

**IN THE HIGH COURT AT CALCUTTA
Civil Revisional Jurisdiction
Appellate Side**

Present:

The Hon'ble Justice Biswaroop Chowdhury

C.O. 3666 of 2022

Sri Kamal Paul @ Kamal Pal

VERSUS

Bijoy Paul @ Bijoy Pal And Anr.

For the petitioner:

Mr. Subrata Datta, Adv.
Mr. Kuheli Sinha, Adv.

Judgment on: October 19, 2023

Biswaroop Chowdhury,J:

The petitioner before this Court is a defendant in a suit for partition and is aggrieved by the Order dated 21/09/2022 and 14/11/2022 passed by Learned Judge Small Causes Court Sealdah. in Title Suit No – 42 of 2017.

The case of the petitioner may be summed up thus:

1. The plaintiff/respondent no-1 filed a suit for partition before the Learned Small Causes Court at Sealdah being T.S. No – 42 of 2017.

2. The petitioner/defendant no-2 entered appearance in the suit by filing a written statement. The issues to the suit were framed and the plaintiff concluded his examination in chief and cross examination.
3. The Learned Trial Court fixed a date for Defendant's Witness on 01.08.2022 and the Petitioner/defendant no – 2 was not able to appear before the said Court for his evidence on the said date and thereafter another date was fixed on 22-08-2022. Again the date was fixed on 19.09.2022 when due to resolution of local bar function of the Court could not be held and thereafter 21-09-2022, was fixed for evidence of the Defendant's Witness.
4. On 21-09-2022 the petitioner/defendant no.2 filed an application with medical report praying for appointment of an advocate as a Commissioner for taking evidence in his house as the said defendant was suffering from Acute arthritis problem and other ancillaries old age problem and also Cardiac heart disease related problems but the Learned Court was pleased to reject the said application and fix 14-11-2022 for argument of the said suit.
5. On 14-11-2022 the petitioner filed an application under Section 151 C.P.C. for recalling order dated 21-09-2022 and to grant a chance to the petitioner to adduce evidence, but the said application was rejected and 28-11-2022 was fixed for arguments.

The petitioner being aggrieved by the order dated 21-09-2022 and 14-11-2022 passed by Learned Trial Court has come up with the instant application.

It is the contention of the petitioner that the Learned Trial Court erred in law by not considering the facts about the ill health of the petitioner/the defendant no-2. It is further contended that the Learned Trial Court ought to have considered that the petitioner is an old person and he is seriously affected with arthritis problem as also heart ailments. It is also contended that the Learned Court below ought to have been lenient while considering the petition made under Section 151 CPC on 21/09/2022 for appointment of Advocate as a Commissioner for taking evidence of the ailing defendant no. 2 in his home.

Pursuant to the filing of this application notice was issued upon the respondents. As the respondents did not appear inspite of service of notice the case was taken up for hearing in the absence of the respondents.

Heard Learned Advocate for the petitioner, perused the petition filed and materials on record. Learned Advocate for the petitioner submits that the petitioner was unable to attend Court due to illness and the Learned Trial Court erred in rejecting the petition for appointment of Commissioner to take the deposition of the petitioner/defendant. Learned Advocate further submits that the evidence of the defendants ought not to have been closed. Learned Advocate produces copy of the medical prescriptions showing treatment of the petitioner and relies upon the following decision:

Mirmala Debi Choubey and ors.

VS

Pranab Kumar Banerjee and ors.

Reported in 2022(3) Indian Civil Cases 420 (Cal)

Now in order to decide the merits of the orders dated 21-09-2022 and 14-11-2022 passed by Learned Trial Court it is necessary to consider the provisions contained in Order XXVI Rule 1 of the Code of Civil Procedure. Order XXVI Rule 1 of the Code of Civil Procedure provides as follows:

‘Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it.

Provided that a commission for examination on interrogatories shall not be issued unless the Court for reasons to be recorded thinks it necessary so to do.

Explanation. The Court may for the purpose of this rule accept a certificate purporting to be signed by a registered medical practitioner as evidence of the sickness or infirmity of any person without calling the medical petitioner as a witness.’

In the case of Om Prakash Kajaria V M/S. Circular Investment Trust Ltd reported in AIR 2009. Cal – 66, the Hon’ble Court observed that the Court has discretion to issue commission to examine witness who suffers from some sort of infirmity. Apart from sickness the advanced age of a witness can well be

construed as a ground of infirmity on the basis of which the Court can pass an order invoking the provisions of Order XXVI Rule 1 of CPC. In the said case the age of the witness was 78 years, therefore taking her advanced age into consideration, the order of the Court below allowing examination and cross-examination of witness on commission was held proper.

Although there is no definition of advanced age in statute but advance age in medicine is 65 in United States which determines eligibility for Medicare Insurance.

Rule 4A of Order XXVI CPC Provides that 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.

