REVISIONAL CIVIL

Before Harnam Singh, J.

THE NATIONAL FIRE AND GENERAL INSURANCE Co.,—
Petitioner,

1950

versus

June 14

MESSRS MOOL SINGH-GURDEV SINGH,—*Plaintiff-Respondent.*

Civil Revision No. 123 of 1949.

Civil Procedure Code (Act V of 1908), section 151 and order 26, rule 4—Lahore High Court Rules and Orders, Volume I, Chapter 10-F—Commissioner appointed by Court in India to record evidence of witnesses in Pakistan—No reciprocal arrangement existing between Pakistan and India—Whether Letter of Request can be issued or commission appointed for recording evidence—Refusal to issue Comsion—Whether subject of revision by the High Court.

Held that a Commissioner appointed by a Court in India to take evidence of witnesses in Pakistan would be *pro-tanto* an officer of the Court which issued the Commission and, therefore, he would be competent to record evidence in Pakistan only if the local law of Pakistan permits him to record evidence. As there is no reciprocal arrangement between India and Pakistan regarding the examination of witnesses on Commission, clearly an officer of a Court in India, in the absence of any such arrangement, is not competent to record evidence on Commission in Pakistan.

Order 26, rule 4, of the Code of Civil Procedure, contemplates the issue of Commission to places within the territory of India.

A party cannot as of right demand the issue of a Commission to a place outside India unless reciprocal arrangements exist and have been recognised by the High Court.

That the trial Sub-Judge was not in error in refusing to issue the Commission and the order passed by him did not fall within clauses (*a*), (*b*) or (*c*) of section 115 of the Code of Civil Procedure and the High Court, therefore, was not competent to interfere with the discretion exercised by the trial Court in refusing to issue the Commission.

Petition under section 44 of Act 9 of 1919, for revision of the order of Shri Harnam Singh, Sub-Judge, 1st Class,

Delhi, dated the 23rd December 1942, disallowing the examination of witnesses in Pakistan.

MUKAND LAL PURI and RANBIR SAHNI, for Petitioner.

HARBANS SINGH GUJRAL, for Respondent.

JUDGMENT.

HARNAM SINGH, J. This order disposes of Civil Revisions Nos. 123 of 1949 and 575 of 1949. Harnam Singh J.

To appreciate the points arising in these petitions the facts must be set out in some detail.

On the 20th of August 1948, Messrs Mool Singh-Gurdev Singh instituted the suit out of which these proceedings have arisen for recovery of Rs. 50,000 from the National Fire and General Insurance Company Limited, Calcutta, on the basis of Policies Nos. 12|202853, 12|203894 and 12|204083, dated the 29th of June 1946, the 29th of January 1947, and the 22nd of April, 1947, respectively. The plaintiffs claim proceeds upon the allegation that the plaintiff had insured with the defendant against fire and all other risks including riots and civil commotion risks their stock of *gur* and dry fruit and other non-hazardous goods stored and lying in the godown, forming part of the building belonging to *Lala* Ishar Dass Jaggi situate at Ganj Mandi, Rawalpindi, for an aggregate amount of Rs 50,000 under the policies mentioned above. It is then alleged in the plaint that during the disturbances, civil commotion and riots, which followed the partition of the country about the middle of September 1947, while the said policies were in full force, the insured stocks were damaged, looted or removed by the rioters.

The defendant-company put in their written statement on the 3rd of November 1948. Now, inasmuch as the defendant company in their written statement raised pleas to which the plaintiff's counsel wanted to reply by filing a regular replication the case was adjourned to the 19th of January 1948. On the last

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mentioned date the plaintiff-firm filed their replication.

On the pleadings of the parties the following issues were framed : —

(1) Has this Court jurisdiction to try the suit ?

(2) Is the plaintiff's firm registered under the Indian Partnership Act ? If not, what is its effect ?

(3) Was Policy No. 12|202853 not renewed after 22nd June 1947 ?

(4) Were the insured goods looted by rioters on the dates alleged by the plaintiff ?

(5) Were the insured goods in the manner provided by the contract of policy ? (*sic*)

(6) Did the plaintiff delivered to the defendant a claim in writing for the loss and damage as contemplated by condition 11 of the policy ? If not, what is its effect ?

