

HIGH COURT OF SIKKIM, GANGTOK
(Civil Extraordinary Jurisdiction)

HON'BLE MR. SATISH K. AGNIHOTRI, A.C.J.

W.P.(C) No. 12 of 2016

Smt. Lalita Subba (Limboo),
W/o Yudha Singh Subba,
Aged about 43 years.
R/o Lingchom, Geyzing,
P.O. Lingchom, P.S. Tikjuk,
Geyzing, West Sikkim.

... **Petitioner.**

Versus

1. Shri Ashok Subba (Limboo),
S/o H.B. Subba (Limboo),
R/o Bashilakha Village,
Namcheybung Block,
P.O. Namcheybung P.S. Pakyong,
East Sikkim, Gangtok.
2. Shri Harka Bahadur Subba (Limboo)
S/o Lt. Randhoj Limboo,
R/o Bashilakha Village,
Namcheybung Block,
P.O. Namcheybung P.S. Pakyong,
East Sikkim, Gangtok.
3. Shri Silvester Rai (Govt. Primary Teacher),
S/o Late Tek Bahadur Rai,
R/o Bashilakha Village,
Namcheybung Block,
P.O. Namcheybung P.S. Pakyong,
East Sikkim, Gangtok.

4. Shri Linus Rai,
(Chief Accounts Officer, LR & DM Department),
S/o Late Tek Bahadur Rai,
R/o Sichey, Near Missionary of Charity,
P.O. & P.S. Gangtok,
East Sikkim, Gangtok.

... **Respondents**

Appearance :

Mr. William Tamang, Advocate for the Petitioner.

Mr. Rajendra Upreti, Advocate for Respondents
No. 1 and 2.

Mr. Jagan D. Thapa, Ms. Samita Gurung, Ms. Binu
Rai and Ms. Kriti Pradhan, Advocates for
Respondents No. 3 and 4.

ORDER

(01.08.2016)

SATISH K. AGNIHOTRI, A.C.J.

Questioning the legality and validity of the order dated 10.03.2016, whereunder the application filed by the present petitioner, for issuance of a Court Commission to examine two witnesses, was rejected and also the order dated 12.04.2016, whereunder, seeking review of the earlier order dated 10.03.2016, was also rejected by the Civil Judge, North Sikkim at Mangan.

2. Briefly stated facts are; the first and second respondents herein, filed a Title Suit bearing T.S. No. 04 of 2013, on the file of Civil Judge (Junior Division), North Sikkim at Mangan. The petitioner, who was arrayed as defendant No. 3, filed an application under Order XXVI Rules 1 and 4 read with Section 151 of the Code of Civil Procedure, 1908 (hereinafter referred to as "CPC"), seeking issuance of a Commission for the examination of one Shri Ujyal Dhoj Limboo, aged about 72 years and Shri Birkha Bdr. Limboo, aged about 70 years, who are the residence of West Sikkim, on the ground of physical infirmity and sickness.

3. Learned Civil Judge, by the impugned order dated 10.03.2016, came to hold that the medical documents produced did not appear to be a certificate and as such the defendant No. 3/ applicant therein, failed to establish the sickness of the said witnesses. Thereafter, the petitioner herein/defendant No. 3, filed an application, supported by medical certificates, seeking a review of the order dated 10.03.2016. Learned Civil Judge rejected the review application by the impugned order dated 12.04.2016, on the ground that lacunae and remissness in the earlier application cannot be removed by way of review petition.

4. Mr. William Tamang, learned counsel appearing for the petitioner submits that the application of the petitioner for issuance of a Commission merits acceptance on two grounds, firstly, both the witnesses are residents of other District, which is beyond the local limits of the North District having the territorial jurisdiction over the North Sikkim, secondly, such witnesses are old and they are not in a physical condition to travel all the way from their place of residence to Mangan, North Sikkim, for appearing before the Court.

