

06.12.2021

Ct. No.21

3

C.O. 402 of 2021

I.A. CAN 1 of 2021

Mrs. Philomina Raphael & Anr.

-VS-

Rajendra Kumar Raphel & Anr..

(Through Video Conference)

Mr. Tanmoy Mukherjee,

Mr. Emon Bhattacharya,

Ms. Pooja Sah

...for the Petitioners.

Mr. Srijib Chakraborty

...for the Opposite Party.

Assailing the order dated 28.01.2021 passed by learned Civil Judge (Junior Division), 4th Court, Howrah in Title Suit no. 108 of 2008 rejecting the application of the petitioner under 151 C.P.C. for

getting an Affidavit sworn by the defendant no.1 as exhibit has filed the present revisional application. Heard the learned lawyer for the petitioners and the opposite parties extensively.

Learned Advocate for the opposite parties has drawn the attention of the court to Sections 1 and 3 of the Indian Evidence Act, 1872 and also referred to Khandesh Spinning and Weaving Mills Co. Ltd., Jalgaon vs. Rashtriya Girni Kamgar Sangh Jalgaon & Others, reported in (1960) 2 SCR 841 and urged that as per Section 1 of the Indian Evidence Act, 1872, the same is not applicable to an affidavit presented to any court. That order 19 of the CPC allows certain fact or facts to be proved by an affidavit, but the deponent is subject to cross examination by opponent on the facts averred in the affidavit. The affidavit which the defendants /petitioner wants to be exhibited cannot be exhibited as maker of the affidavit the defendant no.1 is still alive and who can come and depose before the court as a witness and prove the content of the affidavit. Thus he prays for dismissal of the present application.

On the other hand learned advocate for the petitioners submits the court below ought to have exhibited the affidavit as there is no impediment in law in getting the same marked as exhibit.

However, when this court found that vide impugned affidavit the defendant no.1 wanted to prove that she became the absolute owner of the suit property by virtue of deed of relinquishment executed by her deceased husband and she in turn gifted the entire property to her daughter/ the defendant no.2/ the petitioner no.2 by executing a registered gift deed. Under law no transfer of immovable property can be effected by an affidavit. The petitioners need to produce those two deeds and prove the same legally before the court below.

Then Learned Advocate for the petitioners submits that he is not prosecuting with the present revisional application and prays for dismissal of the same. However, he prays that petitioner no.1 may be permitted to examine herself as Defence witness no.2 after the completion of the examination of D.W.1, the petitioner no.2.

It is also the contention of Learned Advocate for the opposite parties that to prove the assertion made in the impugned affidavit, the maker/the defendant no.1 has to prove the same before the court by adducing both oral and documentary evidence and face the cross examination.

Since the petitioners want dismissal of the present case for non-prosecution, the C.O. No.402 of 2021 stands dismissed. However, the Petitioners are given

liberty to examine the Petitioner no.1/Defendant no.1 as a witness in the court below.

Accordingly all connected applications, if any, shall stand dismissed. Interim order, if any, stands discharged.

No affidavits are invited. Allegations made are deemed to be denied.

All parties shall act in terms of the copy of the order downloaded from the official website of this Court.

Urgent Photostat certified copies of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(Kesang Doma Bhutia, J.)