

a plaintiff to appeal from the order of the Court striking out the name of the defendant on the ground that the plaint disclosed no cause of action against him. Similarly in this case the effect of the order of the Munsif is that the claim of Bichan and therefore of Ritubhanjan remains undecided. There was an appeal open to Ritubhanjan, not indeed from the order of the Munsif looked upon as an order passed under order I, rule 10, but from that order looked upon as a decree declining to adjudicate upon the claim of Bichan and therefore of Ritubhanjan. That being so, this application must fail and must be refused with costs.

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*Application dismissed.*

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### REVISIONAL CIVIL.

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*Before Das and Ross, J. J.*

NAWAB SATYID MUHAMMAD AKBAR ALI KHAN

v.

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*Code of Civil Procedure, 1908 (Act V of 1908), Order XXVI, rule 5, section 115—Examination of plaintiff on commission, principles governing grant of application for—Revision of order granting.*

Application by a plaintiff for examination of himself on commission should be considered on a different footing from an application by the defendant to be examined on commission or from an application by either of the parties for the examination of witnesses on commission.

If the trial Court grants such an application without taking into consideration the fact that the case of a plaintiff stands on an entirely different footing from that of a defendant or witnesses, and the effect of the order is to amount

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\* Civil Revision no. 18 of 1924, against an order of Rai Bahadur Surendra Nath Mukharji, Subordinate Judge of Patna, dated the 1st December, 1923.

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to a denial of justice to the defendant, the High Court has power to interfere with the order in revision.

*Kumar Sarat Kumar Ray v. Ram Chandra Chatterjee*(1), *Nadin v. Bassett*(2), and *Emanuel v. Soltyk off*(3), approved.

Application by defendant no. 1.

This application was directed against an order of the learned Subordinate Judge of Patna, dated the 1st December, 1923. An application was made before him for the examination of certain persons, including the plaintiff, in London. The learned Subordinate Judge granted the application. The suit in which the application was made was instituted by one Herbert Francis, residing at no. 21, Bedford Row, London, against Nawab Saiyid Muhammad Akbar Ali, residing in Patna, and certain other persons. The allegations on which the suit was brought were these: that on the 15th September, 1919, Nawab Wasig Hussain Mobarak Jung, the son of the first defendant then residing in London, executed a bond in favour of the plaintiff by which he agreed to pay to the plaintiff the sum of £1,400 in five years and to pay interest at 15 *per cent. per annum* annually. It was also alleged in the plaint that the bond:

"was intended to constitute a mortgage and was sent to India to be registered where it was lost and was never registered,"

and the plaintiff said that he did not rely on the agreement between him and the deceased as a mortgage. The plaintiff then stated that there were three instalments of interest due to him amounting to £630. It was then asserted that on the 2nd of December, 1919, the deceased executed a promissory note by which he agreed to pay to the plaintiff the sum of £35 six months after that date. The suit was instituted to recover £35 and interest thereon £6-8-6, and the sum of £630 due as interest upon the bond which, according to the plaintiff was lost.

(1) (1922) 35 Cal. L. J. 78.

(2) (1884) 25 Ch. D. 21.

(3) (1892) 8 T. L. R. 331.

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The plaintiff applied before the Subordinate Judge for an order permitting him to examine on commission himself, his two clerks, Doctor Abdul Mazid, now in England, and the widow of the deceased, Mrs. Jung. The learned Subordinate Judge thought that the application was a reasonable one and he saw no objection whatever in granting it. The defendant appealed against the order granting the application.

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*Sultan Ahmed* (Government Advocate), with him *Janak Kishore* and *Syed Ali Khan*, for the petitioner : The question is whether the plaintiff and his witnesses, residing outside the jurisdiction of the Court, should be permitted to be examined on commission when the *forum* has been chosen by the plaintiff himself. Ordinarily Courts are liberal in allowing defendants to be examined on commission but the case of a plaintiff stands on a different footing. The defendant has no voice in the choice of the *forum* whereas the plaintiff's choice is usually unrestricted. I rely on *Kumar Sarat Kumar Ray v. Ram Chandra Chatterjee* (1), *Nadin v. Bassett* (2) and *Ross v. Woodford* (3).

As regards witnesses, order XXVI, rule 5, Civil Procedure Code, lays down that the Court ought to be satisfied that the witnesses are necessary and relevant witnesses before issuing a commission. I submit that on the very face of the plaint the witnesses sought to be examined on commission are not necessary witnesses and their evidence cannot in any aspect of the case be considered material or relevant to the purposes of the case.

*Baikuntha Nath Mitter*, for the opposite party : There is no want of jurisdiction in the order of the Court. The learned Subordinate Judge was perfectly entitled to exercise his discretion in the matter one way or the other; and great caution has to be used by revisional Courts in interfering with such orders.

(1) (1922) 85 Cal. L. J. 78.

(2) (1884) 25 Ch. D. 21.

(3) (1894) Ch. D. 38.

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I rely upon a decision of this Court in Civil Revision 195 of 1922, where their Lordships allowed the plaintiff's prayer to be examined on commission.

