P L D 1958 Supreme Court (Pak.) 138

Present: M. Shahabuddin, A. R. Cornelius, Muhammad Sharif and Amiruddin Ahmad, JJ

THE HANOVER FIRE INSURANCE COMPANY----Appellant

versus

MESSRS. MURALIDHAR BANECHAND---Respondent

Civil Appeal No. 28 of 1957, -decided on 30th January 1958

(On appeal from the judgment and orders of the High Court of Judicature at Dacca, dated the 19th December 1955, in Civil Revision No. 814 of 1955 and dated the 1st of June 1956 in appli cation for leave to Appeal to the Supreme Court No. 3 of 1956 with Civil Rule No. 111 (F C) of 1956).

(a) Constitution of Pakistan----

---Art. 160-Special leave to appeal to Supreme Court-Granted to consider whether evidence recorded in India by a resident of Pakistan on open commission issued by a Court in Pakistan was validly received as evidence in case.

(b) Constitution of Pakistan----

---Art. 160-Special leave to appeal to Supreme Court-Grounds-Conflict of case law and general impor tance of question.

(c) Civil Procedure Code (V of 1908)

---O. XXVI, rr. S & 19 -Evidence taken on open commission in India-Not receivable as legal evidence-Proper procedure to get such evidence is by a letter of request-Rules and Orders, High Court of East Pakistan, r. 298- Not in conflict with O. XXVI.

Held, that the statement of a witness resident in India and recorded in that country on an open commission issued by a Court in Pakistan before a resident of Pakistan appointed for that purpose by that Court cannot be validly received as evidence in the case.

A letter of request should have been issued instead oil' an open commission for this purpose.

Rule 19 of Order XXVI, Civil P. C., does not provide for the issue of an open commission of this kind in such a case. As the Government of Pakistan has agreed that Order XXVI should govern the procedure in those cases rule 19 of that order should be followed by Courts in Pakistan. A Commissioner appointed by a Court in Pakistan is only an officer of that Court and therefore could not in a foreign country exercise any of the powers which Commissioners are given under Order XXVI, unless the foreign country concerned is prepared to clothe the officers of Pakistan Courts with authority to exercise such powers. It is therefore necessary to act in accordance with the reciprocal arrangements arrived at between Pakistan and India.

Rule 5 of Order XXVI, Civil P. C., does not make it obliga tory on a Court to issue a commission. It only gives Courts a discretion in the matter which is to be exercised judicially, and judicial exercise of discretion is to act in accordance with the reci procal arrangements arrived at between the Governments concerned.

The Governments of Pakistan and India are agreed that Order XXVI should govern the procedure in such cases and that Order does not speak of an open commission but rule 19 prescribes a letter of request. Consequently rule 298 of Rulers and Orders, High Court of East Pakistan did not conflict with any provisions of law.

(d) Interpretation of Statutes

--Provisions should be so inter preted as not to be inconsistent with comity of nations or rules of international law.

Every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations, or with the established rules of international law.

Hamidul Haq Choudhury, Senior Advocate, Supreme Court, Ruhul Islam, Advocate with him, instructed by K. Hossain, Attorney for Appellant.

S. R. Pal, Advocate, Supreme Court, instructed by B. N. Choudhury, Attorney for Respondent.

Pates of hearing : 25th and 26th November 1957.

JUDGMENT

SHAHABUDDIN, J.-----This is an appeal by special leave granted, for considering whether the statement of a witness resident in India and recorded in that country on an open commission issued by a Court in Pakistan before a resident of Pakistan appointed for that purpose by the said Court, can be validly received as evidence in the case.

