

JUDGMENT

[Islamabad]

Before Aamer Farooq, J

BBC PAKISTAN (PVT.) LTD. and another---Petitioners

Versus

MASUD ALAM (deceased) through Legal Heirs and others---Respondents

Civil Revision No.400 of 2015, decided on 4th April, 2016.

AAMER FAROOQ, J.---Through the instant civil revision the petitioners have assailed order dated 16.09.2015 whereby the application for appointment of local commission to record evidence was dismissed.

2. The facts, in brief, are that the predecessor in interest of the respondents filed a suit against the petitioners. In the referred suit, at the time of recording of evidence of the petitioners, an application was filed under Order XXVI, C.P.C. read with enabling provisions for recording of evidence through local commission. The application was resisted by the respondents. The learned Trial Court vide the impugned order dismissed the application of the petitioners.

3. Learned counsel for the petitioners inter alia submitted that while dismissing the application, filed by the petitioners, reliance has been placed on case titled Archibald Campbell Mackillop v. Tobacco Manufacturers (India) Ltd. and another (PLD 1951 Sindh 22); whereas the principle of law laid down in the said judgment was not followed in the subsequent judgment. In this behalf learned counsel for the petitioners placed reliance on the case titled Black Sea Shipping Company and another v. Polskie Linie Oceaniczne (Polish Ocean Lines) Gdynia and 2 others (1987 CLC 2314), Khawaja Feroz v. Muhammad Dawood and others (PLD 2008 Kar. 239) and Iqbal M. Hamzah v. Gillatte Pakistan Ltd. (2011 YLR 277). Learned counsel further contended that representatives of the petitioners have security concerns, therefore, the request was made through the application, for recording of evidence by the local commission at the expense of the petitioners; that while dismissing the application the learned Trial Court has exercised the jurisdiction with material irregularity.

4. Respondent No.1 appeared in person before this Court on 31.03.2016 and submitted that the instant petition has been filed without authority and there is no reason or justification for recording of evidence through local commission.

5. Learned counsel for the petitioners on the query of the Court has referred to resolution dated 28.03.2011 in favour of Mr. Haroon ur Rasheed as well as resolution dated 20.04.2011 by petitioner No.2 in favour of the same person i.e. Haroon ur Rasheed.

6. The instant petition has been filed by Haroon ur Rasheed who has been duly authorized by

the petitioners vide resolutions dated 28.03.2011 as well as 20.04.2011 to file suit, verify pleadings or to defend the proceedings and file appeal and revision in this behalf, therefore, the instant petition has been competently instituted. The learned Trial Court dismissed the application for appointment of local commission for recording of evidence on the basis of the dictum laid down in case titled Archibald Campbell Mackillop v. Tobacco Manufacturers (India) Ltd. and another (PLD 1951 Sindh 22). In the referred judgment the Hon'ble Sindh High Court held as follows:

"When it is important that the demeanour of the witness should be seen and his precise answer to the question put to him should be heard by the Judge, or the Judge or jury, who have to decide the case, and that the defendant should have the fullest opportunity of cross-examining him, they being really only able to do that effectually when the witness is in Court and his demeanour, and the way in which he answers the questions, can be judged of by the judge and by the jury, it would not be just to issue of commission for the examination of witness."

However, the Hon'ble Sindh High Court in case titled Iqbal M. Hamzah v. Gillette Pakistan Ltd. (2011 YLR 277) discussed the case law on the subject including two judgments from Indian jurisdiction and held as follows:

