

GAHC010025912023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Tr.P.(C)/11/2023

DR. RAMA MUKHERJEE
W/O- LATE DR. SOUMENDRA MOHAN MUKHERJEE, R/O- VILL HATHIPIL
KHANA, TEZPUR TOWN, P.O- TEZPUR, P.S- TEZPUR, DIST- SONITPUR,
ASSAM, PRESENT R/O- VILL 45, BURDWAN COMPOUND, P.O- RANCHI, P.S-
LALPUR, DIST- RANCHI, JHARKHAND, PIN- 834001

VERSUS

RATNA MUKHERJEE BHOWMICK
W/O- LATE SOUMENDRA MOHAN MUKHERJEE, R/O- VILL- HATHIPIL
KHANA, TEZPUR TOWN, P.O TEZPUR AND P.S- TEZPUR(SADAR), DIST-
SONITPUR, ASSAM

Advocate for the Petitioner : MR. A K PURKAYASTHA

Advocate for the Respondent :

BEFORE
THE HON'BLE MR JUSTICE ARUN DEV CHOUDHURY
O R D E R

15. 02. 2023

Heard Mr. AK Purkayastha, learned counsel for the petitioner.

2. The present application is filed under Section 24 of the Code of Civil

Procedure, 1908 for transfer of the case being T.S. (Probate) No. 43/2010 from the court of learned District Judge, Tezpur, Sonitpur to the court of learned District Judge, Kamrup (M) or any other court of District Judge.

3. The ground for such transfer is that the learned District Judge, Sonitpur has committed serious irregularity and illegality while recording evidence of the petitioner during the course of her cross-examination. It is contended that though an objection was raised to that effect the learned District Judge has not properly and correctly recorded what has been deposed by the petitioner in course of her cross-examination was not properly recorded. However, the learned District Judge did not entertain the said objection raised by the petitioner and the learned District Judge also asked the learned counsel for the petitioner not to interrupt or raise any further objection.
4. It is also another ground that the learned District Judge also rejected the prayer of the petitioner to cross-examine the DW2 in term of mandate of Order 28 Rule 4 (2) and (3) of CPC.
5. It is also alleged that a petition was filed on 01.02.2022 by the petitioner to recall PW1 for adducing further oral evidence, such petition was returned by the learned District Judge to the petitioner.
6. From the above, it is clear that the basic ground of such transfer is alleged illegality by the learned District Judge.
7. In the backdrop of aforesaid pleadings, the learned counsel Mr. AK Purakayastha argues that the petitioner will not get justice and therefore the petition needs to be transferred to any other court.
8. I have given my anxious consideration to the submission advanced by Mr.

Purakayastha. Also perused the material available on record including the order dated 02.11.2022 passed by this court in CRP (IO) 190/2022 and CRP (IO) 75/2022.

9. Earlier a revision petition being CRP (IO) 75/2022 was preferred by the present petitioner and the same was disposed of with certain directions by this court under its order dated 10.06.2022.

10. From the perusal of the aforesaid material, it is apparent that there is a chequered history in the present litigation, which is very clearly reflected in order dated 21.09.2022 passed by this court in CRP (IO) 190/2022, which are summarized below for determination of the present application.

I. The respondent had filed the connected probate petition seeking probate of the will dated 18.11.2006 of Late Dr. Somendra Mohan Mukherjee.

II. As the petitioner herein challenged the said will, the probate petition was converted into a probate title suit and was renumbered as TS (P) 43/2010.

III. The prayer of the petitioner to file written statement was rejected by the learned District Judge on the ground that such written statement was not filed earlier and held that the objection filed earlier should be considered as written statement. However, this court under its order dated 13.08.2014 passed in WP(C) 3908/2014, though was not inclined to exercise jurisdiction under Article 226, however, on the undertaking of the petitioner that they will file written statement on a specific date in addition to earlier written

objection, allowed the petitioner to file the written statement and same was filed.

