

23-11.2021
Court No.1
FB/gsd
(4).

**CALCUTTA HIGH COURT
IN THE CIRCUIT BENCH AT JALPAIGURI
CIVIL REVISIONAL JURISDICTION
(Via Video Conference)**

CO 31 of 2021

Swapan Kumar Borai & Anr.

Vs.

Chhabijan Bibi & Anr.

Mr. Subhasish Misra

Mr. Swarup Das

... For the Petitioner.

Ms. Suman Sehanabis

. . .For the O.P.

Party/parties is/are represented in the order of their name/names as printed above in the cause title.

Under challenge in this application under Article 227 of the Constitution of India is the Order No.38 dated 1.10.2019 passed by the Learned Civil Court (Senior Division), Dinhata.

By the order impugned the Learned Civil Court was pleased to reject the four applications of the present petitioners/the appellants before the Learned Civil Court in Title Appeal No. 49 of 2015. The four applications respectively are under Order 41 Rule 27 CPC; under Order 26 Rule 10(A) CPC; under Order 6 Rule 17 CPC and, under Order 1 Rule 10(2) CPC, all dated 12.3.2019.

Appearing for the petitioners, Mr. Misra, Learned Counsel, submits that four documents of extreme importance were discovered subsequently and therefore could

not be brought to the notice of the Learned Trial Court.

The four documents are respectively: (a) one certified copy of order in Bagra case no. 16 of 2005; (b) one plain xerox copy of application for Barga recording dated 05.01.2005; (c) xerox copy of alleged kabla deed no.10601 dated 10.08.1970 and; (d) certified copy of the deed bearing no.5999 for the year 1972.

Learned Counsel for the petitioners submits that the Learned Civil Court came to an erroneous conclusion that regarding (a) and (b) documents (*supra*) there is no whisper in the lower Court records that such documents were missing.

Regarding document nos. (c) and (d) the Learned Civil Court went by the judgment and decree of the Learned Trial Court.

It is submitted that having adopted the above findings, the Learned Appellate Court proceeded to summarily reject the application of the present petitioners under Order 26 Rule 10(A) of the CPC as well as under Order 6 Rule 17 of the CPC.

A petition of addition of necessary parties filed by the present petitioners under Order 1 Rule 10(2) CPC also stood rejected.

Learned Advocate for the petitioners strenuously submits that the Learned Civil Court ought to have taken correct judicial notice of the application under Order 41 Rule 21 CPC since at the first appellate stage, the present petitioners/the appellants in TA 49 of 2015 ought not to have been deprived of producing relevant evidence only on the

ground that such evidence was not pleaded in the written statement.

It is pointed out that the present petitioners have been able to establish the subsequent discovery of the documents in issue and hence the Learned First Appellate Court ought to have examined their relevance to the proceedings by allowing the application under Order 41 Rule 27 of the CPC.

Appearing for the O.P.s/the plaintiffs in the suit, it is submitted by Ms. Sehanabis, that the present petitioners were party to the *barga* proceedings as reflected from documents (a) and (b) (*supra*) and, in view of their subsequent discovery cannot be a ground for applying under Order 41 Rule 27 CPC. It is submitted that all along the present petitioners were presumed to be in knowledge of the said documents (a) and (b).

Heard.

Considered.

This Court finds no infirmity in the order of the Learned Civil Court connected to the dismissal of the applications of the present petitioners under Order 26 Rule 10(A) of the CPC and Order 6 Rule 17 of the CPC on the ground that the Learned Civil Court had correctly appreciated that the documents (c) and (d) were elaborately discussed and reasons provided by the Learned Trial Court.

However, this Court is of the view that with regard to the documents (a) and (b), the Learned First Appellate Court is required to examine whether such documents are crucially necessary to the ultimate adjudication of the *lis*.

This Court cannot accept the crisp dismissal of the stand of the present petitioners on the subsequent discovery of the documents as failure of due diligence since, it stands to reason that due to such subsequent discovery the documents could not be brought to the notice of the Learned Trial Court by way of any formal pleading.

This Court is also unable to accept the submission of the Learned Counsel for the present O.P.s that merely because the present petitioners were arguably part of the *barga* proceedings, the Learned First Appellate Court is under no obligation to examine the validity of the documents to the ultimate adjudication based on the principles enunciated under Order 41 Rule 27 CPC.

Accordingly, the part of the order impugned connected to the dismissal of the petitions under Order 21 Rule 10(A) CPC and Order 6 Rule 17 CPC by the Learned Civil Court stand affirmed.

Also, the part of the order of the Learned Civil Court connected to the documents (c) and (d) in the application of the present petitioner under Order 41 Rule 27 CPC stands also affirmed.

However, the part of the order of the Learned Civil Court connected to the application under Order 41 Rule 27 CPC connected to documents (a) and (b) stands set aside.

It will be open to the Learned First Appellate Court to examine the necessity of the documents (a) and (b) to the ultimate

adjudication in conformity with the principles of Order 41 Rule 21 CPC.

The necessity of joining parties to the appeal based on the findings of the Learned First Appellate Court upon the ultimate validity of the documents (a) and (b) (*supra*) shall then be considered by the Learned Civil Court in accordance with law.

CO 31 of 2021 stand accordingly **disposed of**.

All parties to act on the server copy of this order duly obtained from the official website of the Hon'ble High Court Calcutta.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties, subject to compliance with all requisite formalities.

(SUBRATA TALUKDAR, J.)