GAHC010319172019

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

Case No. : CRP(I/O)/4/2020

DINANATH SAIKIA
S/O LT. RUDRESWAR SAIKIA, R/O BANIPUR LANE NO. 7, P.O. BANIPUR, PIN-786003, P.S DIBRUGARH, DIST. DIBRUGARH,

VERSUS

DIGANTA SAIKIA
S/O SRI RAMESH CH. SAIKIA, R/O BARBARI GAON JYOTINAGR, NEAR JYOTINAGAR NAMGHAR, P.O. AND P.S. DIBRUGARH, DIST. DIBRUGARH, ASSAM, PIN-786001

Advocate for the Petitioner : MR S KHOUND

Advocate for the Respondent : MR. S SARMA

BEFORE
THE HON'BLE MR. JUSTICE PRASANTA KUMAR DEKA
ORDER

10.12.2020.

Heard Mr. S. Khound, the learned counsel for the petitioner. Also heard Mr. S. Sarma, the learned counsel for the respondent.

The present petitioner is the defendant in Title Suit No. 100/2015 pending in the court of learned Civil Judge at Dibrugarh filed by the respondent plaintiff. The defendant petitioner on 09.10.2018 filed the evidence-on-affidavit in chief of three witnesses i.e. DW-1, DW-2 and DW-3. The plaintiff side accepted the copies of the evidence-on-affidavit in chief of all the three witnesses of the defendant side. Thereafter, the witnesses were referred to the court Commissioner for recording the cross-examination of the defendant witnesses by the plaintiff respondent. The DW-1 was cross-examined on 07.12.2018 and discharged. DW-2 was cross-examined on 14.02.2019 and 16.03.2019 and thereafter discharged. On 14.02.2019 the plaintiff respondent filed an application under Section 151 of the CPC bringing to the notice of the court below that the name of the DW-3 was not included in the list of witnesses submitted by the defendant petitioner stating that for the said reason the plaintiff side would be prejudiced and sought for rejection of the evidence-on-affidavit in chief of DW-3. The learned court below registered the said application as Misc. (J) Case No. 73/2019 arising out of Title Suit No. 100/2015. Finally vide the impugned order dated 18.07.2019, the learned court of Civil Judge, Dibrugarh disposed of the said application and the prayer for rejection of the evidence of DW-3 was allowed. While passing the impugned order, the learned court below took note of the provision under Order XVI Rule 1 Sub Rule (3) of the CPC and held that the defendant petitioner failed to show any reason for omission to mention the name of the DW-3 as the witness in the list nor any application was filed seeking for acceptance of the evidence of DW-3. Finally, the learned court below holding that the defendant petitioner failed to show any sufficient and cogent reason for omission to mention the name of the DW-3 from the list of witness allowed the application filed by the plaintiff respondent. The plaintiff respondent accepted the evidence-on-affidavit in chief and belatedly raised the objection after cross-examination of DW-1 and DW-2 were almost completed.

The learned court below did not consider the factor of delay in raising the objection by the plaintiff side. Order XVI Rule (1)(A) of the CPC stipulates that any party may without applying for summons under Rule 1 of Order XVI bring the witnesses to give evidence or to produce documents. However, in order to get the benefit under the said provision of Rule 1(A) of Order XVI of the CPC the same is subject to the provision of Sub Rule 3 of Rule 1 of Order XVI of the CPC. Order XVI Rule 1(3) of the CPC stipulates that the Court may, for

reasons to be recorded, permit a party to call, whether by summoning through Court or otherwise, any witness, other than those whose name appeared in the list of witness, if such party shows sufficient cause for omission to mention the name of such witness in the said list. The learned court below while passing the impugned order rightly considered that the present petitioner failed to substantiate any sufficient cause/causes for omission to mention the name of DW-3 from the list of witness. But in the present case in hand, the evidence-on-affidavit in chief of all the witnesses were submitted at a time and after cross-examination of witnesses DW-1 was completed and the one of the DW-2 was on the verge of completion then the plaintiff respondent filed the application raising the objection as against the evidence of DW-3.

The stage of objection in my considered opinion was not proper. If at all there was any apprehension of any prejudice by the plaintiff respondent they were supposed to raise the objection immediately after filing of the evidence-on-affidavit in chief of the defendants' witnesses. This is because of the fact that the defendant petitioner could have taken steps for replacing the evidence of the DW-3 prior to the cross-examination of the DW-1 and DW-2. No doubt there was default on the part of the defendant petitioner in not regularising the evidence of DW-3 under Order XVI Rule 1(3) of the CPC but the learned court below ought to have considered the stage of objection raised by the plaintiff side inasmuch as the cross-examination of DW-1 and DW-2 were completed.

A duty is cast on the court below to see that such objection in respect of the evidence of DW-3 is required to be taken by the adverse party before the cross-examination of other witnesses started inasmuch as the evidence-on-affidavit in chief of all the three witnesses were submitted at a time. Otherwise once the cross-examination of two witnesses are completed, subsequent introduction of evidence by a new witness may lead to filling up of lacuna of the evidence of other witnesses already cross-examined if the evidence of DW-3 is required to be expunged inasmuch as in such a situation an opportunity must be given to the defendant side to adduce further evidence in lieu of the expunged evidence of DW-3.

In view of the aforesaid observation, I am of the considered opinion that without interfering the impugned order dated 18.07.2019, it would be proper to give the liberty to the

present petitioner to file appropriate application seeking for re-calling the order dated 18.07.2019 passed by the learned Civil Judge, Dibrugrah in Misc. (J) Case No. 73/2019 arising out of Title Suit No. 100/2015 by showing cogent reason for such omission to mention the name of DW-3 from the list of witness. The learned court below shall thereafter accordingly decide the application and if it is satisfied shall recall the order impugned after passing appropriate order.

Accordingly, with the said observation and liberty granted to the petitioner, this revision petition stands disposed of. Interim order stands vacated.

It is submitted that the Title Suit No. 100/2015 is fixed on 15.12.2020 in the court of learned Civil Judge, Dibrugarh. The petitioner shall produce the copy of the order passed today before the learned court below and file appropriate application seeking for re-calling the impugned order after showing cogent reason for non inclusion of the name of DW-3 in the list of witness already on record. Thereafter, the learned court below after hearing the other side, shall pass appropriate order as per law.

JUDGE

Comparing Assistant