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29.11.2023

C.O. No. 3807 of 2022

**Elkom Enterprises Private Limited
Vs.
Sri Sougata Banerji & Anr.**

With

C.O. No. 4058 of 2023

**Elkom Enterprises Private Limited
Vs.
Sri Sougata Banerji & Anr.**

Mr. Haradhan Banerjee, Sr. Adv.,
Mr. Amar Nath Das,
Ms. Pampa Ghosh ... For the petitioners.

Mr. Saunak Bhattacharyya,
Mr. Sounak Mondal,
Mr. Abhirup Halder ... For the Opposite Parties.

These two revisional applications are arising out of the selfsame suit being Ejectment Suit No. 68 of 2014, as such are taken up together for analogous hearing and disposal.

The said suit is pending before the 10th Court of learned Civil Judge (Senior Division) at Alipore, District – 24 Parganas (South). The defendant in the said suit is the petitioner of both the revisional applications.

The learned Trial Judge by the order dated November 14, 2022 has dismissed an application filed by the petitioner under Order XVIII Rule 17 of the Code of Civil Procedure praying recall of two plaintiffs' witnesses(P.W.₁ and P.W.₂) for further cross

examination. The said order is the subject matter of challenge in C.O. 3807 of 2022.

The learned Trial Judge by the order dated September 21, 2023 has refused to stay the further proceedings of the suit on the ground of pendency of the aforementioned revisional application before the High Court. The said order is under challenge in C.O. 4058 of 2023.

A supplementary affidavit to C.O. 3807 of 2022 is filed on behalf of the petitioner, let it be kept with the record.

Mr. Haradhan Banerjee, learned Senior advocate for the petitioner submits that the erstwhile advocate of the petitioner failed to cross-examine the P.W.₁ on most vital issues involved in the suit, as such the re-examination of the said witness was felt necessary, accordingly further prayer for recall of the said witness was made and to prove the notice of Commission, the further cross-examination of the Advocate Commissioner(P.W.₂) was sought for but the learned Trial Judge without considering the relevance or the necessity of such cross-examinations has dismissed the application of the petitioner.

He further submits that the learned Trial Judge has failed to appreciate the scope of re-examination and direction of re-examination contemplated under Section 138 of the Indian Evidence Act, 1872, he submits that the re-examination is a matter of right to

a party to the suit, the permission of the Court for such re-examination is necessary only when it relates to a new matter but in the present case, the petitioner never intended to recall the said witnesses on any new matter. Mr. Banerjee, in support of the said contention places reliance on a decision of the Single Bench of this Court in the case of ***Raghu Nath Biswas vs. Rabi Ram Chandra Jaladhar & Ors.***, reported in **2008 (1) Calcutta Law Journal (Cal) 851** and the decisions of the Hon'ble Supreme Court in the case of ***Rammi alias Rameshwar vs. State of Madhya Pradesh*** reported in **AIR 1999 SC 3544** and in the case of ***Arvind Singh vs. State of Maharashtra***, reported in **(2021) 11 SCC 1**.

Mr. Sounak Bhattacharyya, learned advocate for the plaintiffs/opposite parties submits that the ejectment suit on the ground of reasonable requirement is pending since 2014, after much effort, the suit could be fixed for peremptory hearing. The evidence from the side of the plaintiffs was closed on February 15, 2019 and the P.W.₁ and P.W.₂ were discharged upon cross-examination in full. The failure of the erstwhile learned advocate to put satisfactory questions in cross-examination is no ground for recalling of the said witnesses. He places reliance on the decision of the Hon'ble Supreme Court in the case of ***Ram Rati vs. Mange Ram (Dead) Through Legal Representatives & Ors.*** reported in **(2016) 11 SCC**

296 to contend that power under Order XVIII Rule 17 of the Code to recall a witness is a discretionary power of the Court but to be used sparingly.

I have heard the learned advocate for the parties and have perused the materials on record.

The plaintiffs are seeking the eviction of the defendant from the suit premises *inter alia* on the grounds that they require the said premises for their use and occupation.

The defendant in his lengthy application under Order XVIII Rule 17 of the Code which consists more than twenty pages has leveled different allegations against his erstwhile advocate to justify his prayer for recalling of the said witnesses. It is rightly submitted by Mr. Bhattacharyya that the said allegations do not qualify the requirement of Order XVIII Rule 17 of the Code.

‘Re-examination’ as defined under Section 137 of the Indian Evidence Act, 1872 is the examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

The argument of Mr. Banerjee that there is no fetter to the right of the party to seek re-examination of a witness without the permission of the Court when it is not related to a new matter, is completely misleading inasmuch as it is not a case of re-examination, in the present case, the defendant is praying cross-

examination of the plaintiffs' witnesses, as such the direction of re-examination as contemplated under Section 138 of the Indian Evidence Act, 1872 has got no manner of application in respect of the prayer of the defendant. The decisions cited by Mr. Banerjee therefore are entirely misplaced.

The power of the Court under Order XVIII Rule 17 of the Code to recall witness is discretionary and shall not be used to fill up any omission or lacuna as has been held by the Hon'ble Supreme Court in the case reported in **(2016) 11 SCC 296 (supra)** cited by Mr. Bhattacharyya.

The ejectment suit is pending for about ten years, the application for recalling of the said witnesses is aimed to cause further delay in disposal of the said suit.

The order rejecting the said application under Order XVIII Rule 17 of the Code dated November 14, 2022 therefore does not call for any interference, in consequence, challenge to the order dated September 21, 2023 has become infructuous.

For the reasons discussed above, C.O. 3807 of 2022 and C.O. 4058 of 2023 are dismissed with **costs of Rs. 25,000/-** to be paid by the petitioner to the opposite parties within a week from date, in default the evidence of the defendant in the suit shall stand closed.

The disposal of the suit be expedited without granting any unnecessary adjournment to either of the parties.

Urgent Photostat certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(Biswajit Basu, J.)