

12.12.2023

C.O. No. 1755 of 2023
Sri Harish Chandra Shaw & Anr.
Versus
Shri Ram Chandra Sharma

Mr. Prasanta Bishal

...for the Petitioners.

Mr. Mainak Chandra

...for the Opposite Party.

The revisional application has been filed by the plaintiffs, challenging an order dated January 24, 2023 passed by the learned Civil Judge (Junior Division), 6th Court at Alipore, District 24-pargans (South), in Ejectment Suit No.1196 of 2008.

By the order impugned, the learned Court rejected an application filed by the plaintiffs under Order 26 Rule 1 read with Section 151 of the Code of Civil Procedure. The plaintiff No.1/petitioner No.1 prayed for appointment of an Advocate Commissioner at his cost, for recording and completing his examination-in-chief and cross-examination, on commission. The plaintiff No.1 filed his evidence-in-chief as P.W.1. The examination-in-chief could not be completed as the plaintiff no.1 suddenly fell ill. He was suffering from various diseases and neurological problems. He was admitted in the institute of Neurosciences, Kolkata. He underwent a surgical procedure. Upon release from the

hospital, he was bed ridden. His treatment continued. Relevant medical documents were also annexed with the said application.

The contention of the petitioner No.1 is that, it was impossible for him to climb the stair-case. Unless an Advocate Commissioner was appointed in order to record the evidence-in-chief and cross-examination of the plaintiff No.1 i.e., the P.W.1, the plaintiffs would suffer irreparable loss and injury as they would not be able to effectively adduce evidence in their own suit. The application indicates that in the midst of the examination-in-chief, the P.W.1 suddenly fell ill and had to be hospitalized. Such hospitalization led to a surgery. The plaintiff No.1 was discharged, but the medical reports do not indicate that he had completely recovered, although he was considered to be stable. The plaintiff No.1 is around 67/68 years old.

The discharge summary and the prescriptions annexed to the revisional application indicate that the plaintiff No.1 is suffering from serious neurological problems and underwent a Lumbar Discectomy surgery at the institute of Neuroscience, Kolkata.

The defendant filed a written objection to the said application and stated that the plaintiff No.2, who was the wife of the plaintiff No.1 and could depose on behalf of plaintiff No.1, as per Section 120 of the Indian Evidence Act, 1872. The application was filed as a

dilatory measure, in order to delay the progress of the suit.

Relying on the provisions of Section 120 of the Indian Evidence Act, the learned Court below rejected the application on the ground that examination of a witness in court was the rule and examination on commission was an exception, to be allowed only under special circumstances. The parties to the suit were husband and wife, who were both plaintiffs. The wife was a competent witness in all civil proceedings and could depose on behalf of the husband.

Learned Advocate for the petitioner submits that the learned Court below proceeded on a mis-conception of law, in holding that the plaintiff No.2 i.e., the wife was a competent witness in this case. Learned Advocate submits that the provisions of Order 26 Rule 1 was completely ignored by the learned Court below. The learned Court below ought to have decided whether the ingredients of Order 26 Rule 1 of the Code of Civil Procedure, had been satisfied in the present case, by the plaintiffs or not. The plaintiff No.1, on account of sickness and infirmity, was unable to attend the Court after the examination-in-chief commenced. Medical documents in support of illness were annexed to the application filed by the learned Court below. The P.W.1, who had started his deposition was entitled to complete the same, to prove his case. The provisions of Section

120 of the Indian Evidence Act would not come to the rescue of the plaintiffs in the case in hand. He further submits that the plaintiff No.1 would not be able to climb the stairs in order to reach the Court room which was on the second floor, in the Alipore Court premises. There are no elevators which the litigants can avail of. Under such circumstances, the learned Court ought to have allowed the evidence of the P.W.1 on commission. Moreover, the wife, i.e., the petitioner No.2 was also suffering from various ailments and she was not in a position to depose.

When the petitioner No.1 had already started adducing evidence as P.W.1, the wife would not be an effective witness to depose on behalf of her husband on the facts which were exclusive to the knowledge of the plaintiff/petitioner No.1.

