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GAHC010206332023



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

Case No. : CRP(IO)/316/2023

SMT. SANDHYA PAUL AND 3 ORS.
W/O- LATE MIHIR PAUL, R/O- BHABANIPUR TITAGURI PART-II, P.O.
TITAGURI, P.S. AND DIST. KOKRAJHAR, BTR, ASSAM

2: MITHUN PAUL
S/O- LATE MIHIR PAUL
R/O- BHABANIPUR TITAGURI PART-II
P.O. TITAGURI
P.S. AND DIST. KOKRAJHAR
BTR
ASSAM

3: LITAN PAUL
S/O- LATE MIHIR PAUL
R/O- BHABANIPUR TITAGURI PART-II
P.O. TITAGURI
P.S. AND DIST. KOKRAJHAR
BTR
ASSAM

4: SMT. BABLI PAUL @ DEY
D/O LATE MIHIR PAUL
W/O SRI TAPASH DEY
R/O PANCHAGARH
P.O. AND P.S.-FAKIRAGRAM
DIST- KOKRAJHAR
BTR
ASSA

VERSUS

NIHAR PAUL
S/O LATE MAKHAN CHANDRA PAUL, R/O SHIKSHAK PALLY, GORIHATI,

COOCHBEHAR, P.O.-GORIHATI, P.S. AND DIST-COOCHBAEHAR, WEST
BENGAL, PIN-736170

Advocate for the Petitioner : MR. B J MUKHERJEE

Advocate for the Respondent : MR. R BARUAH (FOR CAVEATOR)

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

ORDER

Date : 09.10.2023

Heard Mr. B.J. Mukherjee, learned counsel for the petitioner and Mr. A. Ikbal, learned counsel for the respondent.

2. By filing this application under Article 227 of the Constitution of India read with Section 151 CPC, the petitioner has assailed the order dated 17.07.2023 passed by the learned Munsif No.1, Kokrajhar in TS 10/2021. By the said order, the learned Court had rejected petition filed by the petitioners-defendants to summon official witness and also rejected the prayer to deposit arrear cost and to proceed with examination of DW-2 and 3.

3. The petitioners are the defendants in TS 10/2021, which was filed by the respondent as plaintiff. The suit was for partition of the suit property described in Schedule-A and B of the plaint, for recovery of *khas* possession and consequential relief. The petitioners as defendants have contested the suit. In course of trial, the witnesses of the plaintiff's side were examined and cross-examined and discharged. From the records, it appears that the case is pending for DWs since 21.05.2023.

4. It would be sufficient to mention that as per the contents of petition

no. 219/2023 (Annexure-4), the case was fixed on 21.02.2023 for cross-examination of DW-1. On 19.12.2022, the evidence on affidavit of DW-2 and 3 were furnished. However, by order dated 25.01.2023, the learned trial Court had discarded the evidence of DW-2 and 3 due to non-payment of cost. By the said petition, it was projected that the defendant was not aware of imposition of cost as a condition for acceptance of evidence on affidavit of DW-2 and 3 and accordingly, a prayer was made to review the order dated 20.01.2023 and allow cross-examination of DW-2 and 3. Another petition no. 218 dated 21.02.2023 was also filed to allow the defendant no.1 to issue notice to the official witness of Cooch Behar to depose in the suit. Both the petitions were rejected by the impugned order.

5. The learned counsel for the petitioners has submitted that the petitioner no.1 was not aware of the imposition of cost and therefore, the cost was not paid.

6. The said submission is found to be devoid of any merit because it is the contention of the petitioner in paragraph 4 of this application that the case was fixed for DWs since 21.05.2023. The number of adjournments taken by the petitioners has not been disclosed in this application. Nonetheless, it has not been disputed that more than permissible adjournment under Order XVII Rule 1 CPC has been availed by the petitioners.

7. At this stage, the learned counsel for the respondent has produced a print out of the case status in respect of the said suit which shows that the suit was fixed on 21.05.2022, 20.06.2022, 13.07.2022, 10.08.2022, 08.09.2022, 31.10.2022, 21.11.2022, 19.12.2022 and 25.01.2023 for evidence on affidavit and the cross-examination of DW-1 was fixed on 21.02.2023. Thereafter, it appears that the suit was pending for hearing on petition on 27.03.2023,

02.05.2023, 24.05.2023, 22.06.2023 and thereafter, the order was passed by the learned trial Court on 17.07.2023.