(7) Are the plaintiffs guilty of breach of any other condition laid down in clause 11 of the Policy ? If so, what is its effect ?

(8) Did the plaintiff abandon the insured goods, for how long, and what is its effect on the suit ?

(9) Did the defendant company waive the condition laid down in clause 11 of the policy conditions ?

(10) Relief.

After framing the issues set out above the trial Court adjourned the case for evidence of the parties to the 8th of April 1949.

Now, on the 23rd of November 1949, the defendant company applied under rule 4 of Order 26 of the Code of Civil Procedure hereinafter referred to as the Code, for the examination of seven witnesses on Commission. Of the witnesses sought to be examined on Commission Mr. F. A. Steels and Mr. D. S. Smith belong to Lahore (Pakistan) and Station House Officer, Police Station Rawalpindi, and the Assistant Rehabilitation Officer belong to Rawalpindi (Pakistan). On the 17th of December 1948, counsel for the plaintiff objected to the examination of the four witnesses mentioned above on Commission in Pakistan, *inter alia,* on the ground that no arrangements exist for the examination of witnesses in that country and that it is not possible for the plaintiff to go to Pakistan for the execution of the Commision.

On the application under rule 4 of Order 26 of the Code, the trial Court ordered :

> " The counsel for the parties are present. Witnesses Nos. 3 to 6 are residents of Pakistan. Our Government has not so far made any arrangement regarding examination of witnesses with that Dominion. Hence no Commission or Letter of Request for recording statements of witnesses can be issued. Interrogatories be sent to Calcutta by 3rd January 1949. "

Defendant now applies under section 115 of the Code for the revision of the order passed by the trial Court on the 23rd of December 1948. Mr. Harbans Singh Gujral, learned counsel for the respondent firm, urges a preliminary objection that a revision from the order passed by the trial Court is not competent.

Now, Chapter 10-F of the High Court Rules and Orders, Volume I, contains directions for the subordinate Courts in the matter of issue of Commissions

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and Letters of Requests. Para 1, Chapter 10-F, reads :—

"There are two methods of obtaining evidence in a foreign country, namely, by a Letter of Request addressed to a foreign Court or by means of a Commission appointing an individual to take the evidence *thus constituting him* pro tanto *an officer of the Court.* It may be noted that the Commissioner has ordinarily no power to compel the attendance of a witness. He can only invite the witness to present himself and give evidence. If the witness declines to do so, the Commissioner is helpless. If, on the other hand, recourse is had to a Letter of Request addressed to the foreign Court concerned, the latter can, if necessary, exercise its power of compulsion.

"Further a Commissioner can record evidence only if the local law of the country where the Commission is sent permits the Commissioner to record evidence.

"It will appear from the above that a Letter of Request is ordinarily the more appropriate method in the case of foreign 'countries'."

Rai Bahadur Mukand Lal Puri concedes that inasmuch as there is no reciprocal arrangement between India and Pakistan a Letter of Request cannot be addressed to a Court in Pakistan, but he maintains that under rule 5 of Order 26 of the Code the Court was competent to appoint an individual to take the evidence of the four witnesses mentioned above at Lahore and Rawalpindi. I am unable to accept this contention, for I find that the individual appointed to take the evidence would be *pro tanto* an officer of the Court at Delhi and that being so, he would be competent to record evidence only if the local law of Pakistan permits him to record evidence. Now, there is no reciprocal arrangement between India and Pakistan regarding

the examination of witnesses on Commission and clearly an officer of a Court in India in the absence of any such arrangement is not competent to record evidence on Commission in Pakistan. A similar point arose in Civil Revision No. 58 of 1950. In that case Khosla, J., said :