The appellant firm, the Hanover Fire Insurance Company, is the defendant in Money Suit No. 3 of 1952 in the Court of the Subordinate Judge, Rangpur. Two of its witnesses were examined on an open commission issued by the Subordinate Judge for exami nation of those witnesses in Calcutta before a resident of Pakistan appointed for the said purpose by the said Judge; but when the plaintiff-respondent Messrs. Muralidhar Banechand applied for a similar examination of its witness in Calcutta, objection was taken on behalf of the appellant on the ground that the approved method in such cases was the issue of a letter of request to the High Court of Calcutta. Several other objections were also taken, but they are not relevant to this appeal. The Subordinate Judge overruled all the objections and issued an open commission. When the matter came up in revision before the High Court of Dacca it was urged before Ispahani and Badiuzzaman, JJ. that the Subordinate Judge had acted illegally and with material irregularity in issuing a direct commission instead of a letter of request or a commission through the diplomatic channel and in this connection reliance was placed on civil rules and orders of the Dacca High Court, according to which a letter of request should be issued in such cases and a letter dated 24th October 1949 from the Ministry of Law, Karachi, which stated that in countries where Pakistan had diplomatic connections, letters of request should be routed through those representatives. The learned Judges held that the instructions in the civil rules and orders could not overrule. Order XXVI, rule 5, Civil P. C., under which Courts have power to issue a commission or a letter of request and that the letter of the Law Ministry referred to above did not say that only a letter of request should be issued to the exclusion of a commission. They dismissed the revision petition on the ground that no question of jurisdiction arose and so they could not interfere.

The appellant then applied to the High Court for leave to appeal to this Court and this application was dismissed by the Chief Justice and Ismail, J. They took the view that the correspondence between the Government of East Pakistan and the Government West Bengal, according to which both Governments had agreed that Order XXVI, Civil P. C., should

govern the procedure, did not prohibit the issue of commissions and rule 5 of Order XXVI gave Courts power to issue a commission, there was no substantial question of law to be decided. But about three months prior to this decision another Division Bench of the same High Court (Rahman and Murshed, JJ.) had taken the view that Courts in Pakistan had no power to send their officers to a foreign Country to take evidence except under a reciprocal arrangement between the two countries recognising such a procedure. They found that there was no such reciprocal arrangement between Pakistan and India which could clothe the officer appointed by our Courts with the powers of a Civil Court for recording evidence in India. In that case the Subordinate Judge of Chittagong had issued an open com mission and appointed a pleader of his Court to record evidence in Calcutta. The learned Judges held that the Subordinate Judge did not exercise the discretion vested in him judicially and that there fore they could interfere under section 115, Civil P. C. Although in the case before them there was justification for the witness being examined on commission, the learned Judges set aside the order of the Subordinate Judge observing that a letter of request should have been issued.

It was on account of this conflict of authority and the general importance of the question that leave was granted in this case. When the petition for special leave was heard the appellant's counsel conceded that if his argument prevailed it would probably be neces sary to exclude the evidence which the appellant company had already obtained in the very mode to which objection was taken by it in the present case; and' he added that his client was prepared to accept that eventuality.

In our opinion the view taken by Rahman and Murshed, JJ. is the correct view. From the letter of the Deputy High Commissioner for India in Pakistan, Dacca, dated 27th September 1950 which has been referred to in the order of the High Court refusing leave to appeal it is clear that what had been agreed to by the two Govern ments was that cases of the kind under consideration should be governed by Order XXVI of the Civil P. C. and not only by rule 5 of that order. As pointed out by Mr. Hamidul Haq on behalf of the appellant rule 19 of Order XXVI which deals with commissions issued at the instance of foreign tribunals has also to be taken into consideration in deciding the question before us. According to this rule, a High Court in Pakistan, if it is satisfied that a foreign Court situated in a foreign country wishes to obtain the evidence of a witness in any proceeding before it, which is of a civil nature and that that witness is residing within the limits of the High Court's appellate jurisdiction, may issue a commission for

the examination of such witness. According to para. 2 of the rule, evidence of these requirements could be furnished by a certificate signed by the consular officer of the foreign country of the highest rank in Pakis tan and transmitted to the High Court through the Central Government or by a letter of request issued by the foreign Court to the High Court in Pakistan through the Central Government or by a letter of request issued by the foreign Court and produced before the High Court in Pakistan by a party to the proceedings. This rule does not provide for the issue of an open commission of the kind that has been issued in the present case. It was con ceded by the learned advocate for the respondent that rule 19 of Order XXVI is in force in India also. As the Government of Pakistan has agreed that Order XXVI should govern the procedure in those cases rule 19 of that order should be followed by Courts in Pakistan. As pointed out by Rahman and Murshed, JJ., a Com missioner appointed by a Court in Pakistan is only an officer of that Court and therefore could not in a foreign country exercise any of the powers which Commissioners are given under Order XXVI, unless the foreign country concerned is prepared to clothe the officers of our Courts with authority to exercise such powers.

