

02.12.2022

DL No. 59

BM

Court No.652

CO 935 of 2018

Dhiraj Kumar Mukherjee & Anr.

Vs.

Sila Ghosh

Mr. Uttiya Roy
Mr. Arnab Mondal

... for the petitioners

Affidavit of service filed by the petitioner is taken on record. The opposite party is not represented.

Being aggrieved by and dissatisfied with the order no.117 dated 10.01.2018 passed by the learned Civil Judge, Junior Division, 1st Court, Katwa in Title Suit No.62 of 2008, present revisional application has been preferred.

The petitioners contended that the petitioners as plaintiffs filed the Title Suit No.62 of 2008 against the defendant for ejectment of tenant and recovery of khas possession. The defendant contested the suit by filing written statement and the defendant on various pretexts tried to get the suit delayed before the trial court. After conclusion of plaintiff's evidence the suit proceeded for examination of the defendant's witness and examination-in-chief on behalf of the defendant was affirmed and filed by the constituted attorney of the defendant Shyam Sundar Ghosh by virtue of power of attorney which has been marked as exhibit-

'A' in that suit. Thereafter, several dates are fixed for further evidence on behalf of the defendant but the defendant resorted to dilatory tactics and prayed time before the trial court and for which the learned court ultimately rejected the defendant's prayer for adducing any further evidence and fixed the suit for hearing argument on 6.9.2017. In the meantime, the defendant has come out with two applications one under Section 151 of the Code and the other under Order 26 Rule 1 of the Code stating that the order for closure of defence witness may be recalled and an Advocate Commissioner may be appointed for recording evidence of the defendant namely Shila Ghosh on commission. The petitioner herein raised objection. Said application came up for hearing before the learned trial court and the learned trial court by order dated 10.01.2018 allowed both the applications and appointed one Mozzem Hossain, an Advocate of the bar for recording evidence of the defendant on commission.

Mr. Roy, learned counsel appearing on behalf of the petitioners submit that trial court has made irregularity in recalling its own order which has already attended its finality and the learned trial court made material irregularity in allowing the said applications on a consideration which is absolutely superfluous. The constituted attorney Shyam Sundar

Ghosh has already deposed on behalf of the defendant and as such adducing further evidence on behalf of the defendant does not arise. The court below has acted in excess of its jurisdiction by allowing the said petition. He further submits the defendant's document in support of her medical condition is inconsequential in the given facts and circumstances of the case when she is otherwise being represented by her constituted attorney in the suit and she herself had denied to appear before the court in person. Accordingly, petitioner prayed for setting aside the aforesaid order.

Having considered the submissions made by the learned counsel on behalf of the petitioner and also considering the facts and circumstances of the case, it appears that after being satisfied on the medical certificate filed on behalf of the defendant, the learned court below was pleased to allow the defendant's application as according to the court below the said deposition is required for the interest of justice and to adjudicate the suit properly.

It is true that one constituted attorney on behalf of the defendant has already deposed as DW-1 and as per the provision of order XVIII, rule 3A, where defendant herself wishes to appear as a witness, she was required to appear as witness before any other witness on her behalf has been examined . In the

prayer for deposition commission defendant took a ground that plaintiff specifically put suggestion to defence witness that defendant Shila Ghosh never delegated power to conduct the suit nor she is aware of the suit and for which she filed said application for deposition commission to deny said allegation. Furthermore defendant contended that in a petitioner dated 04.11.2008 plaintiff specifically had taken a plea that defendants are not continuing the suit and the defendant also did not put signature on Vokatnama, so the physical presence of defendant before the court is required to answer her case. Defence contention is defendant Shila Ghosh presently residing in Kolkata and is not in a position to appear physically before the court due to ailments, which fact has not been denied by plaintiff /petitioners.

Needless to say that the provision laid down in order XVIII, rule 3A is of directory in nature and it is not an inviolable rule. In fact the object of Rule 3A is to prevent a party from covering the loopholes in the evidence of other witnesses examined earlier on it's behalf. Here plaintiffs have no such allegation of plugging loopholes, on the contrary defendant sought for such examination to contradict plaintiff's contention that defendants is not proceeding/ continuing with the suit. In view of above when

satisfactory reasons are adduced by the defendant about her illness, to which no counter has been shown, the court below has not committed any wrong in allowing her to be examined at a later stage on commission specifically when there is nothing to show that the application is intended to fill up any lacuna or to cover up any gap.

In view of above C.O. 935 of 2018 is hereby dismissed, however, learned Commissioner is directed to complete the commission work within a period of eight weeks from the date of communication of the order and since, the suit is pending from 2008, the learned trial court is also directed to make every endeavour for expeditious disposal of the suit and to conclude the entire proceeding of the suit preferably within a period of six months from the date of communication of the order.

Urgent photostat certified copies of this order, if applied for, be supplied to the parties upon compliance of all necessary formalities.

(Ajoy Kumar Mukherjee, J.)