

KUNHALI-
KUTTI HAJI

v.

KUNHA-
MAYAN.SCHWABE,
C.J.

WALLACE, J.

tarwad. The memorandum of objections of respondents Nos. 1 to 9 is dismissed with costs of the appellant and the memorandum of objections of the tenth respondent is dismissed without costs.

WALLACE, J.—I agree and have nothing to add.

N.B.

APPELLATE CIVIL.

Before Mr. Justice Wallace.

JAGANNATHA SASTRI (PLAINTIFF-PETITIONER),
PETITIONER

1922,
November
30.

v.

SARATHAMBAL AMMAL AND TWO OTHERS (DEFENDANTS,
COUNTER-PETITIONERS), RESPONDENTS.*

Civil Procedure Code (V of 1908), O. XVI, r. 19. (b)—Issue of commission to witness living beyond 200 miles from Court—Right of party when no abuse of process.

Where a party asks for the examination on commission of a witness not under his control owing to the witness residing more than 200 miles from the Court-house, a commission should issue as a matter of right unless the Court is satisfied that the application is an abuse of the process of the Court. It is not for the Court to decide whether the party will be benefited by the issue of the commission or not; that is a matter entirely for the party. *Amirth Nath Jha v. Dhunput Singh Bahadoor*, (1873) 20 W.R., 253; *Sitamma v. Subraya*, (1911) 21 M.L.J., 889 and *Veerabadrin Chetty v. Nataraja Desikar*, (1905) I.L.R., 28 Mad., 28, followed.

Held further that where a Court acting contrary to law refuses to issue a commission in a case like the above, the High Court can interfere in revision and set aside an interlocutory order to prevent unnecessary expense and waste of time to the parties.

* Civil Revision Petition No. 308 of 1922.

PETITION under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the order of the Court of the District Munsif of Mayavaram, in Interlocutory Application No. 67 of 1922 in Original Suit No. 278 of 1921.

The facts are given in the judgment.

K. Sankara Sastri for petitioner.—Under Order XVI, rule 19 (b), Civil Procedure Code, the Court is bound to issue a commission as the witnesses reside beyond 200 miles; compare Order XXVI, rules 1 and 4. It is not for the Court to say whether the party will be benefited by the commission. *Sitamma v. Subraya*(1), *Huree Dass Bysack v. Meer Moazzum Hossein*(2). The High Court can interfere in revision even with such interlocutory orders when the refusal is based on wrong interpretation of the law; *Veerabadran Chetty v. Nataraja Desikar*(3).

C. A. Seshagiri Sastri for the respondents.—Issue of commission is a matter of discretion with the Court, compare Order XXXVII, rule 5, of the Supreme Court Rules and *Coch v. Allcock*(4). He referred to *Adamji Khadi Bhai v. Issuf Ahmed Mulla*(5), *A. E. Saleji v. Ahmed Musaji Saleji*(6), *Chinnu v. Sambanda Moorathi*(7), for the principles governing the issue of a commission. If the witness is under the party's control as in this case the Court need not issue the commission; *Amirth Nath Jha v. Dhunput Singh Bahadoor*(8). The Court can refuse to issue a commission if it thinks that it is an abuse of process of Court; being a matter of discretion there can be no revision. *Chinnu v. Sambanda Moorathi*(7). He distinguished the cases quoted by petitioner.

(1) (1911) 21 M.L.J., 889.
(2) (1905) I.L.R., 28 Mad., 28.
(3) (1912) 18 I.C., 750.
(7) (1914) 28 I.C., 522.

(2) (1871) 15 W.R., 447.
(4) (1888) 21 Q.B.D., 178.
(6) (1913) 19 I.C., 643.
(8) (1873) 20 W.R., 253.

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The Court delivered the following JUDGMENT :—

In this case the lower Court has refused to issue a commission for the examination of two of the petitioner's witnesses, who live more than 200 miles from the Court-house, and cannot therefore be compelled to attend by ordinary process.

The petitioner contends that, as a matter of law, the Court was bound to issue a commission. The respondent contends that it was entirely a matter for the discretion of the Court. The point is one on which reported authorities speak with an uncertain voice.