It is therefore necessary to act in accordance with the reciprocal arrangements arrived at between Pakistan and the country con cerned i.e., Pakistan and India in the present case; otherwise our Courts would be passing orders inconsistent with rules of interna tional law. In this connection the following passage from 'Maxwell on Interpretation of Statute Tenth Edition (p. 148) is instructive :-----

"Under the same general presumption that the legislature does not intend to exceed its jurisdiction, every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations, or with the established rules of international law. If, therefore, it designs to effectuate any such object, it must express its intention With irresistible clear ness to induce a Court to believe that it entertained it, for if any other construction is possible, it would be adopted to avoid imputing such an intention to the legislature. All general terms must be narrowed in construction to avoid it. But if the statute is unambiguous, its provisions must be followed, even if they are contrary to international law."

Rule 5 of Order XXVI on which the learned advocate the respondent as well as the learned Judges who have upheld the view that an open commission could be issued in the circumstances of this case have relied does not make it

obligatory on a Court to issue a commission. It only gives Courts a discretion in the matter. It says that Courts may issue a commission or a letter of request and the only judicial way of exercising this discretion is to ascertain the reciprocal arrangements between Pakistan and the foreign country concerned and act in accordance with that arrangement. The directions in the orders and rules of practice are based only on this principle. In the judgment under appeal these rules and orders are ignored on the ground that such directions cannot override the provisions of the Code ; but these directions are given by the learned Judges of the High Court in accordance with the provisions of the law concerned. It is true that such direction cannot override the provisions of law and they should be ignored if they are contrary to the provisions of law, but a High Court should at least examine them carefully before declaring them to be of no value when their purpose is to guide the subordinate Courts and they have been framed or adopted by the High Court itself. Had the learned Judges considered the rules and orders relevant to the subject under discussion they would have found that they do not override rule 5 but indicate how the discretion given under rule 5 of Order XXVI should be exercised. For instance, rule 298 of the Rules and Orders of the High Court which deals with taking of evidence in foreign countries for Courts in Pakistan is to the effect that on principle the most strictly proper method for the Courts of one country to adopt is the method of letter of request addressed to the proper Court in the foreign country. There is a note to this rule which says that letters of request are not to be employed to obtain evidence from U. S. A., as that country prefers the method of commission to be employed and will enforce the attendance of witnesses before the Commissioner.

As stated already the Governments of Pakistan and India are' agreed that Order XXVI should govern the procedure in such cases and that Order does not speak of an open commission but rule 19 prescribes a letter of request. Consequently rule 298 of the Court's rules and orders does not conflict with any of the relevant provisions of law.

The only reciprocal arrangement between Pakistan and India under which witnesses can be examined in either country without the intervention of the Court of that country that was brought to our notice was the one mentioned in a letter dated 20th January 1956, from the Solicitor to the Government of Pakistan to the Secretary of the Government of East Bengal. It is to the effect that the Governments of Pakistan and India had agreed on reciprocal basis for examination of witnesses in several proceedings pending in Courts in either country where

the witnesses are residing, provided that the witnesses are nationals of the country where the proceedings are pending. The letter further says that this arrangement enables the Courts in Pakistan to obtain in several proceedings, evidence of Pakistani nationals residing in India by issuing commission to the Pakistan's diplomatic representatives in India, the same facility being available in the case of Indian nationals residing in Pakistan. But this obviously does not apply to the case under consideration, as here the witness to be examined is an Indian national.

Mr. Pal appearing for the respondent contended that in any view of the matter it could not be said that the Subordinate Judge had no jurisdiction and therefore the High Court could not interfere. But a Court has to exercise its discretion judicially and as pointed out already judicial exercise of the discretion given under rule 5 is to act in accordance with the reciprocal arrange arrived at between the Governments concerned. The Subordinate Judge has no jurisdiction to act contrary to those arrangements.

We, therefore, consider that any evidence obtained on an open commission, as has been issued in the present case; will not have been legally recorded. The open commission issued by the Subordinate Judge should be withdrawn and a letter of request should be issued instead. The appeal is allowed, but there shall be no order as to costs.

A. H Appeal allowed,

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