

GAHC010002052023



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

Case No. : CRP(IO)/15/2023

AMALA BARMAN
W/O- LATE NITAI CHANDRA BARMAN,
R/O- VILL CHANDAMARI,
P.O, P.S AND DIST.- KOKRAJHAR (BTR), ASSAM.

PRESENTLY RESIDING AT WARD NO-3, KOKRAJHARTOWN,
P.O, P.S AND DIST.- KOKRAJHAR (BTR), ASSAM.

VERSUS

NARAYAN BARMAN
S/O- LATE NITAI CH. BARMAN,
R/O- VILL CHANDAMARI,
P.O, P.S AND DIST.- KOKRAJHAR (BTR), ASSAM, PIN-783370

For the Petitioner(s) : Mr. B. J. Mukherjee, Advocate

For the Respondent(s) : Mr. A. Ikbai, Advocate

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

ORDER

Date : 05.03.2024

1. The instant proceedings under Article 227 of the Constitution is filed challenging the order dated 04.11.2022 passed by the learned Court of the Munsiff No.1, Kokrajhar in Title Suit No.22/2010 whereby the learned Trial Court not only refused to grant an adjournment on account of the cross-examination

of the plaintiff but also rejected the entire additional evidence even prior to the arguments are made in the said suit.

2. This Court has duly perused the judgment and order dated 23.10.2019 passed in Title Appeal Case No.1/2017 whereby the learned First Appellate Court i.e. the Court of the Civil Judge, Kokrajhar had remanded the suit with a direction for fresh trial and also directed that the issue which was framed by the learned Appellate Court be decided.

3. Pursuant to the said judgment and order, the Petitioner filed an application under Order XXVI Rules 1, 2 and 8 of the Code of Civil Procedure, 1908 (for short "the Code") for adducing additional evidence by way of commission. This application was registered and numbered as Petition No.499/2021.

4. The learned Trial Court vide an order dated 03.12.2021 opined that the Petition No.499/2021 would be taken up for consideration after filing of the additional evidence on affidavit by the plaintiff. Pursuant thereto, the plaintiff filed her additional evidence on affidavit. Subsequent thereto, vide an order dated 28.01.2022, the learned Trial Court disposed of the petition being Petition No.499/2021 thereby observing that it was a fit case for issuance of commission to examine the plaintiff more particularly keeping in mind the old age of the Plaintiff/Petitioner. The learned Trial Court further vide the said order dated 28.01.2022 appointed an Advocate namely Smt. Lalita Narzary as the Advocate Commissioner to record the evidence of the plaintiff in her residence.

5. Pursuant thereto, vide an order dated 04.03.2022, in view of the improvement in the COVID situation, the Commissioner was directed to proceed for examination of the plaintiff thereby fixing 21.03.2022 for payment of cost. On 21.03.2022, the plaintiff duly deposited the cost and the Court fixed

12.04.2022 for report of the Commissioner. The record further reveals that neither the plaintiff thereupon was cross-examined nor the Commissioner had submitted a report and accordingly on 18.05.2022, the said aspect of the matter was duly recorded. It was further recorded in the said order that it was essential that the Sub-Registrar, Kokrajhar should bring the volume of the Gift Deed and all the relevant documents in his Office in connection with the Gift Deed bearing Registration No.372/344 dated 26.03.2009 and till the completion of the examination of the Sub-Registrar, Kokrajhar on the said Gift Deed, the cross-examination of the plaintiff on her additional evidence on affidavit was to be kept in abeyance. Accordingly, vide the said order dated 18.05.2022, notice was issued to the Sub-Registrar, Kokrajhar and fixed 15.06.2022 for examination of the Sub-Registrar, Kokrajhar.

6. It is not known what happened thereafter as the records do not speak. Be that as it may, on 04.11.2022, a petition was filed on behalf of the plaintiff stating that the plaintiff is an old aged woman and suffering from various ailments for which she has failed to appear before the Court to face cross-examination. The learned Trial Court vide the impugned order dated 04.11.2022 rejected the said application seeking adjournment on the ground that the plaintiff had sought adjournment on several occasions for cross examination of the plaintiff on her additional evidence on affidavit. Not only that, the learned Trial Court further went ahead to hold that the evidence as well as the additional evidence which have been tendered was rejected as the same was beyond the pleadings.

7. This Court has duly heard the learned counsels for the parties. Admittedly, the plaintiff is 92 years old and this very aspect of the matter was duly taken note of by the learned Trial Court in its order dated 28.01.2022 wherein the

application for appointment of a Commissioner to examine the plaintiff was allowed. It is however very surprising to take note of that the learned counsel who was representing the plaintiff did not point out this order before the learned Trial Court inasmuch as had that order been pointed out, this Court has reasons to believe that the learned Trial Court would not have passed the impugned order dated 04.11.2022.

8. Apart from that, another very important aspect of the matter which this Court finds it relevant to point out is that the appreciation of evidence whether the same would be relevant or are required to be taken or not and how it is to be appreciated should have been done at the time of writing of judgment and not prior thereto. However, surprisingly, the learned Trial Court rejected all such evidence which was placed subsequent to the remanding of the suit vide the impugned order on the ground that the plaintiff had gone beyond her pleading which on the face of it appears to be an exercise of jurisdiction illegally with material irregularity.

9. Considering the above, this Court sets aside the order dated 04.11.2022. This Court further directs the parties to appear before the learned Trial Court on 19.03.2024 on which date, the learned Trial Court shall fix a date for submission of the report on commission and further direct the Commissioner so appointed to complete the said cross-examination on or before the next date so fixed.

10. This Court further observes that the learned Trial Court may also direct the learned Commissioner to be appointed to submit a report if either of the party/parties is/are not permitting the cross-examination of plaintiff to be concluded. Thereupon, on the basis of such report, the learned Trial Court would be at liberty to pass such order(s) as deemed fit and proceed with the disposal of the suit. This Court further observes that the learned Trial Court

while deciding the said suit shall not be influenced with the order dated 04.11.2022 and decide the suit in accordance with law.

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

JUDGE

Comparing Assistant