

# RAJASTHAN HIGH COURT

Dutch Ophthalmic Research Centre

Vs.

Ultramed Private Ltd.

S.B. Civil Writ Petition No. 480 of 2005

(K.S. Rathore, J.)

23.02.2005

## JUDGMENT

**K.S. Rathore, J.**

1. This writ petition is directed against the order dated 8.12.2004 passed by the Additional District Judge (Fast Track) No. 3, *Jaipur City, Jaipur* in civil suit No. 102/04 by which the application filed by the defendant under Order 26 Rules 5 and 15 Civil Procedure Code has been rejected.

2. The case of the petitioner is that Dr. Anil Sharma filed a suit for declaration, permanent injunction and damages alleging therein that the petitioner appointed the plaintiff-respondent No. 1 vide authority letter dated 23.4.1994 as its sole distributor for SAARC countries on the basis of an oral contract to sell the ophthalmic equipments. It was also alleged that such contract was for five years starting from 23.4.1994, however, since such imported ophthalmic equipments were defective and also the defendant- petitioner terminated the contract, therefore, the plaintiff-respondent No. 1 claimed for the damages. The suit was in progress and the defendant-petitioner has also filed its written statement denying the allegations made in the plaint. Issues were framed on 17.5.2003 by the Trial Court.

3. On 18.10.2004, the defendant-petitioner filed an application under Order 26 Rules 5 and 15 Civil Procedure Code praying for examination of witness of defendant-Mr. Frank Ruseler on commission as the witness sought to be examined on commission is not within India (is in Holland) and also prayed to pay the expenses of commission in accordance with Rule 15 of Order 26.

4. Learned counsel for the petitioner referred the provisions of Order 26 Rules 5 and

15 which are reproduced hereunder:-

"Order 26 Rule 5 : *Commission or request to examine witness not within India* :- 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 (India) is satisfied that the evidence of such person is necessary, the Court may issue such commission or a letter of request."

"Order 26 Rule 15 :- *Expenses of commission to be paid into Court* :- Before issuing any commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued."

5. After referring the aforesaid provisions, learned counsel for the petitioner submits that the Trial Court without giving any finding has rejected the application only on the ground that the petitioner sought 10 weeks time to produce his witness himself, which has been lapsed.

6. In support of his submissions, learned counsel placed reliance on the judgment rendered by Hon'ble Supreme Court in case of *M/s Filmistan Private Ltd. Bombay v. M/s Bhagwandas Santprakash and Another*,<sup>1</sup> wherein Hon'ble Supreme Court has observed that power of Court to issue commission is discretionary and further observed that witness examined on commission cannot be effectively cross-examined or their examination will entail heavy costs are not sufficient circumstances to interfere with discretion of Court in appeal.

7. Further reliance has been placed by the petitioner on the judgments in *Mrs. Sunita Jagmohan Verma v. Jagmohan Verma*,<sup>2</sup>

8. In case of *Mrs. Sunita Jagmohan Verma v. Jagmohan Verma* (supra), the Delhi High Court has held as under :-

"The issue of a commission under Order 26 Rule 4 in a case where the personal attendance of a witness cannot be enforced because of the restriction imposed by Order 16 Rule 19, although discretionary with the Court, should ordinarily

be allowed as a matter of course. It is for the simple reason that a party cannot be punished merely because it feels helpless in procuring the attendance of a witness and the court too is powerless to order such a witness to appear in person. The Court, of course, must be satisfied about the compelling necessity to examine such a witness."

9. Learned counsel for the petitioner submits that it is mandatory for the court below to first decide whether the witness to be examined on commission is necessary witness or not. To this effect, he referred certain paras of the pleading in the suit wherein, the name of Mr. Frank Ruseler has been mentioned and the petitioner has submitted ample documents to show that Mr. Frank Ruseler is a necessary witness.

10. Per contra, learned counsel for the respondents Mr. G.K. Garg controverted this fact and submits that earlier also in SB civil misc. petition No. 220/96, the High Court observed that the defendant will bring his witness himself. Further the High Court in SB civil revision petition No. 1904/99 directed to expedite the trial within a period of six months.

11. Learned counsel for the respondents referred para 4 of the application dated 18.10.2004 filed under Order 26 Rules 15 and 5 wherein it has been stated that the witness of the petitioner is unable to attend the court on the ground that he is busy in the month of March, therefore, he requested that he be examined on commission.

12. Mr. Garg also referred Order 26 Rules 1 and 5 and has given much emphasis on Rule 1 which provides that any Court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the Court or who is from sickness or infirmity unable to attend it. If this cause is shown by the petitioner that he being sick or has any infirmity then he can be examined on commission. Learned counsel submits that the Trial Court has given finding on this aspect also whereas in the application no specific reason has been mentioned.

13. Heard rival submissions of the respective parties and carefully perused the relevant provisions as well as judgments referred before me.

14. To decide the controversy, two ingredients are to be decided : (1) whether witness of such person is necessary or not, who resides outside India, (2) whether such person

can be examined on commission for which reason is to be shown by the person concerned either he is unable to attend the court on account of sickness, infirmity or otherwise unable to attend the proceedings.

15. It is no doubt that witness of petitioner is necessarily required for the purpose of evidence.

16. Now it is to be seen that whether the witness of the petitioner is entitled to be examined on commission or not. For that purpose, the petitioner has to show the reason as to how the witness is unable to attend the Court as stipulated in Rule 1 Order 26. In the application filed under Order 26 Rules 15 and 5, no where the reason has been mentioned, the only reason which has been mentioned that in the month of March, he is busy and for continuous 7 days, he cannot attend the court proceedings. This reason cannot be sufficient for appointment of commission, therefore, the Trial Court has rightly rejected the request for appointment of commission. To this effect, the impugned order does not require any interference by this Court.

17. I have also perused the impugned order in the light of the observation made by the Hon'ble Supreme Court in case of M/s Filmistan Pvt. Ltd. (supra), wherein Hon'ble Supreme Court observed that power of court to issue commissions is discretionary and witnesses examined on commission cannot be effectively cross-examined or their examination will entail heavy costs are not sufficient circumstances to interfere with discretion of court in appeal. In the instant case also, the request was made only to examine the witness of the petitioner on commission. Admittedly, effective cross-examination cannot be made, if the witness of the petitioner is permitted to examine on commission, therefore, the discretion exercised by the Trial Court requires no interference.

18. In view of the aforesaid observation, the writ petition is devoid of merit and the same is hereby dismissed.

19. At this stage, a request is made on behalf of the petitioner to grant more time to produce the witness before the Trial Court.

20. Looking to the facts and circumstances of the case, I grant three months time to the petitioner to produce his witness before the Trial Court.

Petition dismissed.

## Cases Referred.

1. AIR 1971 SC 61 (V 58 C 9)
2. AIR 1985 Delhi 1, AIR 1955 Mad 210 and AIR 1990 Bom 152