

M/s. Filmistan Private Ltd., Bombay

Vs

M/s. Bhagwandas Santprakash and Another

Civil Appeal No. 262 of 1969

(J. C. Shah, K. S. Hegde, A. N. Grover JJ)

21.08.1970

JUDGMENT

HEGDE, J. -

1. This appeal by special leave is directed against the order issued by Vimadalal, J., in S. Suit No. 109 of 1962, on the original side of the High Court of Judicature at Bombay directing the issue of a letter of request to our Ambassador at Kabul to examine certain witnesses who are residing in Kabul on commission.

2. Admittedly the witnesses sought to be examined at Kabul are relevant witnesses. All of them are living outside the jurisdiction of the Court and hence they are not amenable to the process of the Court. It was said on behalf of the appellant that one of the witnesses sought to be examined is an agent of the 1st defendant and therefore that defendant could have produced him in Court for examination. As regards the other witnesses, it was said that the facts that they were expected to depose could have been established by other evidence. We have no doubt that these facts must have been considered by the learned Trial Judge. The order under appeal is essentially a discretionary order. We do not think that a case is made out for interfering with the discretion of the learned Trial Judge. The fact that the witnesses examined on commission cannot be effectively cross-examined or their cross-examination will entail heavy costs are not sufficient circumstances to interfere with the discretion of the learned Trial Judge.

3. It was urged on behalf of the appellant that the Commissioner cannot compel the witnesses to appear before him for examination and therefore the attempt to examine them is a futile one. We think this consideration is irrelevant at this stage. We do not know whether the witnesses in question are willing to be examined by the Commissioner or not. It is for the defendant to produce them before the Commissioner, if he wants them to be examined.

4. It was further urged that as there is no reciprocal agreement between our Government and the Government of Afghanistan, the witnesses cannot be law-fully examined in Kabul. Section 77 of the Code of Civil Procedure, read with Section 75 empowers the Court to issue a letter of request to any person other than a Court to examine witnesses residing at any place not within India. This power of the Court is not subject to any reciprocal agreement between the Governments. We do not know whether there is any law in Afghanistan prohibiting the examination of witnesses by Consular authorities. Nor is there any material before us on the basis of which we can decide whether the Commissioner can administer oath or not. These questions do not appear to have been urged before the Trial Court. The question whether the evidence recorded by the Commissioner is legally admissible or not can certainly be canvassed at the trial for the case. It is not necessary to go into

that question at present.

5. For the reasons mentioned above this appeal fails and the same is dismissed-no order as to costs.

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