CIVIL RULE.

Before Rankin C. J. and Mitter J.

1927

Aug. 23.

PHANINDRA KRISHNA DUTT

v.

PRAMATHA NATH MALIA.*

Commission—Practice—Duty of Court—Revision—Civil Procedure Code (Act V of 1908), s. 115 and O. XXVI, rr. 1, 8.

In an application under O. XXVI, r. 1 of the Code of Civil Procedure, for issue of a commission to examine the defendant, on the ground of sickness or infirmity, it would *primâ facie* be more just that the defendant, even although the defence consists of an equitable counter-claim, if he really cannot attend to give his evidence in Court, should be examined on commission. It would, however, be the duty of the Court to satisfy itself very carefully as to the seriousness and reality of the sickness that was alleged.

When it is found that the witness is unable to attend Court by reason of sickness or infirmity, the Court has jurisdiction to issue the commission prayed for. It is then a question of the Court's discretion. Such discretion cannot be revised under s. 115 of the Code.

The mere fact that commission has been ordered is no reason why the evidence should be read unless it is found that at the time of the hearing sickness or infirmity or other reason prevents the witness from giving his evidence in the ordinary way.

Mahim Chandra Guha v. *Naba Chandra Chowdhury* (1) and *Satish Chandra Chatterji* v. *Kumar Satish Kantha Roy* (2), relied on.

Dhanu Ram Mahto v. *Murli Mahto* (3), discussed.

The procedure laid down in O. XXVI, r. 8 of the Code should be observed in such cases.

CIVIL RULE on behalf of the plaintiff.

The petitioner instituted a suit in 1925 in the Court of the Subordinate Judge at Asansol for recovery of

(1) (1926) 44 C. L. J. 288. (2) (1925) 28 C. W. N. 327.
(3) (1909) I. L. R. 36 Calc. 566.

* Civil Rule No. 693 of 1927.

a sum of Rs. 49,004-4 as from the defendant in respect of remuneration and charges due to him for work done as a managing contractor of a colliery under the defendant. The defendant abovenamed filed a written statement, denying *inter alia* his liability for the plaintiff's claim and making a counter-claim for Rs. 2,35,641-10 as., on account of damages alleged to have been caused to the defendant's colliery by the carelessness and negligence of the plaintiff while in service under the defendant. The defendant put in court-fees on the amount of his counter-claim. In April, 1927, the defendant applied for examining himself on commission on the ground that he was suffering from lumbago which made it impossible for him to remain in the same position for more than 10 minutes. He filed a medical certificate in support of the statements made in his application. The plaintiff objected to the issue of commission, contending *inter alia* that the defendant was in the position of a plaintiff in respect of his counter-claim in the suit, that the defendant was in reality fit to examine himself in Court and that, as no date had been fixed for the hearing of the suit, there was no necessity then to examine the defendant on commission. Since then the defendant filed another medical certificate in May, 1927. On the 12th May, 1927, the Subordinate Judge granted the application of the defendant for examining himself on commission.

The plaintiff thereupon moved the High Court and obtained this Rule.

Mr. Amarendranath Bose (with him *Babu Radhikaranjan Guha* and *Babu Sitangshubhusan Bose*), for the petitioner. In this case, the defendant who has been sued by my client for wages due on account of service rendered preferred a

1927

PHANINDRA KRISHNA DUTT v. PRAMATHA NATH MALIA.

