

04.04.2023
Item No.3
Ct. No. 654
Aloke

**IN THE HIGH COURT AT CALCUTTA
Civil Revisional Jurisdiction**

**C.O. 2926 of 2022
with
IA No. CAN 1 of 2023
IA No. CAN 2 of 2023**

**M. Mukherjee @ Sri Mrinal Kanti Mukherjee
...
Vs.
A. Sarkar @ Amit Sarkar & Anr.**

Mr. Mrinal Kanti Mukherjee
... for the petitioner (in person)
Mr. Subhajyoti Chandra

Mr. Wasim Ahmed
Mr. Md. Kashif
Mr. Pritam Chakraborty
... for the Plaintiffs

This revisional application has been filed by defendant-petitioner under Article 227 of the Constitution of India challenging the order dated 30th July, 2022 passed by learned Civil Judge (Junior Division), Kakdwip, District – South 24 Parganas in Misc. Case No.17 of 2011 rejecting the application of the petitioner-defendant for cross-examination of P.W.1 on recall.

The brief fact of the case is that the opposite parties-plaintiffs filed a suit being, Title Suit No.71 of 2011 for demarcation and permanent injunction. In the said suit the plaintiffs filed an application under Order XXXIX Rule 1 and 2 read with Section 151 of

the Civil Procedure Code for temporary *ad interim* injunction. By order dated 17th May, 2011, the learned Trial Court granted *ad interim* injunction. Alleging violation of such *ad interim* order of injunction, the plaintiffs filed an application under Order XXXIX Rule 2A of the Code of Civil Procedure being, Misc. Case No.17 of 2011. In the said application the plaintiffs examined witnesses and defendant also adduced his evidence. On 30th July, 2022 the defendant filed an application for recalling P.W.1 for cross-examination. The said application was rejected by the learned Trial Court. Hence, this revision.

Mr. Mrinal Kanti Mukherjee, learned advocate (in person) submits that the defendant did not get sufficient opportunity to cross-examine P.W.1 which led to filing such application for recall of P.W.1 for cross-examination. Since, at that point of time, the petition for Special Leave to Appeal was pending before the Hon'ble Supreme Court he could not take appropriate steps in that regard. He further referring to a decision of Hon'ble Supreme Court passed in ***Vidhyadhar Vs. Manikrao & Anr.*** reported in ***AIR 1999 SC 1441*** and an unreported decision of Hon'ble Madras High Court passed in ***C.R.P.(PD)***

No.2182 of 2019 & C.M.P. No. 2182 of 2019

dated 20.07.2020 (**G. Balaji & Anr. Vs.**

Saravanasamy) submitted that it is a settled

principle of law that adverse presumption arises

in a case where the witness refuses to step into

the witness box to face cross-examination. The

prayer of the petitioner-defendant is made out

of bona fide circumstances and there cannot be

any ground to refuse such innocuous prayer for

cross-examining a witness on recall. In the light

of his aforesaid submissions, he prays for

setting aside the order of the learned Trial

Court and granting opportunity to the

petitioner-defendant for cross-examination of

P.W.1 on recall.

In reply to the contentions raised on

behalf of the opposite party Mr. Wasim Ahmed,

learned advocate, submits that Misc. Case

under Order XXXIX Rule 2A is pending for more

than 12 years and the petitioner-defendant has

taken adjournments one after the other which

is resulted in delay in disposal of the Misc.

Case. He further submits that this Court in

C.O. No.662 of 2014 passed specific directions

for expeditious disposal of the Misc. Case.

However, till date the same could not be

disposed of. He further indicates that the

petitioner-defendant got ample opportunity to

cross-examine P.W.1. However, he declined to cross-examine the witness P.W.1. Further the facts and circumstances of the case does not disclose that the witness refused to step into the witness box, thus the proposition of law advanced on behalf of the defendant-petitioner does not apply to the facts and circumstances of the case. In the light of his aforesaid submissions, he prays for dismissal of the revisional application. He also files copy of the order-sheets of the learned Trial Court which is taken on record.

On going through the order impugned dated 30th July, 2022, it is found that the cross-examination of P.W.1 was declined by the learned advocate for the opposite party. It has also been taken note by the learned Trial Court that vide order no.111 dated 17th November, 2015 the defendant (opposite party) was given sufficient opportunity to cross-examine P.W.1, however, on such date, the cross-examination of P.W.1 was declined. The impugned order further reveals that the examination of other witnesses, namely, P.W.2 proceeded and was cross-examined in full and discharged on 30th November, 2015. Thereafter, witness on behalf of defendant (opposite party) has also proceeded. This application for recall of P.W.1

for cross-examination has been filed after a considerable period. The proposition of law advanced on behalf of the petitioner passed in ***Vidhyadhar (supra)*** relates to a situation where a party to the suit does not appear into the witness box and state his own case on oath and does not offer himself to be cross-examined by the other side, in that event a presumption would arise that the case set up by him is not correct. Similarly, fact in respect of decision of Hon'ble Madras High Court in ***G. Balaji (supra)*** relates to a witness not submitting himself for cross-examination. Needless to mention that the facts and circumstances of the case at hand does not show that P.W.1 refused to face cross-examination rather on the date of his examination he was present but the cross-examination was declined by the petitioner-defendant. That being the position the proposition of law advanced by defendant-petitioner is not applicable to the facts at hand.

In the light of aforesaid discussions, I find no impropriety in the impugned order passed by the learned Trial Court.

The revisional application being No. **C.O. 2926 of 2022** stands dismissed. The impugned order of the learned Trial Court is affirmed.

All connected application, if any, stands disposed of.

Interim order, if any, stands vacated.

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

(Bivas Pattanayak, J.)