Mr. Mainak Chandra, learned Advocate for the opposite party vehemently opposes the case of the petitioners. According to him, the records do not reveal that the plaintiff/petitioner No.1 was completely bed ridden. As a general rule, the witness must adduce evidence in Court, as it was necessary for the Court to observe the demeanour and the behaviour of the witness on the box. Thirdly, under Section 120 of the Indian Evidence Act, wife was a competent witness to depose on behalf of the husband. The plaintiff No.2, as the co-plaintiff and as the wife could adduce evidence on behalf

of the plaintiff No.1. Mr. Chandra referred to the following decisions:- **Smt. Munni Devi Alias Krishna Devi vs. Smt. Sona Devi and ors.**, reported in **(2014) 144 AIC 896** and **Shashikala and ors. vs. Laxman Yadu Kadam @ Dhor** passed in **Second Appeal No.1832 of 2005**, by the Karnataka High Court.

Considered the rival contention of the parties. The plaintiff No.1 filed his evidence-in-chief as the P.W.1 and the examination-in-chief had just commenced, when he fell seriously ill. Order 26 Rule 1 provides that evidence on commission can be allowed in case a witness is prevented from attending Court for reasons of 'sickness' or 'infirmity'. The Court can allow such examination on commission, for cogent reasons. The explanation provides that a certificate signed by the medical practitioner, as evidence of the sickness or infirmity of a person could be accepted by the Court, even without calling the medical practitioner as a witness. These aspects were not considered by the learned Court below, although medical documents were filed along with the application. Section 120 of the Indian Evidence Act, 1872 is a provision on the strength of which, husband and wife are competent witnesses for each other. The aforesaid provision permits the wife to depose on behalf the husband and vice versa. However, the wife's oral evidence would be confined to facts within her

knowledge. Such view was taken by different High Courts in the decisions referred to herein below:-

- 1) ***Smt. Rajni Shukla vs. Special Judge, (EC Act.) Banda and Anr.*** reported in **2007 SCC OnLine All 647. The relevant paragraph is quoted below:-**

“9. However, by virtue of Section 120, Evidence Act husband was even in the absence of any Power of Attorney quite competent to depose on behalf of the wife. Moreover, in India normally properties standing in names of the ladies are managed by their husbands. If the facts which the plaintiff wants to prove are also in the knowledge of her husband, then even in the absence of any Power of Attorney, he is quite competent to depose on behalf of his wife. However, if there is any fact, which is in the exclusive knowledge of the plaintiff, then she alone can depose about that.”

- 2) ***Ved Pal and Ors. vs. Shakuntala @ Aruna*** reported in **2005 SCC OnLine AP 64.**

In the case in hand, if the plaintiff No.2 is made to depose on behalf of plaintiff No.1, her oral evidence will be restricted to her knowledge. Further, in an Indian society, it is usually the male member of the house who is better equipped with the facts and circumstances of a litigation and pursues the same. The incidents relating to induction of the tenant and existence of the grounds for eviction, the notice terminating the tenancy, are to be proved by the plaintiff No.1. Thus, P.W.1 is in a better position to establish the plaint case, for eviction of the defendant. The wife/plaintiff No.2 may be a co-owner of the property in question, but that would not necessarily mean that she is in a position to prove the plaint case as

effectively as her husband, by adducing proper evidence. The finding that the plaintiffs are trying to delay the proceeding is not accepted, as the suit for ejectment has been filed by the plaintiffs and the plaintiffs would not want to delay their own suit.

The decisions cited by Mr. Chandra deal with the competence of the husband and the wife to depose for each other, but the said decisions do not apply in this case. The issue involved is whether the P.W.1, who had started adducing evidence, should be allowed to complete the examination-in-chief and the cross-examination on commission, owing to his infirmity and physical restrictions.

There is no dispute with the fact that the plaintiff No.1 underwent Lumbar Discectomy. The prescriptions of the institute of Neurosciences, Kolkata have been annexed to the application filed before the learned Court. It is also a fact that the plaintiff No.1 would have to take the stairs in order to reach the Court. Under such circumstances, the order impugned is set aside. The learned Court below is directed to appoint a learned Advocate Commissioner for recording the evidence-in-chief and cross-examination of the P.W.1 at his residence, at his own cost. The opposite parties and his learned Advocate shall be present during such evidence on commission. It is made clear that the evidence-in-chief and cross-examination shall be completed within

three consecutive days. Learned Court below shall fix the days in the presence of the parties.

The revisional application is accordingly disposed of.

There shall be no order as to costs.

Parties and the learned court below are to act on the server copy of this order.

(Shampa Sarkar, J.)