

July 14, 2023
Sl. No.6
Court No.19
s.biswas

CO 2001 of 2023
Abhra Aich
vs.
Arati Paul and others

Mr. Partha Pratim Roy
Mr. Lakshminath Bhattacharya
... for the petitioner
Mr. Kushal Chatterjee
Mr. Shibjit Mitra
... for the opposite parties

This revisional application has been filed challenging an order dated May 4, 2023, passed by the learned Civil Judge (Junior Division), 4th Court, Alipore, South 24 Parganas in Ejectment Suit No.127 of 2017.

By the order impugned, the learned court below rejected the application of the defendant No.3 praying for liberty to cross-examine the plaintiff's witness, PW1. The learned court below rejected the application, inter alia, holding that the application filed by the defendants was redundant in view of the fact that his defence has been struck off and the order striking out the defence, had been upheld by the Hon'ble High Court.

Mr. Roy, learned advocate appearing on behalf of the petitioner, submits that the order suffers from perversity. Reliance has been placed on the decision of the Hon'ble Supreme Court in the case of **Modula India v. Kamakshya Singh Deo** reported in AIR 1989 SC 162. It is submitted that even if the

defence had been struck off by the court, the right to cross-examine the plaintiff's witness cannot be taken away.

Mr. Chatterjee, learned advocate appearing on behalf of the plaintiff/opposite party no.1, submits that the issue involved in this revisional application is not simpliciter whether the defendants would be allowed to cross-examine the plaintiff's witness or not.

According to Mr. Chatterjee, this suit had been fixed for ex parte arguments on February 6, 2023 on an application filed by the plaintiff. Upon contested hearing, the application was allowed. Thereafter, the defendant could not have asked for liberty to cross-examine the plaintiff's witness when the order fixing the suit for ex parte hearing had not been recalled.

According to Mr. Chatterjee, no such prayer was ever made. Hence, learned court below rightly rejected the application by which the substituted defendant no.3 had sought permission from the court to cross-examine the plaintiff's witness.

Relying on a decision of the Hon'ble Apex Court in the matter of **Arjun Singh v. Mohindra kumar and others** reported in AIR 1964 SC 993, Mr. Chatterjee submits that once the suit was decided to be heard ex parte, the learned court below had no

other option, but to complete the argument of the plaintiff and pass judgment.

Mr. Chatterjee, further submits that although the petitioner/substituted defendant no.3 filed an application praying for liberty to cross-examine the plaintiff's witness, but in the said application, no reasons had been assigned as to why such prayer was not made earlier. The defendant no.3 chose to waive his right by not coming at an earlier stage.

Heard the parties. The decision of **Arjun Singh** (supra) cited by Mr. Chatterjee, is not applicable in the facts of this case, inasmuch as, the Hon'ble Supreme Court had held that once the hearing had been completed and judgment had been reserved, the party opposing the suit could not come at such a later stage and pray for recalling of the order of ex parte hearing of the suit. In this case, the argument had not commenced. Hence, the petitioner is allowed to cross-examine the PW.

This court is of the view that the substituted defendant no.3 came into the proceedings later. The application filed by the plaintiff for ex parte hearing of the suit was objected to by the petitioner. Subsequently, when the suit was fixed for ex parte argument of the plaintiff, the petitioner once again approached the court by filing the application, so that he may be allowed to cross-examine the PW.

Right to cross-examine of the plaintiff, when defence has been struck off, has been upheld by the Hon'ble Apex Court. The defendant does not have any right to argue on other points or make out his own case. He may only deal with the plaint case.

Thus, one last opportunity should be given to the defendant no.3 to cross-examine PW. However, on account of the delay, the PW should be compensated with cost.

Reliance is placed on the decision of **Modula India** (Supra), where the limited right to cross-examine the plaintiff's witness has been upheld. Therefore, the defendant no.3 is permitted to cross-examine the plaintiff and to advance arguments on the plaint case. As the defence was struck off, the position of the defendant no.3 is that of a man who on account of non-compliance of laws, stands precluded from arguing his own case in the suit.

Thus, the order impugned is set aside. The order fixing the suit for ex parte argument is also set aside. The cross-examination of PW shall be completed in a day, to be fixed by the learned court below, provided the defendant no.3 pays cost of Rs.5000/- to the plaintiff or to the learned Advocate of the plaintiff, within a period of two weeks from date. Cost is being awarded on account of the delay and the harassment caused to the plaintiff. The

learned court below, thereafter, shall complete the hearing of the suit within two months. No unnecessary adjournments shall be given to the defendant no.3 on the next dates.

The revisional application is disposed of.

All the parties are directed to act on the basis of the server copy of the order.

Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Shampa Sarkar, J.)