"Order XXVI, Rule 1, C.P.C. deals with the circumstances for the issuance of Commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under the Code from attending the Court or who is from sickness or infirmity unable to attend it. Rule 2 of the same Order provides that order for the issue of Commission for the examination of a witness may be made by the court either on its own motion or on an application by any party to suit or of the witness to be examined. Rule 4 provides that persons for whose examination Commission may issue. Another important aspect should also be kept in mind that in order to expedite the matter for an early disposal of the suits, it has become quite common phenomenon that immediately on settlement of issues, in most of cases the advocates appearing for the parties even on oral motion jointly suggest the appointment of a Commissioner for recording evidence and this Court is continuously and regularly appointing Commissioners for recording evidence in number of cases without awaiting the formal application in this regard. Sometime where Commissioner is appointed on the insistence of the plaintiff, and the defendant's counsel shows reluctance in the appointment on any ground, this court use to pass the orders that the fee of the Commissioner shall be paid by the party on whose insistence or request. Commissioner is appointed. It is also quite common that in many cases the plaintiffs do accept the liability of payment for the entire Commission subject to the adjustment of fee in the cost, if any granted at the time of final adjudication of the suit. In the present case also, the plaintiff is ready to bear the entire cost of Commission. In PLD 2008 Karachi 239, supra, the learned Divisional Bench of this court has already held that taking steps for early decision in the matter and recording evidence on Commission to save time of the parties could not be termed to be erroneous or an act against the principles of natural justice and the order of the learned Single Judge was affirmed, who said to have rightly held that it would be in the interest of both the parties if they came out of litigation as early as possible. Order of appointment of Local Commission was not likely to cause any prejudice to defendant in any way as both the parties would have the opportunity to adduce their evidence and cross-examine the witness."

Similarly, the Hon'ble Division Bench of Sindh High Court in case reported as Khawaja Feroz v. Muhammad Dawood and others (PLD 2008 Karachi 239) held as follows:

"The learned counsel stressed for recording of evidence in court to check the demeanor of witness and stopping irrelevant questions likely to be put to him, it may be observed that such conditions are available in all the suits where the recording of evidence on commission has been ordered. Had this been a valid reason, then appointment of Commissioner for evidence would have been discouraged in all the cases."

"It is pertinent to mention here that impugned order clearly states that there will be no harm for the defendant if the request of the plaintiff for appointment of Commissioner and recording of evidence is granting. It will be in the interest of both the parties if they come out of litigation as early as possible, hence the objection of learned counsel for defendant that other suits are pending in this court since long has no force."

The Hon'ble Division Bench of Sindh High Court in case titled Black Sea Shipping Company and another v. Polskie Linie Oceaniczne (Polish Ocean Lines) Gdynia and 2 others (1987 CLC 2314) did not follow the case titled Archibald Campbell Mackillop v. Tobacco Manufacturers (India) Ltd. and another (PLD 1951 Sindh 22) and observed as follows:

"We wish to make it clear that we do not wish to be misunderstood to mean what, in all cases, commission, by interrogatories must be allowed, but we only wish to convey that in case a witness is resident of foreign country, or, even a distant place in Pakistan, the normal mode of examination would be by commission, unless the Court comes to the conclusion that the objects of justice would not be satisfied by examination on commission by interrogatories."

"The process of reasoning adopted by the learned Single Judge is mainly based on the adequacy of opportunity for cross-examining the witnesses. We must say with respect that, if an application for examination of a witness on commission is to be rejected solely on the ground that the quantum of opportunity to cross-examination is lesser, when a witness is examined on commission, then, on principle, no commission need ever issue. This, in our view, is not correct in law. We are fortified in our view by the further observations, which we have made in the earlier part of the order stating that, if the replies to interrogatories are not found sufficient it is always open to the Court to send supplementary interrogatories. However, saying that cross-examination on interrogatories would invariably fail to achieve the object of producing evidence is stating the proposition too broadly."

"It would mean that the grant of a commission has to be decided on the basis of material, which affirmatively or, negatively show that the examination of witness on commission would meet the ends of justice."

"We have already stated that, applying the above rules to the instant case, we find that there is nothing to show that effective cross-examination cannot be done. Nor has it been shown to us that the discretion has been exercised by the learned Single Judge in a wrong manner. On the other hand, we would say that the order for examination on commission is in full accord not only with the requirements of law but even with justice in the circumstances of

the case."

7. In light of above case law the reasoning that prevailed with the learned trial Court in dismissing the application for recording of evidence through local commission is not valid and based on law, therefore, the jurisdiction has been exercised with material irregularity. The recording of evidence through commission is a practice which is in vogue and is not alien to dispensation of civil justice.

8. In view of above, the instant civil revision is allowed and the impugned order dated 16.9.2015 is set aside; consequently the application for recording of evidence through local commission, filed by the petitioners, is accepted.

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