The practice in English Courts undoubtedly is that it is a matter of judicial discretion for the trying Court to issue a commission and the Calcutta High Court has usually interpreted the pertinent sections of the old and the present Civil Procedure Codes in that sense ; vide *Amrith Nath Jha v. Dhunput Singh Bahadoor*(1), *Adamji Khadi Bhai v. Issuf Ahmed Mulla*(2), and *A. E. Saleji v. Ahmed Musaji Saleji*(3) though in *Amirth Nath Jha v. Dhunput Singh Bahadoor*(1) it was held that, ordinarily, where the witness is a stranger residing beyond the limit fixed by law for the service of direct process, and is not a person under the control of the party applying for the commission such a commission should issue. *Huree Dass Bysack v. Meer Moazzin Hossein*(4) may be read as laying down that a party has a legal right to have a commission issued.

In the Madras High Court, a single Judge in *Chinnu v. Sambanda Moorthi*(5) held that the matter is one of judicial discretion, while a Bench in *Sitamma v. Subraya*(6) held that it was a matter of statutory right. From the arguments in the latter case it clearly appears

(1) (1873) 20 W.R., 253.

(3) (1913) 19 I.C., 643.

(5) (1914) 23 I.C., 522.

(2) (1912) 16 I.C., 750.

(4) (1871) 15 W.R., 447.

(6) (1911) 21 M.L.J., 889.

that the issue argued was whether a party had a statutory right to a commission or whether the Court had discretion to refuse it, and the Court held that the former view was correct. In *Veerabadran Chetty v. Nataraja Desikar*(1), though the matter of the issue of a commission to a witness more than 200 miles from the Court-house did not arise it was held that the Court had power to refuse direct process in its inherent power to prevent abuse of its process.

The balance of authority is in favour of the view that (1) ordinarily, in the case of a witness not under the control of the party asking for the commission who resides beyond the limit fixed under Order XVI, rule 19 (b), Civil Procedure Code, a commission should issue as a matter of right, unless the Court is satisfied that a party is merely abusing its authority to issue process, and (2) that it is not for the Court to decide whether the party will be benefited thereby or not; that is a matter entirely for the party.

In the present case, the two witnesses for whom a commission was asked are pleaders residing at Salem, more than 200 miles from the Court-house, one being the father of the petitioner. Neither is under his control. The lower Court has given no definite ground for refusing a commission, and certainly it does not say that the petitioner was attempting to abuse its power of issuing process. I am satisfied, that, even if the matter of the issue of the commission was one within its judicial discretion and not a matter of statutory right, it has not exercised that discretion judicially.

Some useful guidance may be gained from a comparison of the language of Order XXVI, rule 4, Civil Procedure Code, with that of rule 1. In rule 1 the

(1) (1905) I.L.B., 28 Mad., 28.

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word "may" must mean "is given authority to." I am not prepared to accept the respondent's suggestion that the word "may" is explained by, and refers to, no more than the alternative method prescribed of proceeding either by "interrogatories or otherwise." I think that rule 1 clearly means that, in the case of persons who, owing to illness, etc., are unable to attend the Court, the Court cannot refuse to issue a commission. If that is not the meaning of the rule then it is useless. And if the word "may" implies so much in rule 1, it is reasonable to conclude that in rule 4, where the same phrase is used, it has the same meaning; that is, the Court must, when moved, issue a commission.

My view therefore is that the law directs the Court to issue a commission in a case like the present, unless it is satisfied, for reasons to be stated, that the request for the commission is an abuse of its process, and that the lower Court has therefore acted contrary to law. In a case where the lower Court has not obeyed the law, I think it is clearly the duty of this Court to interfere, even in interlocutory proceedings, rather than permit a trial to go on, on an illegal course, which must entail unnecessary expense to the parties and useless waste of time.

I therefore set aside the lower Court's order and direct it to issue the commission prayed for by the petitioner, but before issuing the commission it should decide whether the third defendant, the contesting respondent of this petition, is a necessary party to the suit. The petitioner will get his costs in this petition in any event from third defendant.