

Mangal Singh allotment in favour of Lachhman Singh, respondent. He will, therefore, not be adversely affected by being refused allotment in village Naurangabad.

v.
The Deputy
Custodian-
General of
Evacuee
Property,
New Delhi,
and others

The petitioner will recover costs of this petition.

REVISIONAL CRIMINAL.

Before Bhandari, C. J. and Bishan Narain, J.

THE STATE OF DELHI,—*Petitioner.*

versus

SHRI S. Y. KRISHNASWAMY, I.C.S. ETC.—*Respondents.*

Criminal Revision No. 848 of 1954

1954

June, 7th

Code of Criminal Procedure (Act V of 1898)—Section 503—Powers under—Whether exercisable by Special Judge—Criminal Law (Amendment) Act (XLVI of 1952)—Section 8(3)—Principles regarding examination of witnesses in the administration of justice stated.

Held, that a Court of Special Judge appointed under the provisions of the Criminal Law Amendment Act, 1952, is deemed to be a Court of Sessions by virtue of section 8(3) of the said Act. A Special Judge stands on exactly the same footing as a Session Judge and can exercise the same powers under section 503 of the Code of Criminal Procedure as may be exercised by the latter.

Held, further that each application for the examination of a witness on commission must be decided in the light of following principles:—

- (1) It is the duty of every person who is acquainted with the facts of a particular case to appear in Court, give evidence in regard to all relevant facts within his knowledge, and to answer the questions which are put to him for the purposes of the enquiry or trial.
- (2) The accused has a right to require that, save in special circumstances, he should be confronted with the witnesses who are to give evidence

against him and to cross-examine them in the presence of the trial Court. This right enables the Tribunal to watch the appearance, manner and demeanour of the witnesses while testifying and to form its own opinion in regard to their credibility and truthfulness.

- (3) Examination on commission is an exception rather than the rule and a commission for the examination of a witness should not be issued unless the Court is satisfied that the case is fully covered by the provisions of law which authorise the exception.
- (4) The granting of a commission is a matter of judicial discretion to be exercised according to the *particular circumstances of each case*.
- (5) In cases in which facts are disputed, a heavy burden lies on the party who wishes to examine a witness on commission to show clearly that the witness cannot be reasonably expected to appear in court in person.

Petition under Section 439 of Criminal Procedure Code, for revision of the order of Shri Gurdev Singh, Special Judge, Delhi, dated the 22nd May, 1954, holding that the court of a Special Judge, appointed for the trial of an accused for an offence under the Prevention of Corruption Act has no jurisdiction to issue a commission for the examination of a witness.

C. K. DAPHTARY, Solicitor-General, A. M. CHATTERJEE, and D. K. KAPUR, for Petitioner.

H. L. SARIN, for Respondent No. 2.

JUDGMENT

BHANDARI, C. J.—Two points arise for decision Bhandari, C. J., in the present case, namely, (1) whether a Special Judge appointed under the provisions of the Criminal Law Amendment Act, 1952, can exercise the powers conferred by section 503 of the Code of Criminal Procedure; and (2) whether the order passed by the learned Special Judge of Delhi declining to issue a commission for the examination of a certain witness should be set aside.

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Mr. K. M. Munshi, Governor of Uttar Pradesh, was cited as a prosecution witness in a case against Mr. Krishnaswamy, I.C.S., and certain other persons, which is pending in the Court of Sardar Gurdev Singh, a Special Judge at Delhi. On the 22nd May, 1954, the Public Prosecutor made an application under section 503 of the Criminal Procedure Code in which he prayed that the personal attendance of Mr. Munshi be dispensed with and that his evidence be recorded on commission as the presence of Mr. Munshi cannot be procured without causing much delay and inconvenience to the witness and without causing dislocation of his public duties as the Governor of an important State. Sardar Gurdev Singh was unable to accede to this request as he was of the opinion that Special Judge appointed under the provisions of the Criminal Law Amendment Act, 1952, has no power to issue a commission under section 503 of the Code of Criminal Procedure and that even if he has that power this is not a fit case in which the said power should be exercised. The State Government has come to this Court in revision and the question for this Court is whether the Court below has come to a correct determination in point of law.

There can be little doubt that it is within the competence of a Special Judge to direct that the personal appearance of a witness be dispensed with and that he should be examined on commission. Subsection (1) of section 503 is in the following terms:—

- (1) Whenever, in the course of an enquiry, a trial or any other proceeding under this Code, it appears to a Presidency Magistrate, a District Magistrate, a Court of Session or the High Court that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under

the circumstances of the case, would be unreasonable, such Magistrate or Court may dispense with such attendance and may issue a commission to any District Magistrate or Magistrate of the first class, within the local limits of whose jurisdiction such witness resides, to take the evidence of such witness."

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Subsection (3) of section 8 of the Criminal Law Amendment Act, 1952, runs as follows:—

"(3) Save as provided in subsection (1) or subsection (2) the provisions of the Code of Criminal Procedure, 1898, shall so far as they are not inconsistent with this Act, apply to the proceedings before a Special Judge, and for the purpose of the said provisions the Court of the Special Judge shall be deemed to be a Court of Session trying cases without a jury or without the aid of assessors and the person conducting a prosecution before a Special Judge shall be deemed to be a public prosecutor."