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DAS, J. (after stating the facts set out above, proceeded as follows):—

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A distinction must, in my opinion, be drawn between the plaintiff himself and the witnesses whom he seeks to examine on his behalf. The provision of law under which the application was made is contained in order XXVI, rule 5, of the Civil Procedure Code, which provides as follows :

“ Where any Court to which application is made for the issue of a commission for the examination of a person residing at any place not within British India is satisfied that the evidence of such person is necessary, the Court may issue such commission or a letter of request.”

There was undoubtedly jurisdiction in the Court to allow the examination of the plaintiff on commission; but, the question, in my opinion, is, whether the exercise of that jurisdiction in this case does not amount to a denial of justice to the defendant. In my opinion, an order for the examination of the plaintiff on commission is a very strong order to pass in any case. The case of the defendant stands on an entirely different footing. As was pointed out in the case of *Kumar Sarat Kumar Ray v. Ram Chandra Chatterjee* (1): “ Where an application is made by a defendant, who lawfully resides out of the jurisdiction of the Court, according to the ordinary course 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.” It is not difficult to understand the principle upon which the distinction is drawn between the case of a plaintiff and the case of a defendant. The plaintiff is entitled to choose his own *forum*; and having chosen his *forum* he is not entitled to say, “ I reside

(1) (1922) 35 Cal. L. J. 78.

outside the jurisdiction of the Court, therefore I ask to be allowed to examine myself on commission." The obvious reply is, "Why did you choose that particular *forum*? It was open to you to bring the suit in the Court where you reside." So far as the defendant is concerned, obviously the same argument does not apply in his case. In the case of *Nadin v. Bassett* (1), the plaintiff, residing in New Zealand, brought an action in England for redemption alleging himself to be the heir-at-law of a person who had died intestate entitled to a remainder-in-fee in the equity of redemption which had fallen into possession since his death. As was pointed out by Kay, J., in the Court of first instance, and Cotton, L.J., in the Court of Appeal, in order to make out his personal identity it was necessary for him "to produce evidence showing himself to be the person who landed in New Zealand from such a ship and in such a year." He applied for his own examination and the examination of a certain number of witnesses in New Zealand. Kay, J., thought that to compel him to come to England and to give evidence in his favour would be to deny him justice for it was not possible for him to incur the expenses involved in a journey to England from New Zealand; and he allowed the application. In appeal a different view was taken. The decision of Cotton, L.J., on this point is as follows: "The great contest, however, is as to the examination of the plaintiff. The examination before a special examiner may be ordered if the Court considers it 'necessary for the purposes of justice.' No case is made that it is practically impossible for the plaintiff to attend at the trial, and what we have to consider is whether under the circumstances of the particular case justice requires that he should be examined in this way. It appears to me that it is not consistent with the due administration of justice to allow the plaintiff to give evidence in his own behalf without attending to be orally cross-examined." In the result the learned Judge qualified

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(1) (1884) 25 Ch. D. 21.

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the order passed by the Court of first instance by inserting a proviso that the depositions of the plaintiff are not to be read if the defendant requires him to appear at the trial to be examined and cross-examined. We offered to pass an order in these terms in this case, but Mr. *B. N. Mitter*, on behalf of the plaintiff opposite party, says that an order in this form will be perfectly useless so far as he is concerned. That being so, the question is, whether we ought to maintain the order passed by the learned Judge in the Court below for the examination of the plaintiff on commission in England. It is contended before us by Mr. *Mitter* that the learned Subordinate Judge acted with jurisdiction; and that we ought not to interfere in this case, since it is not shown that he had no jurisdiction to act in the way that he has done. This question was also investigated by Sir Ashutosh Mukharji, J., in the case to which I have already referred. The learned Judge cited the following passage of Lord Esher M.R. in *Emanuel v. Soltykoff*<sup>(1)</sup>:  
 "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." This is exactly the point here. In my opinion, the learned Judge in the Court below dealt with the application as if it was merely an application for examination of witnesses on commission. He conceded it is true that ordinarily a party himself or his servant should not be allowed to be examined on commission; but he did not sufficiently

(1) (1892) 8 T. L. R. 381.

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realize that even in the case of parties to the suit the case of a plaintiff stands entirely on a different footing and that it is an extraordinary thing to pass an order for the examination of a plaintiff on commission. That being so, I arrive at the conclusion that the learned Judge in the Court below exercised his jurisdiction with material irregularity; and that this Court sitting in revision is entitled to interfere with that order in aid of justice. The order of the learned Subordinate Judge must accordingly be set aside so far as this point is concerned.

The other question is whether the rest of his order ought to stand. It is urged that two of the witnesses are the servants of the plaintiff, and that in any case there is no justification for the examination of all these witnesses in England especially as the whole case will then have to be tried in India on dead evidence. That may be so; but we cannot at this stage say that the plaintiff is not entitled to have the evidence of his own witnesses. It is not shown that the plaintiff can procure their attendance in India. They may refuse to come to India, and, to say at this stage, that the plaintiff is not entitled to have them examined on commission, is practically to deprive the plaintiff of justice. I am not willing to take this risk in this case. It was suggested that their evidence is really irrelevant. That may be so, but I am not prepared at this stage to say how their evidence will affect this case.

The result is that the order of the learned Subordinate Judge, in so far as he has directed the examination of the plaintiff on commission, is set aside. The rest of the order will stand. The petitioner is entitled to the costs of this application.

Ross, J.—I agree.

*Order modified.*