

27.6.2023
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Ct. no. 652
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CO 3506 of 2019

Dr. Arunabha Sarkar
Vs.
Dr. Amitava Sarkar

Ms. Sarmistha Ghosh Sarma ...for the Petitioner

Mr. Probal Kr. Mukherjee, Sr. Adv.
Ms. Shebatee Datta ...for the Opposite party

Being aggrieved and dissatisfied with the order dated 12.6.2019 passed by the learned Civil Judge, Senior Division, 2nd Court, Alipore, South 24 parganas in Title Suit no. 56 of 2013, present application under Article 227 of the Constitution of India has been preferred.

The petitioner contended that in the said suit, the plaintiff has prayed for ejectment, recovery of possession and damages against the petitioner. The petitioner contested the said suit by filing written statement along with counter-claim denying all material allegations made therein and in the said counter-claim, he has specifically contended that the deed of gift is a fraudulent deed and the plaintiff cannot claim any right title or interest in the suit property by dint of fraudulent deed of gift dated 28th July, 2010. The Opposite party/plaintiff filed written statement against that counter-claim

On 4th January, 2017, the defendant/petitioner herein prayed for issuance of a summon to advocate, Souhitya Ghosh to adduce further evidence on behalf of defendant and said application was allowed by the court below and summon was issued to said advocate to appear before court below as DW-3 on 11.1.2017. Plaintiff/opposite party opposed the issuance of summon to Souhitya Ghosh as he is conducting advocate of plaintiff. On 16th January, 2017 petitioner herein prayed for reissuance of summon to Souhitya Ghosh claiming his evidence is vital for unearthing the circumstances surrounding the alleged execution of two deeds of gift and one will as he had drafted those documents.

The opposite party/plaintiff filed an application under Section 151 of the Code to vacate the order dated 4th January, 2017 passed by the court below and in the said application, the opposite party submitted that the learned court below has allowed the defendant's petition which itself is defective as because the purpose for which the witness was proposed to be summoned was not mentioned in the defendant's application and thereby they have suppressed as to why the said witness is required to be examined or how his evidence is material.

On March 14, 2017 petitioner filed application to reissue the summon to said advocate to appear as defendant's witness no. 3. Learned court below by an order dated 8th August, 2017 was pleased to allow

plaintiff's aforesaid application under Section 151 of the Code and rejected defendant's aforesaid application dated March 14, 2017.

Being aggrieved and dissatisfied by the order dated 8th August, 2017, the petitioner preferred a revisional application before this court being C.O. 3868 of 2017 and when such revisional application came up for hearing before this court on 14th January, 2019, this court was pleased to dispose of the said application by directing the court below to hear defendant's application under Order XVI rule 1 of the Code afresh and to pass reasoned order. When the said application again came up for hearing before the court below on 12th June, 2017, the learned court by the impugned order, has been pleased to reject the said application.

Learned counsel for the petitioner submits that the court below had acted illegally and with material irregularity in rejecting the said application. The defendant/petitioner had sought for issuance of summon upon the said advocate, Souhitya Ghosh in his capacity as draftsman of two gift deeds and one will executed by Late Ajit Kumar Sarkar on 28th July, 2010 and not in any other capacity. Learned court below ought to have considered that since these documents have been drafted by advocate, Souhitya Ghosh, his evidence is therefore essential for a clear understanding of the circumstances surrounding the alleged execution of two gift deeds and

one will. Accordingly, said witness is required to be examined and order impugned being whimsical and arbitrary, is liable to be set aside.

In this context, the petitioner has relied upon a judgment in the case of **Donald Weston and two others vs. Peary Mohal reported in 18 CWN 185.**

Learned counsel for the opposite party has pointed out application dated 4th January, 2017 and contended that the said application is neither supported by affidavit nor verified and as such it has not been made in proper form. Moreover, from the four corners of the said application, it does not appear as to why said witness is required to be examined in the present case. He strenuously argued that unless the defendant/petitioner discloses the reason for summoning the person as witness such prayer cannot be allowed because advocate Souhitya Ghosh whom the petitioner wants to produce as defence witness by issuance of summon, is the learned advocate representing the plaintiffs in the court below and if he is compelled to depose in this case unnecessarily on behalf of the defendants, then plaintiff will not get the assistance of said advocate in future and it will cause injustice upon the plaintiff.