> " According to the petitioner, the only evidence which he wishes to produce is the statements of six witnesses.
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> " He, therefore, asked for the issue of an open Commission and Mr. Malhotra who argued the case for the petitioner has submitted before me that the petitioner undertook to secure the services of a lawyer who would be willing to go to Lahore and examine these witnesses. The learned Subordinate Judge refused to grant this prayer on the ground that the issue of a Commission for the examination of witnesses in Pakistan was not practical as no mutual arrangements for the issue of such Commission existed.
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> "It is conceded before me that there are no such arrangements and that no mutual agreement has been arrived at with regard to such matters. Order 26, rule 41, Civil Procedure Code, contemplates the issue of Commissions to places within the territory of India. A party cannot as of right demand the issue of a Commission to a place outside India unless reciprocal arrangements exist and have been recognised by the High Court. Such arrangements do exist in respect of several countries but with regard to Pakistan no such arrangements have yet been made. In the circumstances, it is clear that the petitioner cannot as a matter of right ask for the issue of a Commission. Therefore, it cannot be said that the learned Subordinate Judge

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was in error in refusing to issue the Commission. Indeed, he was acting within his rights and within the law."

With great respect I follow the decision in Civil Revision No. 58 of 1949 and find that the order passed by the trial Court on the 23rd of December 1948, does not come within clauses (*a*), (*b*) or (*c*) of section 115 of the Code. Then, there is no indication on the record as to the nature of evidence to be given by the four witnesses sought to be examined on Commission in Pakistan. It is, however, stated in these proceedings that Mr. F. A. Steels and Mr. D. S. Smith were appointed surveyors by the defendant-company and that they reported to the defendant-company on matters relevant to the dispute. The report of the surveyors has not been placed on the record and I fail to see the effect of that report on the merits of the case out of which these proceedings have arisen.

Again, it is stated that Station House Officer, Police Station Rawalpindi and the Assistant Rehabilitation Officer, Rawalpindi, are to be examined at the trial with respect to the incident in which the insured stocks were managed, looted or removed by the rioters. But the defendant-company does not maintain that the Station House Officer, Rawalpindi, or the Assistant Rehabilitation Officer, Rawalpindi, have got any personal knowledge of the incident which resulted in the loss of goods. Indeed, the loss of the insured goods in the manner provided by the contract of policy is disputed by the defendant-company.

For the foregoing reasons I do not think that the evidence of the four witnesses mentioned above is necessary for the decision of the suit out of which these proceedings have arisen.

Finding as I do that the order passed by the trial Court on the 23rd of December 1948, does not come within clauses (*a*), (*b*) or (*c*) of section 115 of the Code and that the evidence of the four witnesses

sought to be examined on Commission in Pakistan is not necessary for the disposal of Civil Suit No. 462 of 1948 I find that this Court is not competent to interfere with the discretion exercised by the trial Court in refusing to issue a Commission for the examination of witnesses in Pakistan.

I now pass on to consider the point raised in Civil Revision No. 575 of 1949. On the 8th of November 1949, the defendant-company applied under Rule 17 of Order VI of the Code for the amendment of the written statement.

Para 2 of that application reads :

> " That after the issues have been framed in the case, the plaintiff filed certain documents from which it transpires that the plaintiff *stored 1,500 empty gunny bags worth Rs. 900* in the same shop and at the same place where the insured goods are said to have been contained. Empty *gunny bags, and particularly in such a large quantity,* are ' hazardous goods ' and under the terms of *warrantees* and conditions of the policy in suit, were not to have been kept or stored in the premises containing the insured goods. Because of this *breach of the warrantees* and conditions of the policies, the plaintiff is not entitled to any claim. "

In the application for amendment the defendant-company pleaded that the point raised was a legal defence on the facts admitted in the case. From what I have said above, it appears that the defendant-company based their case for the amendment of the written statement on the ground hat the defendant-company came to know subsequent to the filing of the written statement on the 3rd of November 1948, that the plaintiff had stored 1,500 empty bags worth Rs. 900 in the same shop and at the same place where the insured goods are said to have been contained and that

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the point raised was a legal defence on the facts admitted in the case.

Now, the plaintiff-firm resisted the proposed amendment alleging that the plea would have been taken in the written statement and that the proposed defence was calculated to displace the plaintiff's claim. In short, the plaintiff-firm contends that the proposed amendment raises a new question of fact and ought not to be allowed at that stage of the proceedings. In disposing of the application for amendment the trial Court said :

> " Considering the fact that the defendant's counsel came *to know about the existence of the gunny bags in question* about a year ago, I consider the present application to be so much belated as to deserve dismissal. It is accordingly dismissed. "

The defendant-company now applies under section 115 of the Code for the revision of the order passed by the trial Court disallowing the proposed amendment.