- IV. Raising an issue of separating the entitlement of family pension of deceased Late Dr. Somendra Mohan Mukherjee from the fold of testamentary dispossession the petitioner approached this court twice by filing two civil revision petition being CRP (IO) 93/2018 and CRP(IO) 382/2018, which were ultimately withdrawn on 22.11.2018 with a liberty to file appropriate application before the learned District Judge. Such withdrawal was allowed.
- V. Thereafter, yet another petition being petition No. 1201/2009 was filed under Section 151 CPC filed on 20.07.2019 before the learned trial court for expunging ex-parte evidence of the three witnesses being objectionable/ scandalous.
- VI. The learned trial court rejected such petition. Being aggrieved another petition being CRP(IO) 139/ 2020 was preferred before this court and this court vide order dated 04.01.2021 did not entertain such challenge taking a view that the impugned order passed in the petition No. 1201/2019 did not suffer from an jurisdictional error.
- VII. Thereafter on 04.01.2021, the petitioner filed an application under Order 6 Rule 17 of the CPC seeking amendment of the written statement. The said amendment petition was rejected by the learned District Judge, Sonitpur by an order dated 17.03.2022. Such rejection order was challenged in CRP (IO) 75/2022. After an elaborate discussion, this court vide its order dated 10.06.2022 found no infirmity in the judgment passed by the learned trial court

and did not interfere with order impugned. However, considering the fact that there has been inordinate delay in the disposal of the probate proceeding and also considering that the evidence on affidavit of three witnesses were filed on 27.04.2010 to prove the will and out of these three witnesses one witness has already expired and any further delay in disposal of the probate proceeding will result in frustration of the entire probate proceeding and hence issued the following direction.

*“(i) The parties shall appear before the Court of the District Judge, Sonitpur, Tezpur on **21.06.2022**. On the said date, the respondent herein who is the plaintiff in T.S.(P) No. 43/2010, shall produce her witnesses for cross-examination at **10.30 AM**.*

(ii) The Court of the District Judge, Sonitpur, Tezpur is directed to take up the said probate proceeding as the first item of the day so that the examination of the plaintiff witnesses can be done. If for some reasons the cross-examination could not be done or completed, the court below shall take up the matter on the next date as the first item and continue henceforth till the cross-examination of the plaintiff witnesses are completed. The said cross-examination is directed to be taken on day-to-day basis till it is not completed.

(iii) It is further made clear that if there is any objection raised as regard the admissibility of the evidence tendered, the court below shall take it up for consideration at the final argument of the suit.

*(iv) It is further directed that after completion of the cross-examination, the court below shall dispose of the said probate proceedings as expeditiously as possible and preferably within a period of **3 (three) months** from 21.06.2022.*

(v) During the said trial, if any of the parties are aggrieved by any order being passed, which are not otherwise appealable under the Code of the Civil Procedure, the parties shall be at liberty to raise objection to such order in terms with Section 105 of the CPC.”

VIII. However, being aggrieved by the aforesaid judgment dated 10.06.2022 passed in CRP (IO) 75/2022, one SLP being SLP (C) 1240/2022 was filed before the Hon'ble Apex Court. On the basis of pendency of the SLP, again an adjournment was sought before the learned trial court below, however, the learned trial court had rejected the said petition by order dated 07.07.2022 on the ground

that there was no stay to the judgment and order dated 10.06.2022 passed in CRP (IO) No. 75/2022.

- IX. The learned trial court also took further consideration in rejecting such application the fact that both the witnesses present for cross-examination were senior citizens and on every occasion the respondent sought time on different grounds.
- X. Thus upon closing the evidence of the plaintiff, the court fixed the matter for defendant's witnesses. The defendant did not file evidence on the date so fixed instead filed, an application under Order 18 Rule 17 read with Section 151 CPC for recalling of the order dated 07.07.2022 whereby the plaintiff's witnesses were closed and prayer for adjournment was rejected.
- XI. The learned trial court by an order dated 26.07.2022 rejected the said petition. While dismissing such petition, the learned trial court observed that the petition has been filed by the counsel and not by the defendant herself and that of an order as well as an witness can be recalled only on sufficient cause being shown by the party making such application and there was no sufficient ground for recalling of the witnesses.
- XII. In the meantime, the SLP preferred before the Hon'ble Apex Court assailing the judgment and order dated 16.10.2022 passed in CRP (IO) 75/2022 was withdrawn and accordingly was dismissed. Thereafter, the petitioner filed CRP (IO) 190/2022 assailing the order dated 07.07.2022 and 26.07.2022 as discussed hereinabove.
- XIII. Though this court under its interim order dated 17.08.2022 passed

in CRP (IO) 190/2022 stayed the further proceeding of the suit in question, the learned trial court by its order dated 22.05.2022 closed the defendant's witnesses as the learned trial court was not intimated about passing of the order dated 17.08.2022. Considering such fact and on the basis of submission made by the learned counsel for the petitioner that the present petitioner will be able to file their evidence on affidavit of all the defendant's witnesses on a date as may be fixed by this court, this court under its order dated 21.09.2022 did not interfere with the order dated 07.07.2022 and 26.07.2022 and fixed the matter on 02.11.2022 asking the present petitioner/ defendant to file evidence on affidavit of all the witnesses on that date without fail. Further direction was issued to the learned trial court to dispose of the suit in accordance with law as expeditiously as possible and preferably within a period of three months from 03.11.2022. In the aforesaid term, the CRP (IO) 190/2022 was disposed of.