Thus upon reading the provisions contained in Rule 1, and Rule 4A of Order XXVI of the Code of Civil Procedure it will appear that although Rule 1 of Order XXVI CPC contains some conditions to be fulfilled for issuing commission for the examination on interrogatories or otherwise of any person resident within local limits of its jurisdiction but such condition does not exist under Rule 4A of Order XXVI CPC. The Court under Rule 4A may in the interest of justice or for the expeditious disposal of the case or for any reason

may issue commission in any suit for the examination, on interrogatories or otherwise of any resident within the local limits of its jurisdiction.

In the Salem Advocate Association's case reported in AIR – 2005 S.C. P-3353 the Supreme Court has held that Order XXVI Rule 4A inserted by Amendment Act 1999 provides that notwithstanding anything contained in the 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 of any person resident within local limit of the Courts jurisdiction.

Upon perusing the Order dated 21-09-2023 it appears that the Learned Trial Court disposed the application for appointment of Advocate Commissioner by the following order.

Today is fixed for D.W. as last chance. At this stage Id. Advocate for the Defendant No-2 filed an application in Court for appointment of Advocate commissioner. She also filed one xerox copy of medical paper in support of his case. On being asked Id. Advocate submits that he is only for defendant No-2. Id. Advocate for the plaintiff raised no objection in the prayer made by Defendant No.2 and submitted that medical paper filed by the Court has to be looked in to plaintiff stated that Id. Counsel filed vokalatnama for both the defendant of this case. It appears from the case record that W/S also filed jointly in this case. So the argument of the defendant's counsel is very much confusing. She also didn't file the original copy of the medical papers. It appears that the prayer is made such belated by the defendant No.2. Status of

defendant no. 1 is also unclear from the submission of the defendant no. 2. Doctor didn't mention that said person is unable to move or attend the Court. He is 69 years of age. This facility for deposition through commission can't be used as a routine manner. Sufficient opportunity has given to the defendant for deposition in this case. Medical papers is not convincing about his inability to attend the Court. Therefore prayer for deposition through commission is considered and rejected. Evidence of defence side is closed.

To 14/11/2022 For hearing argument. All parties to appear in Court for argument.'

Thus upon perusing the order passed by the Learned Trial Court it appears that the prayer for appointment of Advocate Commissioner was rejected on the ground that medical papers are not convincing about petitioner's inability to attend Court. Upon rejecting the application for appointment of commissioner the evidence of the defendant was closed.

In the case of Mirmala Debi Choubey and ors relied upon by Learned Advocate for the petitioner a Learned Single Bench of this Court observed in the case that although the conduct of the plaintiffs is very revealing, but that should not be the one and only ground to deprive them from adducing their best possible witness.

In this matter there is no dispute with regard to the age of the petitioner being 69 years and the fact of undergoing medical treatment. Prescriptions on different dates will go to show that the petitioner is undergoing treatment with

regard to his left knee. Thus instead of going into the complicated question as to whether the petitioner is able to attend Court it would have been just and reasonable to appoint an Advocate Commissioner considering the age and treatment of the petitioner. When an aged person is undergoing treatment and finds inconvenient to attend Court to depose it would be just and proper to appoint an Advocate Commissioner to take evidence as Rule 4A of Order XXVI confers upon the Court wide power in the interest of justice. A person has right to defend any action brought against him in any Court of Law or before any authority. Thus the basic rights of such person cannot be deprived without just and reasonable cause.

Thus in any matter where the deposition of any witness is essential and the said witness is unable to attend Court due to ailments the Court has discretion to appoint an Advocate Commissioner either on the application of any party or suo-moto for expeditious disposal of the suit. In the instant matter the Learned Trial Court erred in rejecting the application for appointment of Advocate Commissioner.

Thus the Order dated 21/09/2023 and 14/11/2022 passed by Learned Trial Court cannot be sustained and the same should be set aside.

Hence this Revisional Application stands allowed. Orders dated 21/09/2022 and 14/11/2022 passed by Judge SCC Court Sealdah in T.S. 42 of 2017 are set aside. Prayer of the petitioner for appointment of Advocate Commissioner is granted. Sri Prosenjit Chatterjee Learned Advocate and

member of Bar Association City Civil Court having mobile no - 8420443716 is appointed as Advocate Commissioner to take evidence of the petitioner. Learned Advocate Commissioner shall upon notice to all parties and their Learned Advocates fix a date and time for taking evidence of the petitioner. Such date shall be within three weeks from re-opening of the Trial Court after vacation. Upon taking the evidence Learned Commissioner shall file the report before Learned Trial Court within one week. Upon receipt of the report Learned Trial Court shall proceed in accordance with Law. The remuneration of Learned Commissioner is fixed at Rs 6,000/- (Rupees Six thousand) to be paid by the petitioner. The petitioner shall serve copy of the plaint and written statement upon the Learned Commissioner.

This application stands disposed.

All Parties including the Learned Commissioner shall act on a xerox plain copy of the order on usual undertaking.

Urgent photostat certified copy of this order, if applied for, should be made available to the parties upon compliance with the requisite formalities.

(Biswaroop Chowdhury, J.)