

8.12.2022  
14  
Ct. no. 652  
sb

**C.O. 2659 of 2018**

**Smt. Madhuri Ghosh**  
**Vs.**  
**Smt. Mira Rani Ghosh & Ors.**

Mr. Debdutta Basu  
Mr. Sandip Ghosh  
Ms. Mousumi Chatterjee ...for the petitioner

Mr. Sanjib Seth  
Ms. Basanti Saren ...for the O.P. No. 1 to 3  
& 5 to 15

Challenging the order dated 18<sup>th</sup> July, 2018 passed by learned Civil Judge (Senior Division), 1<sup>st</sup> Court, Howrah in Misc. case no. 1730 of 2014 arising out of Title Suit no. 48 of 2014, the present application under Article 227 of the Constitution of India has been preferred.

The petitioner contended that the petitioner/plaintiff has instituted aforesaid suit for declaration, injunction and for partition against the opposite parties which was registered as Title Suit no. 48 of 2014. The opposite party no. 1 to 3 and 5 to 14 filed their written statement denying all material allegations made in the plaint. While disposing plaintiff's prayer for interim injunction, learned trial court was pleased to pass an order directing both the parties to maintain status quo over the suit property. The petitioner/plaintiff filed Misc. case no. 1730 of 2014 under Order 39 Rule 2A of the

Code alleging that the opposite parties, in violation of order of injunction made forceful entry into the suit property and alienated a flat to a third party. In the said proceeding under Order 39 Rule 2A, the petitioner filed an application under Order 26 rule 1 and 4 of the code praying inter alia for issuance of commission for the examination of the petitioner who is the witness as she is unable to appear before the trial court physically due to her ailments. The petitioner stated in her aforesaid application that she is a patient of Cervical Spondylosis and Osteo Arthritis and practically cannot move properly. She is also cardiac patient and is under treatment of doctors. She stays in her own premises at the ground floor and she cannot climb stairs. In support of such contention, the petitioner has also filed medical certificates. Opposite parties filed written objection against said prayer for recording her deposition on commission. Said application was taken up for hearing and upon hearing and after perusing the documents on record, court below was pleased to reject the petitioner's application for her examination on commission vide impugned order dated 18<sup>th</sup> July, 2018.

Learned counsel for the petitioner submits that the trial court rejected the said prayer without making proper appreciation of the true scope, ambit and purport of the plaint case as well as the application under order 26 rule 1 and 4 of the Code and wrongly came to the conclusion

that the petitioner will be able to attend court proceeding physically after two months. The learned court below failed to appreciate that the cause is recurring one. Accordingly, the petitioner has prayed for setting aside the impugned order.

Learned counsel for the opposite party raised objection against the said contention and argued that from the medical certificate it appears that she was advised for taking rest only for two months from 4.6.2018. Moreover, she was advised to avoid climbing stairs and not totally restrained from climbing stairs and as such there is no sufficient reason as to why the petitioner will not be able to attend the court physically to depose on her behalf. He also submits that during the period the petitioner has appeared before the Oath Commissioner at Howrah and as such it is not true that she is not in a position to appear before the court below. Court below also refused to rely medical certificate as sacrosanct as the doctor who has issued the certificate is not specialist as an orthopaedic.

I have considered submissions made by both the parties and also perused materials available in record. It is not in dispute in the present case that the medical certificate of petitioner filed in support of the application was issued by a registered medical practitioner. It is also not disputed that the petitioner resides outside the jurisdiction of the court. It is also apparent from

certificate that the petitioner/lady aged about sixty years, who has been advised by a registered medical practitioner to avoid squatting, climbing stair. It is also observed by that registered medical practitioner that the petitioner needs total knee replacement. Opposite party though submitted that petitioner appeared before oath commissioner during that period, but it is not known whether she had to climb stairs, on that occasion or not.

Be that as it may the court's jurisdiction and power to appoint a commissioner should flow from section 75 read with order XXVI. Order XXVI, rule 4(1), first proviso now makes it mandatory to issue a commission, if the witness is outside the prescribed limits under order XVI, rule 19 and the evidence of the witness is considered necessary in the interest of justice. It is not the case of the opposite party that recording of petitioner's evidence is not necessary in the interest of justice.

Reading order XXVI, rule 4 and order XVI rule 19 together, it emerges that notwithstanding the discretion vested in the court, the issuance of a commission has been made mandatory in cases where a witness cannot be ordered to appear in person but his evidence in the notion of the court is necessary in the interest of justice, that is to say, unless the court is satisfied that there is compelling necessity to examine such a witness.

After the introduction of explanation to rule 1 of order XXVI, by the amendment Act of 1976, the court is now free to accept medical certificate from a registered practitioner as evidence of the sickness or infirmity of the person concerned without calling the medical practitioner as a witness. It is not necessary that strict medical evidence should be adduced in order to support the allegations of sickness or infirmity in every case. In some cases, as in the present one, infirmity arising out of old age itself might be inferred from the circumstances as are disclosed in the certificate itself.

In view of the above, the order impugned dated 18.7.2018 is set aside. Accordingly, C.O. 2659 of 2018 is allowed.

Learned trial court is directed to appoint a Commissioner for the purpose of recording deposition of petitioner on commission within a period of three weeks from the date of communication of the order and learned Commissioner will make every endeavour to conclude the commission work within a period of two weeks from the date of appointment without granting unnecessary adjournment to either of the parties and will submit his report/work. The cost of commission will be borne by the petitioner.

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.)**