counter-claim. Of the several issues framed in the suit, issues Nos. 3 to 8, 10, 12, 15, 17, 20, 21 and 22 related to the counter-claim. So the defendant is really in the position of a plaintiff. The law makes a distinction between the plaintiff and the defendant in the matter of granting commissions. Every party to a litigation is entitled to insist that the ordinary mode in which evidence is to be taken should not be departed from. The rule is more strictly applied where the plaintiff is an applicant for commission for his own examination. Under O. XXVI, r. 4 (*a*) of the Code, the Court may issue a commission for the examination of any person resident beyond the local limits of its jurisdiction. But where a plaintiff residing out of the jurisdiction of a Court brings a suit in that Court and then applies for his examination on commission, such application has to be regarded with great strictness. *Sarat Kumar Ray* v. *Ram Chandra Chatterjee* (1). Here the defendant, who is virtually a plaintiff, resides within the jurisdiction of the Court and a strong case has to be made out for his examination on commission. My first complaint is that the Court has not realised that the defendant is in the position of a plaintiff. My second complaint is that the Subordinate Judge has not come to any finding necessary for the issue of commission. The Subordinate Judge has not found that the defendant was so ill that he could not attend Court. The considerations which would arise in an application for examination on commission, where sickness or infirmity is alleged, are pointed out in *Panchkari Mitra* v. *Panchanan Saha* (2). An order passed ignoring such considerations is not a mere matter of discretion. Thirdly, the learned Judge did not

(1) (1921) 35 C. L. J. 78, 80. (2) (1924) 39 C. L. J. 598, 602.

consider the *bonâ fides* of the application for commision.

Babu Bijoy Kumar Bhattacharya, for the opposite party. This is not a fit case for interference under s. 115 of the Code. The distinction pointed out in *Sarat Kumar Ray* v. *Ram Chandra Chatterjee* (1) between an application by the plaintiff for examination on commission and an application by the defendant for such examination in cases under O. XXVI, r. 4 does not arise where the application is made as in the present case under O. XXVI, r. 1. The distinction is made because the plaintiff having himself chosen the foram is not entitled to deprive the other side of the advantage of an examination in Court by asking for commission. But the defendant in the persent case, though he may be regarded as plaintiff, never chose the *forum*. There can be no such distinction, where commission is sought on the ground of sickness or infirmity. It is no doubt important that the ordinary mode of taking evidence should not be departed from, but the Court has also to bear in mind that in proper cases facilities must be given to a party to produce all the evidence in support of his case. Here the necessary findings have been arrived at. The Judge has found that the defendant was ill and that the examination of the defendant would last 3 or 4 days and that there was no knowing when the witness would recover. The Court apparently thought that it would be risky to compel the witness to attend Court. This is really a matter of discretion, with which this Court ought not to interfere under s. 115 of the Code. The Court had jurisdiction to issue commission in relevant cases and, exercising its discretion, on the facts found, issued the commission.

(1) (1921) 35 C. L. J. 78.

1927

PHANINDRA KRISHNA DUTT v. PRAMATHA NATH MALIA.

Further, O. XXVI, r. 8 (*a*) gives the plaintiff another remedy, if his case is that the commission was improperly issued. He is entitled under that rule to object to the evidence taken in commission being read unless it is shown at the hearing that the defendant is unable from sickness or infirmity to attend to be personally examined. There is, therefore, no case for revision under s. 115.

Mr. Amarendra Nath Bose, in reply.

Cur. adv. vult.

RANKIN C. J. This is a Rule in revision obtained by the plaintiff, calling upon the defendant to show cause why an order should not be set aside, whereby the defendant was ordered to be examined on commission at his own request.

It appears that the suit was launched in 1925 for the recovery of a sum of Rs. 49,000, as remuneration due for work done as a managing contractor of a colliery and that the defendant had paid court-fee on a counter-claim for some two and half lacs, on account of damages alleged to have been caused to the defendant's colliery by the negligence of the plaintiff. The issues which were settled in 1925 contained a great many matters arising out of the counter-claim.

In April, 1927, the defendant put in a petition that he might be examined on commission, on the ground that he was suffering from lumbago which made it impossible for him to remain in the same position for more than ten minutes. He filed a medical certificate to that effect. The plaintiff objected. He says that he took the point that the defendant, in respect of the counter-claim, was really in the position of a plaintiff. He disputed that the defendant was ill as alleged and that there was any necessity for his examination on commission, and he attacked the

independence of the doctor who gave the medical certificate. The application was repeated and by the order of the 16th of May, 1927, the Subordinate Judge granted the application. It appears from the order recorded that the main ground of opposition was that "the case may not be taken up at an early date and "that the witness even if he is unwell may recover "in the meanwhile. The plaintiff does not admit "that the witness is really ill. It is not known when "the case can be taken up". Having set out these matters, the learned Subordinate Judge goes on to say this: "After hearing the pleaders, I do not think "that it is a fit case in which the prayer for the "examination of the witness on commission shall be "refused. I should, however, recoup the other party "by giving the cost of pleader for the examination of "the said witness." He went on to order that the applicant should deposit Rs. 96 as plaintiff's pleader's fee for three days and if the examination should last for more then three days, the witness would be required to pay at the rate of Rs. 32 per day as the plaintiff's pleader's fee.