5. Per contra, Mr. Jagan D. Thapa, learned counsel appearing for the third and fourth respondents/defendants therein, would resist the application on the ground that sickness of said witnesses, as indicated by the petitioner herein, is not such as it is difficult for them to appear before the Court and make depositions. It is further contended that attempt of the petitioner herein is only to delay the proceedings. Relying to a decision of the Calcutta High Court in **Pradip Kumar Goenka and other vs. Smt. Manju Bhartia and others¹**, wherein the sickness of the proposed witness was not accepted, learned counsel would submit that the application to issue Commission deserves to be rejected.

6. Mr. Rajendra Upreti, learned counsel appearing for the first and second respondents herein/plaintiffs, would fairly submit

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that the plaintiffs have no objection, if the application is allowed, however, a short time be granted to the Commission for the purpose. In support of his contention, learned counsel refers to the proceedings dated 09.03.2016 of the learned Civil Judge in the matter, wherein the plaintiffs had taken the same stance to allow the application.

7. Heard learned counsel for the parties, perused the pleadings and documents appended thereto.

8. There is no dispute that both the named witnesses are residents of Tikjuk, Geyzing, West Sikkim and Longchom, Geyzing, West Sikkim and the suit was filed at Mangan, North Sikkim. The petitioner herein has produced certain certificates indicating their sickness and their advanced age.

9. Order XXVI CPC prescribes for issuance of a Commission to examine witness. Rule 4 contemplates issuance of a Commission for examination in a case where a person sought to be examined is a resident beyond local limits of its jurisdiction and inability of the witness on account of sickness and infirmity to appear before the Court and make deposition. Order XXVI, Rule 4, reads as under: -

"4. Persons for whose examination commission may issue: - (1) Any Court may in any suit issue a commission for the examination on interrogatories or otherwise of -

- (a) any person resident beyond the local limits of its jurisdiction;
- (b) any person who is about to leave such limits before the date on which he is required to be examined in Court; and
- (c) any person in the service of the Government who cannot, in the opinion of the Court, attend without detriment to the public service:

Provided that where, under rule 19 of Order XVI, a person, cannot be ordered to attend a Court in person, a commission shall be issued for his examination if his evidence is considered necessary in the interest of justice:

Provided further that a commission for examination of such person on interrogatories shall not be issued unless the Court, for reasons to be recorded, thinks it necessary so to do.

(2) Such commission may be issued to any Court, not being a High Court, within the local limits of whose jurisdiction such person resides, or to any pleader or other person whom the Court issuing the commission may appoint.

(3) The Court on issuing any commission under this rule shall direct whether the commission shall be returned to itself or to any subordinate Court."

10. On careful perusal of the Order XXVI, it is explicit that a person, residing outside the local limit is not prevented from appearing before the Court for examination, however, if there is some difficulty in appearance, may be on account of sickness or infirmity, the Court, in the interest of justice, may appoint a Commission for examination of such witness. It is for the Court to examine as to whether the witness is required in the case and it is also for the Court to satisfy whether the witness should appear before the Court or to examine by a Commission. The purpose is to ensure that substantial justice is done.

11. Reliance of learned counsel appearing for the third and fourth respondents in **Pradip Kumar Goenka** (supra) is not relevant to the facts of the case.

12. In view of the aforestated analysis, I am of the considered opinion that the application for issuance of a Commission deserves to be allowed. Accordingly, impugned orders dated 10.03.2016 and 12.04.2016 are set aside. Learned trial Court Judge shall fix the cost and expenses for Commission on the next date of hearing and also grant reasonable time so that the trial is not unnecessarily delayed.

13. List the suit with applications before the trial Court on 09.08.2016.

14. Registry is directed to transmit the order with relevant records forthwith to the learned Civil Judge, North Sikkim at Mangan, to pass the order.

Sd/-
Acting Chief Justice
01.08.2016

Approved for Reporting : Yes
Internet : Yes