In this context, he relied upon a judgment in the case of **Kokkanda B. Poondacha and others vs. K.D. Ganapathi and Another** reported in **(2011) 12 SCC 600** and two other judgments by the High court of Delhi in the

case of **Amitabha Sen, Dr. vs. Sports World International Ltd. & Ors.** reported in **2008 (101) DRJ 528** and another judgment of High Court of Bombay in the case of **Sanjay Sham Bagade and another vs. Ramesh Hari Madan and others** reported in **2014 (5) Mn.L.J 321.**

I have considered the submissions made by both the parties. It is not in dispute in the present case that the impugned deed of gift has already been marked as exhibit on proof and the application dated 4.1.2017 itself discloses that the evidence of defendant namely DW2 as already been closed on 8.12.2016.

On being asked by the court, it is submitted that the parties in their pleading has not attributed any role of such advocate for which his examination is necessary being the draftsman. Suit was filed in 2011. Though it is not submitted before me when advocate Souhitya Ghosh was appointed as plaintiff's advocate but it is not the case of petitioner before this court that he ever objected the appointment of Mr. Souhitya Ghosh on the ground that he is interested in the subject matter of the suit.

It is clear from Order XVI rule 1(3) that a witness who is not a listed witness, can be summoned only when the party intends to call him as witness, shows sufficient cause for the omission to mention the name of such witness in the said list. From the petition dated 4.1.2017, it is palpably clear that the defendant/petitioner has not

cited any reason as to why he wants to call such person as witness, he only mentioned that the petitioner wants to adduce further evidence on the next date of hearing and the court may kindly issue summon upon Souhitya Ghosh, Advocate, Alipore Judges Court, Calcutta to adduce evidence and the summons may be issued at parties own risk but why such witness is required to be brought before court to depose, has not been disclosed in the petition dated 4.1.2017.

However, in the present application, the defendant has contended that admittedly the said advocate, is the draftsman of the deed of gift and as such his evidence is essential for a clear understanding of the circumstances surrounding the alleged execution of two gift deeds and one will by the deceased.

It is well settled in view of **Kokkanda B. Poondacha and others(supra)** that an advocate cannot ordinarily withdraw from engagement without sufficient cause and without giving reasonable and sufficient notice to the client. If the advocate has reason to believe that he will be a witness in the case, the advocate should not accept a brief or appear in the case. Paragraph 11 and 12 of the said judgment is relevant in this context, which may be reproduced below:-

“11. The next question which needs consideration is whether a litigant filing the list of witnesses is bound to indicate, howsoever briefly, the relevance of the witness to the subject-matter of the suit, etc., and, in any case, one party to the proceedings cannot cite the advocate representing the other side as a witness and thereby deprive the latter of the services

of the advocate without disclosing as to how his testimony is relevant to the issues arising in the case. In Mange Ram v. Brij Mohan [(1983) 4 SCC 36] this Court interpreted Order 16 Rules 1(1), (2) and (3) CPC and observed: (SCC pp. 41-42, para 9)

“9. If the requirements of these provisions are conjointly read and properly analysed, it clearly transpires that the obligation to supply the list as well as the gist of the evidence of each witness whose name is entered in the list has to be carried out in respect of those witnesses for procuring whose attendance the party needs the assistance of the court.”

“12. *At this stage, we may also advert to the nature of relationship between a lawyer and his client, which is solely founded on trust and confidence. A lawyer cannot pass on the confidential information to anyone else. This is so because he is a fiduciary of his client, who reposes trust and confidence in the lawyer. Therefore, he has a duty to fulfil all his obligations towards his client with care and act in good faith. Since the client entrusts the whole obligation of handling legal proceedings to an advocate, he has to act according to the principles of uberrima fides i.e. the utmost good faith, integrity, fairness and loyalty.”*

The parties, seeking the summon of a person as witness, have to specifically indicate for which he or she is proposed to be summoned while issuing summon, because in order to adjudicate such prayer, the court will have to apply his mind in a judicious manner. In the absence of petitioner showing sufficient cause, he cannot be allowed to examine the witness even under Rule 1A of Order XVI of the Code. Unless it is disclosed as to why it is necessary to summon the witness for which the applications have been moved by petitioner, court is not in a position to decide whether summoning of witness is required to adjudicate real controversy between the parties. Court is not supposed to allow every application for summoning of non-listed witness.

In such view of the matter learned court below has rightly come to the conclusion that unless the defendant

assigned reason in the application as to why he has cited learned counsel for the opposite party as witness and wishing him to be examined in his favour, it would not be justified to allow prayer of the defendant when the deed of gift as a whole has been marked as exhibit and one attesting witness has deposed to prove the deed.

In view of above, I do not find any reason to interfere with the order impugned.

Accordingly, C.O. 3506 of 2019 is dismissed.

It appears that the suit was filed in the year 2013 and accordingly learned court below is directed to make every endeavour for expeditious disposal of the suit and to conclude the entire proceeding preferably within a period of three months from the date of communication of the order.

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

(Ajoy Kumar Mukherjee, J.)