XIV. Thereafter on 01.12.2022, one DW was present and was examined and cross-examined and discharged. On the same date, the petitioner filed another petition No. 3027/2022 under Order 18 Rule 4 Sub-rule 2 and 3 read with Section 151 CPC for recording cross-examination of DW2 through duly appointed Commissioner stating that she is seriously sick and was admitted in Rajendra Institute of Medical Sciences on 23.11.2022 for which she cannot attend court for cross-examination.

XV. Such petition was rejected by the learned court below under its order dated 01.12.2022. The learned court was of the opinion that

on the material available on record including the medical documents pertaining to DW2 does not show that she has been suffering from serious ailment, which prevented her from attending the court and also came to a conclusion that the medical reason cited in the medical document is nothing but daily wear and tear, which is common in the life of human being and it cannot be healed after proper medication.

XVI. Accordingly, such petition was rejected and the matter was fixed 07.01.2023 for cross-examination of DW2.

XVII. On a pointed query to the learned counsel for the petitioner, Mr. Purakayastha has submitted that such order has not been challenged in any higher forum till date.

XVIII. On 07.01.2023, two adjournment petitions were filed. One by the petitioner herein citing illness of the witness DW2 and other was filed by the learned counsel of the probate petitioner on the ground that he was ill. Thereafter, the matter was adjourned and fixed on 01.02.2023.

XIX. On 01.02.2023, the petitioner side again filed an application for cross-examination of DWs, which was allowed and next date was fixed on 13.02.2023.

11. Now the present application is filed for transfer of the Probate Suit from Tezpur to Guwahati and the basic ground for such challenge is the allegation against the learned District Judge being bias against the present petitioner. Transfer of cases on such ground, in the considered opinion of this court needs to be tackled very seriously inasmuch as such

allegation cast a doubt in the integrity and competence of the Judge.

12. Law is settled that transfer on such ground should not be done without sufficient cause. The petitioner in such a case must thoroughly satisfy this court on such bias and the apprehension of the petitioner that it will not get justice before the said court. It is well settled that even when a Judge makes adverse remarks regarding merit of the case a litigant shall not get any privilege to get a suit transfer to some other court. It is also well settled that if a Judge makes an erroneous order the same cannot be a ground itself for transfer, as it does necessarily lead to an inference of bias. Thus, the power of transfer is to be practiced with great caution in such a case, in the light of legitimate concern for justice. While dealing with a transfer petition, the court is to remind itself that the plaintiff has a right to pick his own forum having jurisdiction.
13. In the aforesaid backdrop, now, let us consider the pleading in the present case i.e. the grounds for transfer. The whole allegation is bias against the learned District Judge as discernable from the pleading.
14. This court in CRP(IO) 75/2022 came to a definite conclusion that there has been inordinate delay in disposal of the probate proceeding and that out of three attesting witnesses, one witness had already expired and any further delay in disposal of the probate proceeding shall result in frustration of the entire probate proceeding. Though such decision was challenged before the Hon'ble Apex Court, however, same was withdrawn. Though the petitioners were allowed time to file their evidence, however, instead of filing evidence they filed an application under Order 18 Rule 17. Thereafter again filed a CRP (IO) against closure of their evidence, which was allowed. Accordingly, the defendant adduced evidence, which was

cross-examined. Now, only one witness is remained to be cross-examined.

15. It is correct that many petitions filed by the petitioner on different alleged causes of action had been dismissed by the learned trial court below. However, the fact remains that such orders have also not been interfered by the higher forum. Therefore, it cannot be said that learned trial court was bias and therefore, passed the order. In fact order dated 01.12.2022 has not even been challenged in the Appellate Court. There is also no material to show that the learned District Judge has been adverse to the petitioner. Mere statement shall not do in such a case to allege bias against the learned court.
16. In view of the aforesaid, this court is also of the view that the probate is at the last stage of trial. Only the cross-examination of the DWs remains and thereafter argument and judgment can be delivered by the learned trial court. Looking at the stage of the trial also this court is of the view that this is not a fit case for transfer.
17. Therefore, this court is of the view that there is no base for the petitioner of alleged bias of the learned trial court below. Therefore, this court finds no merit in the present case and accordingly the same is dismissed.

JUDGE

Comparing Assistant