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30.11.2022
Court. No. 12
Suwayan

CO 1837 of 2022

**Kabita Ghosh
Vs.
Nitai Swarnakar & Anr.**

*Mr. Sourav Sen
Mr. Devendra Pathak*

...for the petitioner.

*Mr. Debasish Roy
Mr. Snehasis Jana
Mr. Sukanta Das*

...for the opposite party no. 1.

Heard learned Advocate for both the parties.

The present revisional application under Article 227 of the Constitution of India has been filed challenging the Order No. 41 dated 12.04.2022 as passed by the learned Civil Judge (Junior Division), Ghatal in J. Misc. Case No. 23 of 2016 whereby and whereunder the said Court by the impugned order has been pleased to reject the petitioner's application dated 23.11.2021 as filed under Order 26 Rules 1 and 4 of the Code of Civil Procedure in a proceeding under the provisions of Order 9 Rule 9 of the Code of Civil Procedure.

In considered view of this Court for effective disposal of the instant application the facts leading to filing of the instant revisional application is required to be dealt with in a nutshell. The petitioner before this Court has filed an application under Order 9 Rule 9 of the Code of Civil Procedure as against the opposite parties herein which was registered as J. Misc. Case No. 23 of 2016 before the learned Trial Court. In the said Misc. case the

petitioner preferred an application for examining one Dr. Sukhendu Bikash Maity on commission but the same was rejected by the learned Trial Court vide Order No. 28 dated 18.12.2019 and challenging the said order, one revisional application being CO 778 of 2020 was preferred.

While disposing the said CO 778 of 2020, a co-ordinate Bench of this Court vide order dated 06.08.2021 rejected the said civil revision, i.e., CO 778 of 2020 with a liberty to the present petitioner to apply before the learned Trial Court for recording of evidence of the said witness, that is, Dr. Sukhendu Bikash Maity on commission on the basis of appropriate material. Thereafter the petitioner before the learned Trial Court has again filed similar such application on 23.11.2021 with a self-same, i.e., prayer for recording of evidence of one Dr. Sukhendu Bikash Maity on account of his extreme illness which the learned Trial Court by the impugned order has been pleased to reject.

In support of the instant revisional application, Mr. Sen, learned Advocate for the petitioner draws attention of this Court to the certified copy of the impugned order. Attention of this Court is also drawn to the petition for commission filed on 23.11.2021 as well as the photocopy of the prescription dated 21.11.2021 as issued by one Dr. Palodhi in the name of Dr. Sukhendu Bikash Maity. It is contended on behalf of the petitioner that on bare perusal of the same medical prescription it would reveal the Dr. Sukhendu Bikash Maity is suffering from acute

orthopedic diseases which is why he is unable to move to Court for adducing evidence on behalf of the petitioner and learned Trial Court while passing the impugned order has practically failed to consider such infirmity and/or incapacity on the part of the Dr. Sukhendu Bikash Maity and, thus, misdirected himself in passing the impugned order. Mr. Sen, thus, submits there is a fit case for allowing the instant revisional application by setting aside the impugned order.

While opposing the contention of the petitioner, Mr. Roy, learned Advocate for the opposite party also draws attention of this Court to the impugned order as well as to the order dated 06.08.2021 as passed in CO 778 of 2020 and the photocopy of the application for commission dated 23.11.2021. It is argued by Mr. Roy that since before the learned Trial Court no medical certificate has been placed to substantiate the alleged illness of the Dr. Sukhendu Bikash Maity, learned Trial Court is very much justified in rejecting the prayer of the petitioner. It is contended further that in CO 778 of 2020 this Hon'ble Court vide order dated 06.08.2021 granted liberty to the present petitioner to apply for recording of evidence of the said witness on commission on the basis of the appropriate material only. It is argued since before the learned Trial Court no appropriate material that is to say no medical certificate has been filed, there cannot be any reason to interfere with the impugned order. It is further argued that Order 26 Rule 1 of the Code of Civil Procedure clearly indicates that none other but a medical

certificate has to be filed for entertaining an application under Order 26 Rule 1 of the Code of Civil Procedure.

This Court has perused the entire materials as placed before this court. This court has given its anxious consideration over the submissions of the learned Advocates of both sides. On perusal of the certified copy of the impugned order it appears to this Court that while disposing of the petition dated 23.11.2021 as filed by the petitioner before the learned Trial Court under Order 26 Rules 1 and 4 of the Code of Civil Procedure, the learned Trial Court expressed his view that the medical prescription dated 21.11.2021 as issued by one Dr. Palodhi in the name of Dr. Sukhendu Bikash Maity cannot be considered as a medical certificate within the meaning of explanation of Order 26 Rule 1 of the Code of Civil Procedure.

In considered view of this court, the view taken by the learned Trial Court is pedantic and hyper-technical since in paragraph 15 of the impugned order he has come to a specific finding that the said Dr. Sukhendu Bikash Maity is a septuagenarian citizen suffering from osteoarthritis and other allied difficulties.

On perusal of the photocopy of the medical prescription dated 21.11.2021 it appears to this Court that sufficient materials has been placed before this learned Trial Court to substantiate that the said witness Dr. Sukhendu Bikash Maity is aged about 76 years old and he is suffering from various orthopedic infirmities.

In view of such, this Court considers that learned Trial Court ought to have hold that the medical prescription dated 21.11.2021 can be considered as a valid medical certificate for the purpose of the disposal of the said application for commission.

In view of such, the instant revisional application being CO 1837 of 2022 is allowed.

The impugned Order No. 41 dated 12.04.2022 as passed by the learned Civil Judge (Junior Division), Ghatal in J. Misc. Case No. 23 of 2016 is hereby set aside.

Consequently, the petitioner's application dated 23.11.2021 as filed under Order 26 Rules 1 and 4 of the Code of Civil Procedure before the learned Trial Court stands hereby allowed on contest.

It is hereby directed that the formality of cost of deposit of commission fee, issuance of writ of commission for examination of the aforementioned witness and the recording of evidence on the witness, that is, Dr. Sukhendu Bikash Maity on commission shall have to be completed mandatorily within a period of one month from the date of communication of this order.

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

(Partha Sarathi Sen, J.)