about, rejected such petition. It is his submission that the Petitioner is ready and willing to deposit the cost of his examination on Commission. He, therefore, submits that the impugned order is not sustainable in the eyes of law and is liable to be set aside. He further prays for a direction to learned trial

Court to permit the Defendant-Petitioner to be examined on Commission.

4. Mr. Tripathy, learned counsel for the Opposite Party submits that the medical prescription of the treating Doctor produced by the Petitioner was taken into consideration by learned trial Court while adjudicating the aforesaid petition. There is nothing on record to show that the Petitioner is not in a position to move about. He further submits that the Petitioner being a party to the suit should appear before the Court so that while recording the evidence, the Court can also watch his demeanor. He relied upon the decision in the case of ***Mohit Kumar and others –v- Dato Mohan Swami and others***, reported AIR 2004 SC 3682, wherein it has been held that the Court may liberally exercise its power to permit a party to record evidence on Commission excepting for such witnesses, who are very material and who the learned Judge, in his discretion, feels necessary must appear before him so that the demeanour of such witness may need to be watched and so on. He further relied upon the decision of this Court in the case of ***Manoranjan Panda–v- Sailendra Narayan Praharaj and others***, reported in 2010 (Suppl.-1) OLR 968, wherein it has been held that Order 26 Rule 1 C.P.:C. confers wide discretion on the Court to issue a commission for examination of any person where a witness is to be examined and while issuing such commission for the said purpose, the Court has to accept a certificate purported to be signed by a registered medical practitioner as evidence of sickness or infirmity without calling the medical practitioner as a witness to support the said plea. However, when the witness is a party himself to the suit, he

is a material witness to the suit and his presence is necessary before the Court for recording his evidence to enable the Court to watch his demeanor. In the instant case, no document has been filed by the Defendant to show that he is not in a position to appear before the Court. Thus, he cannot have a luxury to be examined on Commission. If such application is allowed, it will amount to abuse of the process of Court. He, therefore, prays for dismissal of the CMP.

5. Taking into consideration the submissions made by learned counsel for the parties, this Court finds that the Petitioner is the Defendant in the suit. There is no material on record to suggest that the Petitioner is not in a position to move about. It further appears from the prescription of the treating physician produced by the Petitioner before learned trial Court that he is suffering from Ankle Spondylites. That itself cannot be a ground to allow an application for his examination on Commission. The Defendant-Petitioner being a material witness, all endeavours should be made to appear before the Court to lead evidence in the matter. He should appear before the Court to lead evidence so that the Court can watch his demeanor. In the instant case, the Petitioner has not made out any ground sufficient to allow an application under Order XXVI Rule 1 C.P.C. In the case at hand, the Court exercising its judicial discretion has rejected the application filed by the Defendant-Petitioner to be examined on Commission. The discretion being exercised judicially, I am not inclined to interfere with the impugned order.

6. Accordingly, the CMP being devoid of any merit stands dismissed.

7. Since the suit is of the year, 2011, the Court should make all endeavour to see that the suit is disposed of at an early date. Parties are directed to co-operate with learned trial Court for early disposal of the suit.

Urgent certified copy of this order be granted on proper application.

(K.R. Mohapatra)
Judge

bks

