

GAHC010228322022



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

Case No. : CRP(IO)/263/2022

SMTI KAJAL LATA PAUL AND 2 ORS
R/O 7B, THE ACC APARTMENT, 7TH FLOOR, NARENGI FOREST GATE,
GUWAHATI-26, P.O. AND P.S.-NARENGI, PIN-781026, DIST- KAMRUP (M),
ASSAM

2: M/S SREE SATYA NARAYAN PAPER PRODUCTS
A PROPRIETORSHIP CONCERN OF PETITIONER NO. 1

3: M/S SHREE GANESH DISPOSABLES
A PROPRIETORSHIP CONCERN OF PETITIONER NO.

VERSUS

PARITOSH SAHA
S/O SRI PRAMOD SAHA, HAVING ITS BUSINESS AT CHAMPAK NAGAR,
GANESHPARA, P.O.-GUWAHATI-781025, DIST- KAMRUP (M), ASSAM

Advocate for the Petitioner : MR. A K BHUYAN

Advocate for the Respondent : MR S K AGARWAL

BEFORE
HONOURABLE MR. JUSTICE ARUN DEV CHOUDHURY

ORDER

Date : 24.05.2023

1. Heard Ms. B Bhuyan, learned senior counsel for the petitioner assisted by Ms. B Bora. Also heard Mr. S.K. Agarwal,

learned counsel for the respondent.

2. The present petition is filed assailing the order(s) dated 06.04.2022, 27.04.2022, 06.06.2022 and 31.10.2022 passed by the learned Civil Judge No.2, Kamrup (M), Guwahati.

3. The respondent as plaintiff instituted a suit being Money Suit No.239/2018, before the learned court of Civil Judge No.2, Kamrup (M) Guwahati. After receipt of the summons, the present petitioner as defendant, appeared before the learned Court below and filed written statement and contested the suit and the plaintiff filed evidence on affidavit.

4. Thereafter, by an order dated 17.03.2022, the learned court sent the matter before the Oath Commissioner for cross examination of the plaintiff's witness and a date was fixed for submission of report by the Commissioner on 27.04.2022. The cross examination was not done as the counsel for the defendant was not present. Accordingly, the learned Commissioner sent back the records to the learned trial Court with its report.

5. Thereafter, on the basis of such report, the learned court below under its order dated 27.04.2022 dispensed with the cross examination of the PW's and fixed the matter on 06.06.2022 for defendant's evidence.

6. On 06.06.2022 none represented the defendants and no evidence was filed. Accordingly, the learned court below closed the defendant's evidence and fixed the matter for argument on 14.07.2022. On 14.07.2022, the matter was not taken up as the learned Judge was on leave and the matter was fixed on

17.08.2022.

7. It is the pleaded case of the defendant that subsequently, the defendants came to know that due to mistake of the engaged lawyer who recorded the date of the case wrongly, the defendant was unrepresented. Accordingly, in the aforesaid background the aforesaid orders were passed.

8. In the aforesaid background facts, the defendant No.1 filed a petition under section 151 CPC for recalling/reviewing the earlier orders and to enable the defendant to cross-examine the witness of the plaintiffs as well as to lead the defence witness. Such petition was registered as Misc Case No.2631/2022.

9. On an opportunity being given, the plaintiffs filed objection to such application and raised a plea that the defendants were negligent and for their conduct the plaintiffs should not be allowed to suffer inasmuch as the matter has in the meantime reached the stage of argument. It was also the stand of the plaintiff that the defendant failed to appear before the Court not only on one occasion but on many occasions.

10. After considering the aforesaid objections, the learned Judge rejected the application under its order dated 31.10.2022 and accordingly the present petition is filed.

11. The learned trial court came to conclusion that the cross examination of the Pw's was dispensed with after providing ample scope and the non-cooperation of the defendant in the proceeding is apparent and the same also gets support from the report of the Commissioner. The learned court disbelieved the ground of the

defendant that the engaged counsel was bed ridden during the period when the matter was fixed for cross examination for the reasons that no supporting documents were annexed.

12. While concluding, the learned trial Court relying on a judgment of the Apex Court in the case of **My Palace Mutually Aided Co-operative Society Vs. B. Mahesh and Others** reported in **2022 SCC Online SC 1063**, held that an application under section 151 CPC was not maintainable to recall this order. Accordingly, the petition was dismissed.

