

20.12.2022
19
Ct. no. 652
sb

C.O. 2192 of 2018
With
CAN 1 of 2019 (Old CAN 311 of 2019)

Smt. Gopa Dutta & Anr.
Vs.
Bimal Kumar Saraf & ors.

Mr. Tarak Nath Halder
Mr. Sagnik Chatterjee ...for the Petitioner

Mr. Aniruddha Mitra
Mr. Promod Bagaria
Mr. Dhillon Sengupta ...for the opposite party

Being aggrieved and dissatisfied with the order dated 20th April, 2018 passed by the learned Civil Judge (Junior Division), Additional Court, Sealdah, South 24 parganas in Ejectment Suit no. 304 of 2004, present application under Section 227 of the Constitution of India has been preferred.

By the impugned order, the learned court has exempted the plaintiff from continuing further cross examination of DW1, Mrs. Gopa Dutta, in view of the death of defendant no.4. The petitioner contended that opposite party nos. 1 to 3 as plaintiffs filed a suit for eviction against one Mamata Dutta since deceased predecessor in interest of the petitioner and proforma opposite parties herein on the ground of default and reasonable requirement. Husband of aforesaid Mamata Dutta namely Manoranjan Dutta was the tenant in

respect of suit property who died in the year 2000. After the death of original tenant Manoranjan Dutta, aforesaid plaintiffs filed suit for eviction. The predecessor in interest of the petitioners contesting the suit by filing written statement. During pendency of the suit, Mamata Dutta, wife of erstwhile tenant, Monaranjan Dutta died on 6th April, 2006 leaving behind her surviving two daughters and one son. Subsequently one son, Manimoy Dutta, also died on 21st September, 2017 leaving behind his surviving legal heirs. At the time of examination of defendants witnesses, the opposite party took out an application praying for exemption to cross examine the defence witness Gopa Dutta, wife of aforesaid deceased Manimoy Dutta and to proceed with the suit in accordance with law. By the impugned order, the learned court below was pleased to allow the said application, thereby closing the evidence of DW1, fixed May 29, 2018 for argument.

Learned counsel for the petitioner submits that plaintiff/opposite party herein admitting the defendants as tenant in common, filed the instant suit. The court below acted illegally and with material irregularity in closing the evidence of DW 1 and proceeded with the suit without substituting petitioners. He further submits that since the opposite party admitted the predecessor in interest of the petitioner as tenant and accordingly filed instant suit, a fresh tenancy has been created in their

favour and as such the impugned order is not sustainable in law. Instant suit also got abated for non-substituting petitioners as defendants. He further submits that the Act of 1997 has not been given retrospective effect and as such the evidence of DW 1 ought not to have closed by the trial court without making substitution. The trial court also exceeded its jurisdiction in holding that no step has been taken by the defendants and none moved on call for the defendants, despite the fact that learned advocate for the petitioners were present at the time of hearing but the learned advocate was estopped from participating in the hearing of the learned court below on the ground that he lost his power with the death of defendant no. 4, predecessor in interest of the petitioner.

Learned counsel for the opposite party submits that the impugned order is perfectly correct as it was passed in accordance with law. In fact, the DW 1, Gopa Dutta was adducing evidence as constituted attorney of defendant no. 4 and he was deposed on behalf of defendant no. 4. Since the defendant no. 4 has died, the constituted attorney of deceased defendant no. 4 has no more any authority to depose on behalf of a dead person. He further submitted the right to remain in possession in the suit property by original defendant nos. 2 to 4 in the suit property was extinguished long before, on demise of their mother on 5.4.2006. Gopa Dutta, DW-1 who is wife

of late Manimoy Dutta, the defendant no. 4 acquired no right in the suit property, far from to be substituted in place of her deceased husband. Accordingly, opposite party submits that Smt. Gopa Dutta has no right to proceed with the suit nor has any right to adduce evidence on behalf of her deceased husband, since the right to sue does not survive and therefore question of cross examination of DW-1, Gopa Dutta does not arise at all.

Learned trial court while disposing of the said application, was pleased to hold in the impugned order dated 20.4.2018 that on a perusal of the record, it appears that DW 1, Gopa Dutta was adducing evidence on behalf of the defendant no. 4 who has expired on 21.9.2017 as reported by defendant on 8.11.2017. He further observed that Gopa Dutta is not a party in the suit and she was deposing on behalf of defendant no. 4 who had already expired. Accordingly, the learned court below held that DW 1, Gopa Dutta has no right to be examined any further as DW 1.

Having considered the submissions made by both the parties and materials available in the record, I find that the defendant/petitioner has not disputed that DW 1 was not the constituted attorney of defendant no. 4, since deceased or that she is not deposing on behalf of defendant no. 4. In view of above, with the death of defendant no. 4, the authority of the constituted attorney

to depose on behalf of defendant no. 4 goes and as such I find nothing wrong in the order passed by the learned trial court in exempting the plaintiff to cross examine DW 1 any further. Accordingly, the order impugned does not call for any interference. However, if the defendant wishes to adduce any further evidence on their behalf, they will be at liberty to adduce evidence before the trial court and thereafter court will proceed for hearing argument.

Learned trial court is requested to expedite the hearing of the suit and learned trial court shall make every endeavour to conclude the entire proceeding of the suit preferably within a period of six months from the date of communication of the order.

Accordingly, C.O. 2192 of 2018 is disposed of. Pending application, if any, also stands disposed of.

Urgent photostat certified copy of this order, duly applied for, be given to the parties upon compliance of all requisite formalities.

(Ajoy Kumar Mukherjee, J.)