

**IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI**

**C.O. 114 of 2024
Bina Malakar & Ors.**

Vs

Shyamachanran Malakar & Ors.

04.9.2024

ct.3, sl. 110
tudu/p.a

Mr. Soumyajyoti Dutta,
Mr. Gopal Sah.

...for the petitioner.

1. The petitioner is aggrieved with the order of Civil Judge, Junior Division, 2nd Court at Jalpaiguri, dated June 7, 2024 in title suit number TS 52(3243) of 2014. By dint of the same, the said Court has turned down petitioner's prayer and rejected his application under Order 26 Rule 4A and 10 of the Civil Procedure Code. Hence, this revision.
2. Ld. Counsel for the petitioner would submit that his client being the defendant in the said suit, found proper to examine an independent witness. Unfortunately, such witness of the defendant is a physically handicapped, wheelchair bound person, who could not have been called to the Court, for the purpose of deposition. Hence the defendant/petitioner in this case, has made prayer before the Court to issue commission for examination of that witness, in exercise of power under Order 26 Rule 4A of the Civil Procedure Code. By dint of the impugned order, such prayer of the petitioner/defendant in the suit has been turned down and rejected by the Court.
3. Ld. Counsel would attack the impugned order for the reason that the same lacks proper appreciation

of fact as well as due considerations of the statutory provisions and its import. He would say that the Ld. Trial Court has proceeded on the erroneous consideration that the petitioner/defendant was to submit any supportive document regarding physical disability of the witness for which he would not be able to attend the Court to depose. He would further say that the petitioner/defendant has come to know the said information about the independent witness, from the report of the process server and would not be in a position to collect any further information or supporting document regarding physical disability of that independent witness. Under such circumstances, he says, that the Court has not been justified being dissatisfied with the said report of the process server regarding witness's physical disability and immobility and rejecting petitioner's prayer as above. In order to buttress his argument, Ld. Counsel has referred to a judgment of this Court, reported in **2016 (5) CHN (Cal) 403 [Gautam Kumar Agrahari vs. Stock Holding Corporation of India Ltd]**.

4. In view of the nature of grievance of the petitioner, the Court finds that presence of the opposite parties may not be necessary in this case. The case is about production of evidence in connection with a suit for which a witness has to be cited before the trial court. The petitioner, as the defendant of the suit, seeks to produce evidence before the Court, by citing an independent witness. The petitioner has relied on the report of the process server, which speaks about physical disability and immobility of the said person. Now, he has made prayer before the Court that in terms of Order 26 Rule 4A CPC, the Court appoints commission, to examine the said

witness, who is otherwise unable to come before the Court, to depose.

5. Order 26 Rule 4A CPC has provided as quoted below.

“4A. Commission 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.”

6. The scope of the provision as above is indeed very wide. Enormous discretionary power has been bestowed upon the Court to appoint commission in the interest of justice or for expeditious disposal of the case or for any other reason. Order 26 Rule 1 of CPC has provided that commission for examination of a person would be allowed by the Court who is unable to attend the Court from sickness or infirmity. It has also provided that the Court would allow such commission when thinks it necessary so to do. In other words, the Court has to go into a process of decision making by reasonably analysing the facts and circumstances, espousing necessity to issue a commission for examination of an witness. The said provision has further stated that a certificate by a registered medical practitioner may be accepted by the Court, as an evidence of sickness or infirmity of any person.
7. The question is, if a medical certificate is the only acceptable evidence in support of the physical disability of the said person, who is proposed to be the witness before the Court. The trial Court in its order dated June 7, 2024, has held that no

document is forthcoming in respect of disability of the witness. Though it has stated about the report of the process server in which the factor of physical disability of the said person has been mentioned, the Court has not taken that into consideration, for the reason that no other/further document could be produced before it, regarding such physical disability of the said person, to the extent to incapacitate him, to come before the Court to dispose.

8. For the purpose of issuing commission, the court is not to assess the extent of disability of a person or its seriousness, all other medical and technical niceties. For the said purpose, it would be sufficient that the court forms an opinion regarding inability of the person due to physical disablement, to come before the Court. An assertion by a person, who has physically observed the person in disability, would have been sufficient for the Court, to form an opinion, as to the physical infirmity of the said person. In the present case, the process server would have been such a person, who has physically observed the person with disability. He has stated the said fact in his report. The said report, though not relied upon by the Court, but has been acknowledged to have been submitted before it.
9. The purpose of issuing commission by the Court is to impart complete justice to the parties to the suit. The power of issuing commission rests totally in the discretion of the Court. By issuing a commission in a particular case, the Court performs an in - depth investigation where the Court deems necessary, that is for proper adjudication of the case and for the ends of justice. The Court has only to be satisfied

that the reason for inability to come to Court is reasonable. The Court relaxes the rule of attendance in the Court and issues commission only if the Court finds that the reason for non - attending the Court is justified. Therefore, the Court is required to look for such evidence, only to justify the reasonableness of prayer for issuance of commission. The Court is not to look into the dynamics of physical condition of a person by compulsorily relying on the document relating to physical disablement of the person, to come to a conclusion regarding his physical infirmity and inability to come to Court. As discussed earlier, an observer and testifier of the fact may also be relied on in this regard for the purpose of issuance of commission, under the said provision of law.

- 10.** In this case, the report of the process server, is such an endorsement of him as an observer and testifier, of the fact of physical disablement of the proposed witness, to the extent of his being unable to attend the Court to depose. The Court could have relied on the same, instead of calling for further supporting document and rejecting petitioner's prayer, due to non-availability of the same.
- 11.** On the basis of the discussion as made above, this Court finds it proper to set aside the impugned order dated June 7, 2024, passed by the Civil Judge (Jr.Division), 2nd Court at Jalpaiguri, in Title Suit No. 52(3243) of 2014.
- 12.** The Ld. trial Court shall issue necessary direction for appointment of commissioner, in terms of Order 26 Rule 4A of the Civil Procedure Code, for examination of the said witness of the present

petitioner/defendant in the suit. Needless to say that the plaintiffs, in that case, would be entitled to cross-examine the said witness, in accordance with law.

13. C.O.No. 114 of 2024 is allowed and disposed of.

14. Urgent Photostat certified copy of this order, if applied for, be given to the parties upon compliance of all formalities.

(Rai Chattopadhyay, J.)