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14.07.2021
TN

CO No.1329 of 2020

Ashis Das @ Asish Kumar Das
Vs.
Bisweswar Nayek

(Via video conference)

Mr. Aritra Shankar Ray,
Mr. Rabindranath Mahato

.... for the petitioner

Mr. Sounak Bera

.... for the opposite party

Learned counsel for the petitioner contends that the trial court acted without jurisdiction in refusing to recall a previous order dated March 23, 2015, by which the cross-examination of the Commissioner at the instance of the petitioner was closed and the Commissioner's report, filed under Order XXVI Rule 9 of the Code of Civil Procedure, was accepted.

It is argued on behalf of the petitioner that the trial court proceeded on a fundamental misconception of law in holding that it did not have the power to recall its own order since the recall application is in

the nature of seeking another opportunity to reopen the evidence of the Commissioner prior to acceptance of the report.

It is further pointed out by learned counsel for the petitioner, by placing particular reliance on paragraph nos.16 to 24 of the revisional application, that it was not the fault of the petitioner alone for the long delay occasioned in hearing the matter. It is submitted that the petitioner filed his written objection as long back as on July 16, 2009. Thereafter the records of the suit were misplaced twice due to no fault of the parties, which was the real reason for the delay occasioned in taking up the matter. It is further pointed out that the petitioner, in fact, sought adjournment on not more than two occasions.

Learned counsel appearing for the plaintiff/opposite party contends that the impugned order was passed within the framework of law and the trial court was justified in refusing to recall its earlier order.

By placing the contents of the order dated March 23, 2015, which has not been annexed to the revisional application, learned counsel for the opposite party submits that the court had considered sufficiently the issues now raised by the petitioner and only due to the considerable number of opportunities

given to the petitioner, on which occasions the petitioner deliberately stalled the proceedings, the order dated March 23, 2015 was passed. There was no option before the trial court, it is submitted, but to close the cross-examination of the Commissioner and accept the report.

Upon hearing learned counsel for the parties and going through the materials on record, it is revealed that the petitioner is correct in contending that the petitioner was not at fault for the entire period of long delay in taking up the matter. The record was misplaced and could not be traced out at least twice, due to no fault of either of the parties. It is well-settled that the act of court cannot be detrimental to the interest of the parties as per the doctrine of *Actus Curiae Neminem Gravabit*.

That apart, the trial court ought to have considered the provisions of Order XXVI Rule 10 of the Code of Civil Procedure prior to passing the order dated March 23, 2015 as well as the order impugned herein. The court below proceeded on a premise that since the Commissioner's report under Order XXVI Rule 9 of the Code was treated to be a part of the evidence, no further opportunity ought to be granted to the defendant/petitioner to examine the Commissioner further. Apparently the approach, that

the objections to the reports could be raised by the petitioner at the trial stage, is not backed by the provisions of law.

All the more because a Commissioner's report becomes a part of the evidence in the suit, the Legislature, in its wisdom, enumerated in Rule 10(2) of Order XXVI of the Code that the report of the Commissioner and the evidence taken by him shall be evidence in the suit and shall form part of the record. Such provision is, however, subjected to the rider that the court or, with the permission of the court, any of the parties to the suit may examine the Commissioner personally in open court touching any of the matters referred to by him or mentioned in his report, or as to his report, or as to the manner in which he has made investigation. The report being accepted without giving adequate opportunity to the petitioner, due to no fault on the part of the petitioner, is contrary to the scheme of Order XXVI Rule 10 of the Code of Civil Procedure. In the present case, although the petitioner had sought adjournment on certain occasions, it could not be said that the entire delay was caused due to the petitioner, since on several occasions, the records of the suit were misplaced and the matter could not be taken up due to absence of the Presiding Officer of the

court below as well as, on certain occasions, on the prayer of the opposite party as well.

In such view of the matter, the impugned order ought to be set aside.

Accordingly, CO No.1329 of 2020 is allowed on contest, thereby setting aside Order No.211 dated February 6, 2020 passed by the Civil Judge (Junior Division), First Court at Midnapore, District: Paschim Medinipur in Title Suit No.47 of 2004 as well as the Order dated March 23, 2015 passed by the said court in the same suit.

The trial court shall grant another last opportunity to the petitioner to complete the examination of the Commissioner, as contemplated in Order XXVI Rule 10(2) of the Code of Civil Procedure, within a reasonable time, to be fixed by the court below. The acceptance of the Commissioner's report vide order dated March 23, 2015 stands automatically cancelled. Upon giving the petitioner a further opportunity of examination of the Commissioner, as indicated above, the court will reconsider the acceptance of the Commissioner's report and pass necessary consequential orders afresh.

In view of the long pendency of the suit, however, the Trial Judge is requested to dispose of the suit itself as expeditiously as possible, preferably within one year from the date of communication of this order to the court below.

There will be no order as to costs.

Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)