In order to appreciate the points raised by the defendant-company it has to be borne in mind that para No. 6 of Form A. 1 (General), Shop, National Fire and General Insurance Co., Ltd., *inter alia*, provides that no *gunnies* (other than in full pressed iron bound bales) in excess, in the aggregate of 1 per cent of the total value of stock in shop only but not in godown will be stored in any one compartment or tenancy in any portion of the building. Foot-note (*e*) appended to the schedule of Hazardous goods then provides that loose gunnies for packing purposes, provided the quantity will never be largely in excess of that required for immediate purpose of packing may be treated as non-hazardous.

From what is said above, it appears that the proposed amendment proceeds upon a number of facts which will have to be proved at the trial if permission to amend the written statement is given. That being

so, the proposed amendment does not raise a pure question of law arising on the facts admitted in the case.

Be that as it may, Mr. Harbans Singh objects to the maintainability of the petition for revision under section 115 of the Code. He concedes that as a general rule leave to amend will be granted so as to enable the real question in issue between the parties to be raised in the pleadings where the amendment will occasion no injury to the opposite party except such as can be sufficiently compensated by costs or other terms to be proposed by the orders. But learned counsel for the plaintiff-respondent maintains that the discretion conferred on the Court has been exercised in the present case on judicial principles and not in an arbitrary or capricious manner and that being so, the case does not fall within section 115 of the Code.

Now, if it was true that the plea under clause 6 was not taken in the written statement for the reason that the defendant-company did not know that the *gunnies* were stocked in the godown there might be some case for permitting the proposed amendment. A perusal of Exhibits D. 10. and D. 11, however, shows that on the 23rd of January 1948, the plaintiff-firm forwarded to the Secretary, the National Fire and General Insurance Co., Ltd., a copy of the claim filed with the Registrar of Claims, Government of India, showing the insured goods which were burnt or looted in the godown. In the covering letter the defendant-company was asked to expedite the claim in respect of Policies Nos. 12|202853, 12|203394 and 12|204083.

"Empty bags 1,500 Rs. 900."

In the application for amendment the defendant-company states that they came to know for the first time from documents filed by the plaintiff-firm on the 30th of November 1948, that the plaintiff-firm had stored 1,500 empty bags worth Rs. 900 in the godown where the insured goods were stocked. I am unable to accept this statement for the information is contained in Ex. D. 11 and is not to be found in that form in

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documents filed in Court by the plaintiff-firm on the 30th of November 1948. There are entires in the *bahi khata* relating to bags, but there is no entry showing that the bags in the godown numbered 1,500 and that price was Rs. 900. This being the situation of matters, I find that the defendant-company was guilty of *suppressio veri* in making the application under rule 17 of Order VI of the Code. On this ground alone the petition was liable to dismissal. But quite independently of this objection on the facts stated above it is clear that the information on which the proposed amendment is sought was with the defendant-company on the 23rd of January 1948, and the defendant-company filed a written statement on the 3rd of November 1948. That being so, I agree with the trial Court that the application for amendment was so belated as to deserve dismissal.

For all these reasons I find no force in the Civil Revision No. 575 of 1949 which fails and is dismissed.

In the result I dismiss Civil Revision Nos. 123 and 575 of 1949 with costs.

As the case is fixed in the trial Court on the 26th of June 1950, I direct that the records may be sent back so as to reach the trial Court before the 26th of June 1950.

CIVIL APPELLATE

Before Harnam Singh, J.

KARORA SINGH,—*Defendant-Appellant,*

versus

1950

June 19,

KARTAR SINGH (PLAINTIFF) AND SADA SINGH, ETC. (DEFENDANTS)—*Respondents.*

Regular Second Appeal No. 455 of 1948.

Civil Procedure Code (Act V of 1908), Order 41, rule 22—Cross-objections—Whether competent—When appeal barred by time.