

GAHC010090282021



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

Case No. : CRP(IO)/68/2021

ON THE DEATH OF PLAINTIFF NAZMUL HAQUE CHOUDHURY. HIS LEGAL HEIRS

MUSTT. FATIMA KHATUN CHOUDHURY ALIAS FATIMA BEGUM BARBHUIYA, AGED ABOUT 51 YEARS, D/O LATE TABARAK ALI CHOUDHURY, W/O MD. SAFIQUR RAHMAN BARBHUIYA, R/O VILL-SONABARIGHAT PART-I, P.O.-SONABARIGHAT, P.S.-SONAI, PIN-788103, DIST- CACHAR, ASSAM

VERSUS

MD. ZAKIR HUSSAIN MAZUMDER AND 8 ORS.
S/O LATE NUR UDDIN MAJUMDER, VILL-SONABARIGHAT PART-I, P.O.-SONABARIGHAT, P.S.-SILCHAR, DIST- CACHAR, ASSAM, PIN-788013

2:MD. DALIM HUSSAIN MAZUMDER
S/O LATE NUR UDDIN MAJUMDER
VILL-SONABARIGHAT PART-I
P.O.-SONABARIGHAT
P.S.-SILCHAR
DIST- CACHAR
ASSAM
PIN-788013

3:MD. RUKAN UDDIN MAZUMDER
S/O LATE SAFIQUE UDDIN MAZUMDER
R/O VILL-KANAKPUR PART-II
P.O.-SILCHAR
P.S.-SILCHAR
DIST-CACHAR
ASSAM
PIN-788005

4:MUSSTT. BINA BEGUM MAZUMDER
D/O LATE SAFIQUE UDDIN MAZUMDER
R/O VILL-KANAKPUR PART-II
P.O.-SILCHAR
P.S.-SILCHAR
DIST-CACHAR
ASSAM
PIN-788005

5:MUSSTT. RAFTNNESSA LASKAR
D/O LATE TABARAK ALI CHOUDHURY
W/O LATE MAKADDAS ALI LASKAR
R/O PANCHAYAT ROAD
SILCHAR TOWN
P.O. AND P.S.-SILCHAR
PIN-788005
DIST-CACHAR
ASSAM

6:MD. FARUK AHMED LASKAR
S/O LATE ALIM UDDIN LASKAR
R/O VILL-BAHADURPUR
P.O. AND P.S.-UDHARBOND
PIN-788009
DIST-CACHAR
ASSAM

7:MD. SURUK AHMED LASKAR
S/O LATE ALIM UDDIN LASKAR
R/O VILL-BAHADURPUR
P.O. AND P.S.-UDHARBOND
PIN-788009
DIST-CACHAR
ASSAM

8:MD. SAJJAD AHMED LASKAR
S/O LATE ALIM UDDIN LASKAR
R/O VILL-BAHADURPUR
P.O. AND P.S.-UDHARBOND
PIN-788009
DIST-CACHAR
ASSAM

9:MUSSTT. JULFIKA KHANAM BARBHUIYA
W/O MD. FAIZUL HAQUE BARBHUIYA
D/O LATE ALIM UDDIN LASKAR
R/O VILL- UDHARBOND BALIGHAT
P.O. AND P.S.-UDHARBOND

PIN-788030
DIST-CACHAR
ASSA

Advocate for the Petitioner : MR. S D PURKAYASTHA

Advocate for the Respondent :

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

ORDER

Date : **20.01.2023**

Heard Mr. S. D. Purkayastha, the learned counsel appearing on behalf of the petitioner. None has appeared on behalf of the respondents in spite of the service being affected upon the respondents.

2. It appears from the records that the service upon the respondent Nos. 1 to 4 have been deemed to be completed vide the order dated 14.11.2022.

3. The instant application has been filed under Article 227 of the Constitution of India challenging the order dated 12.12.2019 whereby the Court below i.e. the Court of the Civil Judge No.2, Cachar, Silchar has expunged the evidence of PW-1 on the ground that he did not appear for his cross-examination and on the earlier occasion also has not appeared to face the cross-examination.

4. The learned counsel appearing on behalf of the petitioner had submitted by drawing the attention of this Court to the various orders passed that the delay which has happened was not on account of the petitioner alone inasmuch as the respondents have also on various occasion sought for time. He further submitted that on 07.06.2019, 12.07.2019 and 09.09.2019 the Plaintiff Witness

No.1 was present before the Court to face the cross-examination. However, on those dates, the learned counsel for the defendants sought for adjournments. It was on account of the illness of the PW-1 that he could not appear before the Trial Court on 12.12.2019 for which the two petitions were filed being Petition No.1232 and 1233 praying for adjournments. He submitted that the Trial Court did not however take into consideration the said aspect of the matter and rejected the said petitions and thereby expunging the evidence on affidavit of the Plaintiff Witness No.1. He submits that as the plaintiff being an old lady, the evidence of PW-1 who is the son of the plaintiff is very vital for the purpose of disposal of the suit and the expunging of the said evidence of PW-1 would affect non-suit the petitioner. He further submitted that if the PW-1 is given one final opportunity by the Trial Court, the PW-1 would be present before the Court without any fail.

5. Upon hearing the learned counsel for the petitioner and upon perusal of the materials on record, this Court is of the opinion that in the interest of justice, the plaintiff can be given one final opportunity to produce the PW-1 to face his cross-examination. It is however relevant to take note of that the suit is of the year 2009 and as on today which is in the year 2023, the plaintiff evidence is yet to be completed. However, it is the opinion of this Court that one final opportunity is required to give the petitioner to produce the Plaintiff Witness No.1 on such date as may be fixed by the Trial Court inasmuch as on that very day, the PW-1 on account of his medical reasons would not attend the Court. Accordingly, this Court interferes with the order dated 12.12.2019 whereby the evidence of PW-1 was expunged with a direction that the plaintiff to produce the PW-1 to face the cross-examination on such date as may be fixed by the Trial Court.

6. It is also relevant to take note of that the order passed herein though would prejudice the defendants but in the opinion of this Court, the same can be duly compensated by cost. Accordingly, this Court imposes a cost of Rs.25,000/- upon the plaintiff to be deposited before the Trial Court on the next date as fixed by this Court hereinunder.

7. Taking into account that this Court vide the order dated 24.11.2021 stayed the further proceedings of Title Suit No.51/2009, the said order stands vacated in view of the order passed herein and the petitioner is directed to appear before the Trial Court on 13.02.2023 on which date, the petitioner shall deposit the cost of Rs.25,000/- and upon such deposit, the Trial Court shall fix a date for cross-examination of the Plaintiff Witness No.1. The Defendants are at liberty to release of the said amount with the leave of the Trial Court.

8. It is made clear that if on the date as may be fixed by the Trial Court, the Plaintiff Witness No.1 fails to appear, the Trial Court shall proceed with the suit in accordance with law thereby expunging the evidence of PW-1. It is further clarified that the deposit of Rs.25,000/- shall be a condition precedent for setting aside the impugned order dated 12.12.2019. Failure to deposit the said amount on the date so fixed hereinabove, would revive the order dated 12.12.2019.

9. With above observations and directions, the instant petition stands disposed of.

JUDGE

Comparing Assistant