

9.6.2023
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Ct. no. 652
sb

C.O. 1351 of 2018

**Durga Chakraborty
Vs.
Gopal Chakraborty & Ors.**

Mr. Bhaskar Chandra Mannafor the petitioner

Mr. Sourav Sen
Ms. Adrisnata Chakraborty
...for the Opposite parties

Service of notice upon the leaned counsel for the petitioner is taken on record.

The present revisional application under Article 227 of the Constitution of India has been directed against the order dated 20.4.2018 passed by the learned Additional District Judge 2nd Court, Bangaon, North 24 Parganas in O.S. no. 39 of 2015.

By the impugned order, the learned court below was pleased to reject the petitioner's prayer for issuance of warrant against the attesting witness of the will, who in spite of receipt of summon on several occasions, did not appear before the court for adducing evidence.

The petitioner's case in brief is that the property in question originally belonged to one Bela Rani Chakraborty, who before her death, made a will on 9.2.2004. After expiry of the testator, Bela Rani Chakraborty, an application under Section 276 of the

Indian Succession Act, 1925 for probate/letters of administration was filed. The opposite parties herein filed objection denying the statement made in the said application for probate/letters of administration and prayed for rejection of the said application.

Subsequently, an application under Order XXVI rule 1 of the Civil Procedure Code read with Section 151 of the Code was filed for appointment of Commissioner for recording evidence of said attesting witness of the will namely, Sukumar Das. Learned court below after hearing both the parties, was pleased to reject the said application seeking deposition commission under Order XXVI rule 1 of the Code as court below refused to rely upon medical prescription of witness, Sukumar Das and fixed the case for evidence on 20.3.2018. The plaintiff/petitioner filed an application for issuance of summon to witness upon Sukumar Das stating details for adducing evidence. Learned court below vide order no. 33 dated 20.3.2018 observed that the said Sukumar Das was served with summon on several times and he also received the same on earlier occasions but he did not turn up though it cannot be denied that this witness is attesting witness and fate of present suit largely depends upon evidence of said witness and as such court below had given one more chance to petitioner to bring said witness. However, subsequently by the impugned order, court below observed that in civil case,

it is the duty of the petitioner to prove his case by producing his witness before the court. If the witness not willing to come before this court, then court can not compel that person to adduce his evidence against his will. Accordingly though the petitioner had made a prayer for issuance of warrant of arrest in order to compel the witness to appear before the court but said prayer was turned down by the order impugned.

Learned counsel for the petitioner submits that the witness is the attesting witness and his evidence is very much required for the purpose of adjudication of the real dispute between the parties.

Learned counsel for the opposite parties submits that the court below was justified in rejecting the petitioner's prayer for issuance of warrant against the witness because said witness Sukumar Das received summon of the court on several occasions but he is not intending to adduce evidence in the present case and as such, he cannot be compelled to adduce evidence.

Having considered the facts and circumstances of the case and that court below observed that said witness being attesting witness of the will, evidence of such witness is vital for disposal of the case and that the matter is pending since long, the application is disposed of by giving liberty to the petitioner to file an application under Order XXVI rule 1 of the Code, before the court below for appointment of Deposition

Commissioner for recording evidence of the said witness, Sukumar Das. In the event of filing such application by the petitioner in the court below, learned court below will appoint an advocate as Deposition Commissioner to record the evidence of said Sukumar Das. The cost of the commission will be borne by the petitioner. The amount of commissioner's fee and the name of the deposition Commissioner will be decided by the court below in that event. In any case, the court below is directed to make expeditious disposal of the case and to make every endeavour to conclude the entire proceeding within a period of six months from the date of communication of the order.

Accordingly, C.O. 1351 of 2018 is disposed of.

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

(Ajoy Kumar Mukherjee, J.)