If a Court of Session can exercise the powers conferred by section 503 and if a Court of Special Judge appointed under the provisions of the Criminal Law Amendment Act is to be deemed to be a Court of Session, it is obvious that a Special Judge stands on exactly the same footing as a Sessions Judge and can exercise the same power under section 503, as can be exercised by the latter. It is impossible to arrive at a contrary conclusion without indulging in a feat of mental gymnastics. The first question propounded at the commencement of this order must therefore be answered in the affirmative.

Before I proceed to deal with the second question which has arisen in this case, namely whether the Court below was justified in declining to examine Mr. Munshi on commission, it is

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necessary to invite attention to certain principles which are of some importance in the administration of justice. In the first place, it is the duty of every person who is acquainted with the facts of a particular case to appear in Court if and when commanded and to give evidence in regard to all relevant facts within his knowledge. Not only is he bound to appear in Court for such compensation as the law provides but also to answer the questions which are put to him for the purposes of the enquiry or trial. This is a duty resting on all members of the community in their capacity as such and has been recognised and enforced from early times. Secondly, the accused has a right to require that, save in special circumstances, he should be confronted with the witnesses who are to give evidence against him and to cross-examine them in the presence of the trial Court. This right is a most valuable one for it enables the Tribunal which is required to adjudicate on the case to watch the appearance, manner and demeanour of the witnesses while testifying and to form its own opinion in regard to their credibility and truthfulness. Thirdly, the examination on commission is an exception rather than the rule and a commission for the examination of a witness should not be issued unless the Court is satisfied that the case is fully covered by the provisions of law which authorise the exception. Lastly the granting of a commission is a matter of judicial discretion to be exercised according to the particular circumstances of each case.

The learned Solicitor-General contends that it is extremely inconvenient for Mr. Munshi who is spending the summer at Nainital to undertake the long journey from Nainital to Delhi and that apart from the personal physical discomfort involved in the journey, his work as the constitutional head of an important State is likely to be

seriously dislocated, I must confess with regret that neither of these two arguments appeal to me. No affidavit has been put in Court on behalf of Mr. Munshi showing the nature of the inconvenience that is likely to be caused to him. The inconvenience which the Legislature appears to have contemplated is the inconvenience caused by age or infirmity of a witness, or the fact that he resides at a place far removed from the place of trial, or the inconvenience (apart from the expense) which may be occasioned by compelling him to leave his occupation for a considerable length of time. If my recollection is correct, Mr. Munshi is full of life and activity and is not oppressed by age, infirmity or illness. It is true that his temporary residence in the summer capital of Uttar Pradesh is separated from the place of trial by a distance of 300 or 400 miles, but in the present age of speed and comfort when distances have been annihilated and a person can travel in a luxurious air-liner or air-conditioned coach, it is idle to suggest that a journey of 300 or 400 miles is likely to impose too heavy a strain even on the executive head of a premier State. Day after day we see the interesting spectacle of eminent lawyers, physicians, businessmen and politicians flying across the skies from provincial capitals to the imperial city of Delhi, completing their work in the day-time and catching the night plane for the return journey. It has not been suggested, much less proved, that every minute of Mr. Munshi's time is so completely taken up with important engagements for months ahead that it is impossible for him, without serious detriment to his official duties, to spend even a few hours in Delhi and to discharge the public duty which devolves on every citizen to attend Court and testify to the material facts within his knowledge. On the other hand, the trouble and expense that are likely to be caused

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to the accused in taking their counsel from Delhi to Nainital would be much greater than the inconvenience which is likely to be occasioned to Mr. Munshi in undertaking the journey to Delhi. In cases like the present in which facts are disputed and in which it is of the utmost importance that the witness should be examined in the presence of the Court a heavy burden lies on the party who wishes to examine him on commission to show clearly that he cannot be reasonably expected to appear in Court in person. This burden has, I fear, not been discharged in the present case.

For these reasons I am of the opinion that the balance of convenience lies in Mr. Munshi being examined in the presence of the learned Special Judge in Delhi. In any case, I can see no reason for overruling the discretion which has been exercised by the Court below, after taking into consideration all the circumstances of this case. The petition must be dismissed.

I have ascertained from the Solicitor-General that it would be convenient for Mr. Munshi to be examined at Delhi on Monday the 19th July, 1954. The learned Special Judge should take steps to issue a letter of request to Mr. Munshi to appear in his Court in Delhi on the said date.

Bishan Narain,
J.

BISHAN NARAIN, J. I agree.

APPELLATE CIVIL.

Before Harnam Singh, J.

SITA RAM,—Defendant-Appellant

versus

NAUBAT RAI,—Plaintiff-Respondent.

Regular Second Appeal No. 449 of 1953.

Party-wall—Meaning of—Partition—Whether permissible—Rule in such cases stated.

1954

June, 9th

Held, that a party-wall means—

(i) a wall of which the two adjoining owners are tenants in common;