8. It appears from the impugned order that the cost imposed by the learned trial Court was not paid on 31.10.2022 and 21.11.2022. On 19.12.2022, when the evidence of DW-2 and 3 was submitted, the cost of Rs.1,000/- was not deposited and the learned trial Court had ordered that the said DWs would be accepted only on payment of cost. However, when the matter was fixed on 25.01.2023, the cost was again not paid. Therefore, when the learned trial Court had accepted the evidence on condition of deposit of cost, the non-deposit of cost for whatever reasons, was sufficient for the learned trial Court to pass the order dated 25.01.2023 closing the evidence of DW-1 and 3 was discarded. It may be mentioned that the petitioner no.1 paid Rs.1,000/- in the Court, but the same was for cost against her cross-examination and it was not a cost which was imposed as a pre-condition for acceptance the evidence of DW-2 and 3.

9. Moreover, in respect of petition no.218 dated 21.02.2023, it was submitted that the said petition was could not have been construed to be an application under Order XVI Rule 1(3) CPC as the said petition did not contain the name of witnesses and it was merely a prayer before the learned trial Court to allow the petitioner no.1 to issue notice on the official witness. In this regard, it is seen that in the impugned order, the said petition no. 218 dated 21.02.2023 was construed by the learned trial Court to be an application under Order XVI Rule 1 (3) CPC and accordingly, as the name of the said witness did not appear in the list of witnesses, the learned trial Court did not find any reason to allow the petition no.218 of 2023.

10. In the said context, the Court is of the considered opinion that without

insistence on a summons to be issued by the Court, it was otherwise open to the petitioners to bring any such witnesses without the assistance of the Court under the provision of Rule 1-A of Order XVI CPC. In that event it was not necessary for the petitioners to crave leave of the Court to summon such witnesses. But as the name of such witnesses was not entered in the list of witnesses filed before the learned trial Court, the Court does not find any infirmity in rejecting the said prayer.

11. It may be pertinent to mention that the learned counsel for the petitioners has made certain submissions, relating to the nature of pleadings, which is not referred to in this order as any observation made by the Court in respect of the any pleadings of the petitioners, it would have the tendency to prejudice the parties in the trial. Therefore, the Court refrains from making any observations as regards the evidence, vis-a-vis, official witnesses to be examined. It would suffice to mention that as the official witness from the land records of Govt. of West Bengal is not a listed witness, the Court does not find any legal infirmity in the order passed by the learned trial Court.

12. The learned counsel for the petitioner has also submitted that in the event the evidence of DW-2 and 3 are discarded, the petitioners would suffer serious prejudice in the trial. In this regard, the Court is of the considered opinion that merely because a the petitioners would suffer prejudice in the trial is not a sufficient ground to invoke jurisdiction under Article 227 of the Constitution of India and/ or Section 151 CPC and to interfere with the order in respect of which no jurisdictional illegality or perversity is found. The power of the Court under Article 227 of the Constitution of India cannot be used unless the order suffers from perversity or jurisdictional error.

13. In support of his submission, the learned counsel for the petitioners

has placed reliance on the case of *STG Associates and Ors. Vs. Tilak Cosmetic and Ors.*, (2018) 3 GLR 629. As per the said decision, this Court had not interfered with order impugned therein. However, liberty was granted to the plaintiff in the said case to file petition for permitting him to tender evidence of a person named therein as PW-4. In this regard, as already indicated above, it is open to the petitioner to invoke Rule 1(A) of Order XVI to bring a witness. However, to enable the petitioner to do so, no order from this Court is required. Accordingly, if such an application is filed, the same would be examined by the learned trial Court in its own merit without being influenced by this order.

14. Therefore, having not found any legal infirmity or perversity or jurisdictional error in the order of the learned trial Court, no case is made out in this application for interference with the order dated 17.07.2023 passed by the learned Munsif No.1, Kokrajhar, in TS 10/2021. Accordingly, this revision petition stands dismissed at the motion stage without issuance of notice on the respondent.

15. There shall be no order as to cost.

16. The Registry shall transmit a copy of this order to the said learned Court by e-mail to be retained in the record of TS 10/2021.

JUDGE

Comparing Assistant