This Rule was obtained by way of challenging that order and reliance has been placed by the learned advocate who appears for the applicant upon several decisions of this Court. To begin with, it has to be observed that the present case is within Order XXVI, rule 1, of the Civil Procedure Code and that it is not a case under rule 4 to which different considerations may apply. That rule says: "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 juris-"diction who is exempted under this Code from "attending the Court or who is from sickness or "infirmity unable to attend it".

1927

PHANINDRA KRISHNA DUTT v. PRAMATHA NATH MALIA.

RANKIN C. J.

In this class of cases, we have not to deal with the case of a plaintiff who has a choice to bring his own suit in a particular forum and then asks to be examined on commission on the ground that he cannot attend at the place where he has chosen to sue. We are dealing with an application on the ground of sickness or infirmity and, broadly speaking, even although a man's defence consists of an equitable counter-claim, it would *primâ facie* be more just that the defendant, even if he has a counter-claim, if he really cannot attend to give his evidence in Court, should be examined on commission. No doubt it was the duty of the learned Subordinate Judge to satisfy himself very carefully as to the seriousness and reality of the sickness that was alleged and, if I may be allowed to say so, the judgment of the Subordinate Judge is very unhappily phrased. It is phrased in flabby language and it is indefinite to a degree.

The question is not whether this is a fit case in which the prayer for the examination of the witness on commission should be refused The question is whether it is a case in which it has been established by reason of the illness of the defendant that the prayer for examination on commission must in justice be granted. It is, however, in my opinion, an unjust hypercritical attitude to take to say that the learned Subordinate Judge has not intended to find that the plaintiff is ill and suffering from lumbago as alleged, and we have, therefore, to consider whether there is any real reason why this order should be interfered with under section 115 of the Civil Procedure Code. It is quite clear that in a case of this character, the whole jurisdiction to make such an order arises out of the fact which has to be found of the sickness of the person in question. When it is found that he is unable to attend Court by reason of sickness or infirmity,

the rest is a question of discretion. Indeed, it may be said that in such a case it would be a very strong measure to refuse an examination on commission.

Learned advocate for the applicant relied upon certain cases of this Court and of the High Court of Patna. These cases proceeded usually under rule 4 of Order XXVI and they have reference to the question whether a plaintiff chosing his forum should be examined on commission. So far as those cases are concerned, there appears to be authority for the proposition that if a Court does not think that the discretion given to the Court by rule 4 of Order XXVI is properly exercised, it can treat the matter as a material irregularity. Other cases seem to go upon the footing that the Court can treat the matter as a material irregularity, unless it appears from the order recorded by the lower Court that the principles of law which may be thought applicable to the subject-matter being disentangled they were all considered and separately applied. Whether these cases are in the least consistent with the interpretation of the Privy Council from time to time of section 115 of the Code may be seriously doubted. In the present case it is not necessary for me to discuss that particular question. Given the fact that the Court is satisfied under rule 1 of Order XXVI that the person is sick and unable to attend Court and that the Court has exercised its discretion as to whether in those circumstances a commission should issue and has issued a commission, I am clearly of opinion that that discretion cannot be revised under section 115 of the Civil Procedure Code, whether the judgment of the Court below on this interlocutory application consists of a complete treatise on the subject or an incomplete treatise on the subject.

1927

PHANINDRA KRISHNA DUTT v. PRAMATHA NATH MALIA.

RANKIN C. J.

