

149 **20.09.**
2023

Ct. No. 652

Ab

CO 1366 of 2018

Mallika Baidya and others

Vs.

Sri Nilmoni Hazra and another.

Ms. Sarmistha Ghosh Sarma,
... for the petitioners.

Mr. Sounak Bhattacharya,
... for the opposite party no. 1.

The application under Article 227 of the Constitution of India has been preferred against Order No. 169 dated 13th February 2018 passed by the learned Civil Judge (Junior Division), Kakdwip, South 24-Parganas in Misc. Case No. 60 of 2007. By the impugned order the Court below was pleased to reject the application of opposite party no. 1 to recall the witness of opposite party no.1 (in short OPW-1).

The petitioners herein contended that the opposite party no. 1 as preemptor instituted the aforesaid suit under Section 8 of the Land Reforms Act. The petitioners herein contested the said suit by filing written statement wherein they have denied the material allegations made in the plaint.

On 19th March 2016, the petitioners filed an application for recalling OPW-1 in Misc. Case No. 60 of 2007 and in the said application, the petitioners contended that the OPW-1 submitted Affidavit in-Chief on 17th December 2015 and since the Court was shifted to the new building on 17th December 2015, it was not possible for him to tender the documents in the Court on that date. On the subsequent date, when the date was fixed for adducing evidence, the OPW-1 could not present in the Court due to her illness, but the Court below had closed the evidence of the OPW-1.

Learned Counsel appearing on behalf of the petitioners submits that for tendering the documents, the

OPW-1 of the said suit is required to be recalled for adducing evidence. Accordingly, the petitioners have prayed for setting aside the order impugned and prayed for giving an opportunity for recalling OPW-1.

Mr. Sounak Bhattacharya, learned Counsel appearing on behalf of the opposite party no. 1 herein raised objection contending that the documents, which the petitioners herein want to tender before the Court below, are beyond the pleading and, as such, he cannot be recalled to tender those documents. He further pointed out that from the order no. 151 dated 9th September 2015, it appears that the opposite party no. 1 has adopted the written objection filed by the heirs of opposite party no. 1. Accordingly, he submits that there is no reference of those documents in the said written objection. He also submitted that the medical documents filed by the petitioners herein in their supplementary affidavit does not disclose that at the relevant point of time the said witness was ill. Furthermore, since 13th October 2015, the opposite parties have availed six opportunities to call opposite party witness no. 1 but failed to bring the said witness nor made any attempt to recall such witness and, accordingly, the Court below rightly rejected the petitioners' prayer for recalling the OPW-1, which does not call for interference. Accordingly, he prayed for dismissal of the application.

The short question which is posed for consideration of this Court is whether the petitioner can be permitted to recall OPW-1 to tender documents which he wants to rely in support of his case.

While considering the issue, I am not unmindful to the objection of the opposite party that in spite of availing six opportunities, the petitioner herein failed to bring witness, whom he wants to re-examine but at the same time one of the essential elements of rule of law is it's procedure. To run a fair trial, both the party should get equal opportunities to place the documents to support

their respective contentions. Court in the interest of doing justice must see that a fair trial is attainable by both the parties of the suit than to give importance on technicalities.

In view of the facts and circumstances of the case and also considering the contention of the petitioners herein that due to illness, the opposite party could not examine the opposite party witness no. 1, if another opportunity to recall opposite party witness no. 1 be given to the petitioners herein, the highest prejudice that may cause to the preemptor/opposite party no. 1 would be that the matter would be disposed of on merit after contested hearing and after evaluating admissible documents filed by the parties and nothing more.

In such view of the matter, the order impugned dated 13th February 2018 is hereby set aside.

The petitioners herein are given one more opportunity to recall opposite party witness no. 1 and to conclude the evidence within four weeks from the date of communication of this order. In default the order impugned will be restored. However, the admissibility of documents in evidence, intended to be tendered by the petitioner herein shall be kept open for adjudication by the Trial Court and opposite party herein shall get opportunity to cross-examine the witness

It appears from the record that the matter is pending since long. The trial Court is requested to make expeditious disposal of the case and it shall make every endeavour to conclude the hearing of the entire proceeding preferably within a period of three months from the date of communication of the order, without grating unnecessary adjournment to either of the parties.

CO 1366 of 2018 is, accordingly, 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.)