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(1921) 08 CAL CK 0029

Calcutta High Court

Case No: None

Kumar Sarat Kumar, Ray	APPELLANT
Vs	
Ram Chandra Chatterjee	RESPONDENT

Date of Decision: Aug. 9, 1921

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 16 Rule 19, Order 16 Rule 21, Order 26 Rule 4

Citation: AIR 1922 Cal 42 : 68 Ind. Cas. 9

Hon'ble Judges: Panton, J; Asutosh Mookerjee, J

Bench: Division Bench

Judgement

1. We are invited in this Rule to set aside an order of the Trial Court in respect of two applications made by the petitioner, who is the defendant in a pet ding suit. His first application was to Lave himself examined on commission in support of his own ease. His second application was for the issue of a commission to examine Babu Brojo Lal Chakravarty, a Vakil of this Court, to prove three documents which have been produced at a late stage of the proceedings.

2. As regards the first application, it cannot be disputed that the defendant was not entitled to the order as a matter of right under Rules 19 and 21 of Order XVI of the Code of Civil Procedure. Those rules apply to persons who are ordered to attend in person to give evidence, including persons who may be parties to a suit, but are required to give evidence as witnesses. The rules have no application to a case where a party to a suit desires to give evidence of his own motion in his own favour. A case of that description is governed by Order XXVI, Rule 4 of the CPC which provides that any Court may in any suit issue a commission for the examination of any person resident beyond the local limits of its jurisdiction. Here the defendant resides in the District of Rajshahye, beyond the local limits of the jurisdiction of the

Bardwan Court where the suit has to be tried. Consequently, the Court has a discretion in the matter and has to regard all the circumstances before the application is granted or refused. In the present as(sic)'', the defendant alleged that be was indisposed. It is possible that the gravity of his ailment baa been exaggerated and it may not be absolutely impossible for him to be present in the Court in Burdwan although he resides at a distance of more than 200 miles from the Court premises, it must not be over looked, however, that in cases under Order XXVI, Rule 4, a distinction has been observed between an application by a plaintiff asking for a commission to examine himself and an application by a defendant asking for a commission to examine himself. This distinction has been emphasised in connection with the cooresponding rules of the Supreme Court in England, as a clear from the decisions in Ross v. Woodford (1894) 1 Ch. 38 : 63 L. J. Ch. 191 : 8 R. 20 : 70 L. T. 22 : 42 W. R. 188 : New v. Burns (1895) 64 L. J. Q. B. 104 : 14 R. 329 : 71 L. T. 681 : 48 W. R. 182. : Emanuel v. Soltykoff (1892) 8 T. L. R. 331. and Keeley v. Wakley (1893) 9 T. L. R. 571. In these cases, particularly in the judgment of Chitty, J., in Ross v. Woodford (1894) 1 Ch. 38 : 63 L. J. Ch. 191 : 8 R. 20 : 70 L. T. 22 : 42 W. R. 188. and of Lindley, L. J., in New v. Burns (1895) 64 L. J. Q. B. 104 : 14 R. 329 : 71 L. T. 681 : 48 W. R. 182 it is pointed but that where an application is made by a defendant and specially by a defendant who lawfully resides out of the jurisdiction of the Court, according to the ordinary source of his life and business, the Court will not regard the case with the same strictness as the case of the plaintiff who has instituted his suit in a forum of his choice though he resides beyond the jurisdiction of such Court. We do not overlook that in the cases mentioned the defendants resided not merely beyond the jurisdiction of the British Court but also beyond the seas, namely, in South Africa, in Canada and in Russia ''respectively. The principle, however, is based on good series and there is no reason why it should not be borne in mind when a Court is called upon to consider an application under Order XVI, Rule 4 by a person residing beyond the local limits of the jurisdiction of the Court though a resident in British India. To compel such a defendant to come over, at great expense, to attend the trial or to give up his case, might be oppressive and unfair, and, on this ground it was ruled in Adamji Khadi Bhai v. Issuf Ahmed Mulla 16 Ind. Cas. 750. that it would be wrong to apply to the case of a defendant the principles that are applicable to the case of a plaintiff asking for a Commission to examine himself.

3. It is plain, however, that a Court in the position of a Court of Appeal must exercise great caution when invited to interfere with an order of the Trial Court made with jurisdiction in the exercise of its discretion. In this connection, we may re-call the observations of Lord Esher, M. Rule in Emanuel v. Soltykoff (1892) 8 T. L. R. 331 : "The Court had to exercise its discretion as to granting a commission, and this Court would be very unwilling to interfere with the exercise of that discretion by the Court below. Each case must depend upon its own circumstances, and no rule as to the exercise of that discretion could be laid down. If this Court saw that the discretion had been wrongly exercised, if it saw that the case in all its bearings was not laid

before the Court below, if it saw that the Court below misapprehended an important part of the case, this Court would interfere, The Court below seemed to have treated the matter as if it was merely a commission to examine witnesses." In the case before us the Court below overlooked the distinction which should be observed in tie treatment of an application by the defendant as distinguished from a similar application by the plaintiff. In these circumstances, he hold that the order of the Court below should be set aside and the defendant should be examined en commission. But we are clearly of opinion that such examination should not take place at his residence in the interior of the Rajshubye District. If an order of that description were made in favour of the defendant, the plan tiff might be seriously prejudiced. We consequently direct that the defendant be examined on commission in Calcutta and in order to ensure that the plaintiff may not be unduly embarrassed, we direct that the defendant do pay to the plaintiff the sum of Rs. 1,000 (rupees one thousand only) as costs in order to enable him to make adequate arrangements for the areas examination of the defendant. The payment of this sum will be a condition precedent to the carrying out of our order, and the money will be retained by the plaintiff irrespective of the result of the suit. The other expenses in connection with the commission will be borne in the first instance by the defendant. How such costs should be ultimately dealt with, will be determined by the lower Court on the result of the suit. The petitioner undertakes to deposit the sum of Rs. 1,000 in the Court below to the credit of the plaintiff within two weeks from this date and the plaintiff will be entitled to take that money forthwith from the Court.

4. As regards the second point we are of opinion that Babu Brojo Lal Chakravarty also should be examined on commission in Calcutta. We do not decide the question of the admissibility of the documents which are sought to be proved by his evidence. When he has been examined on commission, the matter will be considered by the Subordinate Judge in the light of the evidence placed before him. We make this order so as to avoid possible difficulty at the appellate stage.

5. The result is that this Rule is made absolute and the order of the lower Court sat aside in the manner directed. The petitioner must pay the costs of this Rule to the opposite party. We assess the hearing fee in this Rule at five gold mohurs.

6. Let the record be sent dawn to the Court below at once in order to enable that Court to resume the trial of the suit.