In the present case, however, it is advisable to call attention to rule 8 of Order XXVI. In a recent case in this Court [*Mahim Chandra Guha* v. *Naba Chandra Chowdhury* (1)], before Sir Nalini Ranjan Chatterjea and Mr. Justice Panton, it has been pointed out that that rule is to be treated as a reality. That is a case of a man who got himself examined at a time when he was outside the jurisdiction. At the time of the hearing, he was within the jurisdiction and the other party wanted him to give his evidence in Court in the ordinary way. The Court, as the man's evidence had been taken on commission, allowed the commission evidence to go in and it was pointed out that in those circumstances the evidence taken on commission could not be read as evidence in the case against the defendant in view of the provisions of Order XXVI, rule 8, there being no material which would ground the exercise of a discretion on the part of the Court to dispense with the proof of the various matters mentioned in that rule. Again, in the case of *Satish Chandra Chatterji* v. *Kumar Satish Kantha Roy* (2), Lord Atkinson, delivering the judgment of the Judicial Committee, commented upon a case, where it appears that in December, 1916, a commissioner was appointed, evidence was given on commission in January, 1917, and the trial commenced in February, 1917; and the Judicial Committee there pointed out: "Evidence taken on commission should "only be permitted to be used where the witness is "proved to be too ill to give his evidence in Court or "is absent or (for)? other sufficient reason. If Satish "went to the Court he could, and presumably would "have been accommodated with a seat" and so on. "The whole procedure in this matter strongly suggests

(1) (1926) 44 C. L. J 288. (2) (1923) 28 C. W. N. 327.

"that it was his aversion to undergo the ordeal of an "examination in open Court, in the presence of those "who knew him, rather than ill-health, which kept "him from the witness box".

I take this occasion to point out that when this case comes on for trial, the mere fact that this commission has been ordered now will be no reason whatever for any one to look at it unless it is found that at the time of the hearing sickness or infirmity or other reason prevents the witness from giving his evidence in the ordinary way. I say that the more emphatically, as there is some authority in the books, particularly in the case of *Dhanu Ram Mahto* v. *Murli Mahto* (1), which gives colour to the view that once a commission has been ordered and executed the commission evidence goes in *ipso facto* and without further consideration. I do not say that that proposition was intended to be laid down in the case to which I have referred, but the decision and the reasoning lend colour to that view, and I am particularly anxious, therefore, that it should be made clear to the lower Court that rule 8 of Order XXVI is as much a rule of procedure in the mofussil as anywhere else and that what the Privy Council has laid down and this Court has recently laid down in the cases to which I have referred is the proper method of conducting the case. It does not seem to me that in this case the question whether the man is shown to be so ill that it was advisable to take his evidence on commission is a question of such a character that the learned Subordinate Judge is bound to answer it correctly on pain of being guilty of a material irregularity.

(1) (1909) I. L. R. 36 Calc. 566.

1927

PHANINDRA KRISHNA DUTT v. PRAMATHA NATH MALIA.

In these circumstances I am of opinion that this Rule should be discharged with costs; hearing fee—two gold mohurs.

MITTER J. I agree.

S. M. *Rule discharged.*

APPELLATE CIVIL.

Before Rankin C.J. and Mitter J.

1927

Aug. 24.

BIR BIKRAM KISHORE MANIKYA

v.

ALI AHAMAD.*

Privy Council—Practice—Minor, representation of—Jurisdiction of High Court, after final admission of Privy Council appeal, to order appellant to put the guardian of minor respondents in funds to conduct appeal.

The High Court is not entitled after the final admission of a Privy Council appeal to make an order directing the appellant in the Privy Council case to put the guardian of the minor respondent in funds to have the case argued on behalf of the minor before the Judicial Committee.

Rules made by the Privy Council for Indian appeals and High Court Rules, Appellate Side, relied on.

APPLICATION in the Privy Council department.

This was an application for payment of costs for the representation of the minors before the Judicial Committee.

The application was made by Babu Jatindra Nath Sanyal, a vakil practising in the High Court, who was appointed guardian of the minor respondents in the

* Application for leave to appeal to His Majesty in Council Nos. 118 to 164 of 1923.