

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE

CO 95 of 2023

Harish Chandra Shaw & Anr.
Vs.
Smt. Binapani Majhi & Ors.

Mr. Gopal Chandra Ghosh, Sr. Counsel
Mr. R.K. Mondal
Ms. Sunandana Saha
... For the petitioners

1. Affidavit of service filed in Court today is taken on record.
2. In spite of service, none appears on behalf of the opposite parties.
3. Challenge in this revisional application is the order dated 7th April, 2022 passed in connection with Ejectment Suit No.82 of 2010 wherein the learned Civil Judge (Junior Division), 6th Court at Alipore disallowed a prayer for examination of the plaintiff no.1/landlord on commission under Order XXVI Rule 1 read with Section 151 of the Code of Civil Procedure (in short, CPC).
4. The suit was filed for eviction of tenant on the ground of reasonable requirement. At the time of recording evidence on behalf of the plaintiffs, one application was filed for recording evidence of plaintiff no.1 on commission on account of his illness due to

Lumbar Discectomy and all the medical papers along with certificates issued by the doctor were produced. After hearing both sides, learned Judge recorded the following finding which runs as follows:-

“Competency is the rule and incompetency is the exception. The parties to the suit and their husbands or wives are competent witness in all civil proceedings against any person whether for or against. Examination of the witness in the Court is the rule and examination on commission is the exception under special circumstances”.

5. Provision of Order XXVI Rule 1 of the CPC mandates that Court may issue a commission for examination of witness of a person who is exempted under this Code from attending the Court or who due to sickness or infirmity is unable to attend it.

6. Explanation to provision also mandates that Court may, on this issue, 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 practitioner as a witness.

7. In the case at hand, the learned Judge relied on Rule of Competency and came to his finding that the plaintiff no.2, wife of the plaintiff no.1, can have deposed on behalf of the plaintiff no.1.

8. In the instant case, the application under Order XXVI Rule 1 of the CPC was filed along with medical

certificate as well as other medical papers showing serious illness of the plaintiff no.1 and from that point of view, the learned Trial Judge ought to have decided on the issue of sickness of the plaintiff no.1 or whether he was able to attend the Court.

9. Considering all the medical papers including the certificates issued by the registered medical practitioner, I am unable to agree with the learned Trial Judge on the ground of competency of the plaintiff no.2.

10. The prayer under Order XXVI Rule 1 read with Section 151 of the CPC stands allowed.

11. In the aforesaid view of the matter, the order dated 7th April, 2022 passed in connection with Ejectment Suit No.82 of 2010 by the learned Civil Judge (Junior Division), 6th Court at Alipore, stands set aside.

12. Learned Trial Judge is requested to appoint a Commissioner subject to payment of cost of the Commissioner by the plaintiffs/petitioners herein within a date specified by the learned Trial Judge.

13. Interim order, if any, stands vacated.

14. Connected application, if any, also stands disposed of.

15. All parties shall act on the basis of a server copy of this order duly downloaded from the official website of this Court.

16. Urgent photostat certified copy of this order, if applied for, be given to the parties, upon compliance of necessary formalities.

(Bibhas Ranjan De, J.)