13. Ms. B Bhuyan, learned senior counsel submits that from the materials available on record, it is well established that the defendant has suffered not for his own wrong but for the unintentional mistake of the engaged counsel and that too in a situation where the engaged counsel was bed ridden. She further submits that to cross examine the plaintiff and to lead defence witness is a valuable right and such right should not be denied on the ground of technicalities inasmuch as the failure to cross examination was not willful but under compelling circumstances. It is also her contention that the defendant will not seek any adjournment, if a chance is given to cross examine the plaintiff witness inasmuch as, when after cross examination the matter is fixed for defence witness they will not seek unnecessary adjournment to file such defence witness on affidavit.

14. Per contra Mr. Agarwal submits that while passing the impugned order, the learned trial Court has not committed any error not to say any error of jurisdiction, inasmuch as, this Court

in exercise of power under Article 227 of the Constitution of India should not entertain a petition when there is no jurisdictional error. Accordingly, he submits that the petition should be dismissed.

15. Mr. Agarwal further contends that grave prejudice will be caused to the plaintiffs if the present petition is allowed inasmuch as, the suit is pending since 2018 and it has reached the stage of argument.

16. Mr. Agarwal also contends that by way of the present application more than 4 (four) orders has been assailed which has been passed in different occasions. Therefore, by way of a single revision petition such orders cannot be challenged. In support of such contention Mr. Agarwal relies on the judgment of this court in the case of **Gyan Chand Juneja Vs. Mitun Ghose @ Mitun Sen** in **CRP(10) 261/2022**.

17. Considered the aforesaid arguments.

18. Now coming to the judgment in Gyan Chand Juneja (supra), the coordinate bench at paragraph 19 has made a passing comment that the two orders are challenged in the revision petition and therefore, the maintainability of the petition itself was questionable. However, such question of maintainability was not deliberated or any order has been passed holding the said revision petition to be not maintainable, rather, from paragraph 20 of the said judgment, it is clear that the learned Judge proceeded to enter into the merit of the claim and finally decided the revision petition on merit. Therefore, in the aforesaid facts the

determinations made in paragraph 20, the comment made regarding maintainability cannot be said to be *ratio decendi but an obiter*.

19. It is true that the defendants got opportunities to cross examine the plaintiff's witnesses. It is also true that date was fixed for defence witnesses and the defendant failed to file their evidence on affidavit. However, the fact also remains that the defendant immediately knowing after the fate of their case has approached the court to recall the order inasmuch as, cross examination is a responsibility of the learned counsel and a specific statement on oath was made that the engaged counsel was suffering from ailment during the period of cross examination. Therefore, the fault can not be attributed the defendant. Further, a specific plea is also taken that due to wrong noting of date by the learned engaged counsel, the none represented the defendant on the date fixed. This Court is also in agreement with the arguments advanced by Ms. B Bhuyan, learned senior counsel that by virtue of the order impugned a valuable right of the defendant has been taken away not for the fault of the defendant, but for the unintentional mistake of the engaged Counsel. Therefore, in the considered opinion of this Court, to meet the ends of justice, the defendant is required to be given a chance to cross examine the plaintiffs witness as well as to file evidence.

20. Now coming to the prejudice that may be caused to the plaintiff, this Court is of the view that if the present petition is allowed, the plaintiff shall not be gravely prejudiced inasmuch as,

they will still have a right to cross examine the defendant's witness. This Court is also of the considered opinion that if such opportunities are given, same will also help the Trial Court in coming into a just decision.

21. Therefore, though no jurisdictional error has been committed by the learned trial court below as has been urged by Mr. Agarwal, however, at the same time the exercise of power has lead to failure of justice and such failure of justice can very well be corrected in exercise of powers under Article 227 of the Constitution of India.

22. Accordingly, the present application is allowed by directing the parties to appear before the learned trial Court on **15.06.2023** as Mr. Agarwala has submitted that the plaintiff witness shall remain present on that date. The learned trial Court shall allow the defendants to cross examine the plaintiff witness. If witness is present, no further adjournment shall be granted to the defendant by the learned trial court.

23. The learned trial court shall thereafter give a chance to defendants to file evidence on affidavit and the defendants shall invariably file their evidence on affidavit on that date and the learned court below shall not grant any further adjournment in that case and proceed in accordance with law.

24. With the aforesaid observations and direction the present revision petition stands allowed.

JUDGE