

**IN THE HIGH COURT AT CALCUTTA
JALPAIGURI CIRCUIT BENCH
CIVIL APPELLATE JURISDICTION
Appellate Side**

Present:

The Hon'ble Justice Ajay Kumar Gupta

CO 122 OF 2023

Dipankar Barua

Versus

Nikash Barua & Ors.

For the Petitioner : Mr. Subham Ghosh, Adv.

For the Opposite Party : Mr. Bikramaditya Ghosh, Adv.

Heard on : 12.10.2023

Judgment on : 17.10.2023

Ajay Kumar Gupta, J:

1. This is an application filed under Section 227 of the Constitution of India by the petitioner praying for setting aside an order dated 31st September, 2023 passed by the learned Additional District Judge (2nd Court), at Siliguri in OC (Probate) Suit No. 03 of 2012 (Sri Nikash Barua Vs. Sri Dipankar Barua) thereby an application under Order XVIII Rule 17 read with Section 151 of the CPC, 1908 has been rejected. It is the allegation that Ld. Court acted material irregularity while exercising its jurisdiction without appreciating the document i.e. Deed sought to be tendered and exhibited by the petitioner for effective adjudication of OC (Probate) Suit No. 03 of 2012 pending before the learned Additional District Judge (2nd Court), Siliguri.

2. It is the contention of the petitioner that the Misc. Judicial (LA) Case No. 16 of 2011 became registered and renumbered as OC (Probate) Suit No. 3 of 2012 after it became contentious. The petitioner is the objector of the said suit as the mother of both parties did not execute any Will on 05.05.1992. She died intestate leaving behind her legal heirs and successors. This fact has been admitted and disclosed by the legal heirs and successors of the testatrix while executing and registering a deed of conveyance dated 27.03.2002 and the said deed was registered in the office of Additional District Sub Registrar at Siliguri and recorded in Book

No. 1, Volume No. 45 at pages 351 to 362, being no. I-1872 for the year 2002. In the said deed, it was declared by all the legal heirs and successors that Usha Rani Barua died intestate. So question of alleged will executed by the said testatrix, Usha Rani Barua does not arise at all. This fact is required to be brought before the learned Court below for effective and proper adjudication of the probate suit because the alleged will is not genuine and subsequently manufactured by the Opposite party. Accordingly, an application under Order XVIII Rule 17 read with Section 151 of the Civil Procedure Code has been filed by the present petitioner seeking for recall of the Petitioner/defendant as D.W.1 for the purpose of tendering and exhibiting the said deed of conveyance.

3. After hearing the said application, the learned Additional District Judge rejected the prayer. Hence, the instant revisional application as the Ld. Court did not considered the case of the Petitioner and out rightly rejected though opposite party has an option to cross examination of the witness. It will assist in rendering justice and to secure the end of justice, as such deed of conveyance is required to be produced. There is no chance to cause prejudice to the opposite party if the prayer of the petitioner would be allowed. He relied judgments in support his contention that such application could have allowed even at belated stage and permitted to produce such document at the time of examination of the witnesses and

even if there is some delay, trial court can impose costs rather than to decline production of documents. These judgments are as follows:-

- i.** Levaku Pedda Reddamma & Ors. Vs. Gottumukkala Venkata Subbamma & Anr., 2022 (3) Indian Civil Cases 649 (S.C.).
- ii.** K.K. Velusamy Vs. N. Palanisamy (SC), 2011 (11) SCC 275.
- iii.** M/s. Max Industries and Ors. Vs. State of West Bengal & Ors. (Calcutta), 2022 (4) ICC 333.

4. He further submitted that the Hon'ble Supreme Court as well as High Court on several occasions allowed such prayer even in Section 151 CPC, which recognizes the discretionary inherent power of every Court for rendering justice in accordance with law and for securing the end of justice and prevent abuse of its process because the opposite party will get an opportunity to undertake cross-examination of the said witnesses to verify the veracity, authenticity and genuineness of the document.

5. On the other hand, learned advocate appearing on behalf of the opposite party raised objection of such prayer and further submitted that the petitioner had knowledge about the said deed of conveyance because he is one of the legal heirs and at the time of execution and registration of the said deed of conveyance dated 27.03.2002, he was very much present. He had been knowledge about the contents of the sale deed even then he

did not take such plea in his written objection. He prayed for recalling of witness to bring said document at belated stage only to frustrate the proceeding. The intention of the petitioner is only to delay the proceeding. Apart from that, the deed is not at all necessary for adjudication of letters of administration. Letters of administration filed in the year 2011 but he wants to incorporate that deed of conveyance in the year 2022 which is not at all permissible in the law when the objector is not due diligence while conducting the case. While deciding the case of letters of administration, it is only required to prove genuineness of will executed by the testatrix by the attesting witness. Even for the sake of argument, if the averment made in the said deed that the testatrix died intestate that would not preclude from filing a case for probate or letter of administration if any will discovers by the party. Therefore, the learned Additional District Judge rightly rejected the said application as such interference by this court does not require.

6. Heard submissions advanced by parties and on perusal of the record as well as the impugned order under challenge in this revisional application, this Court finds the petitioner wants to recall the witness and produce a document i.e. deed of conveyance date 27.03.2002 at the stage of argument with a contention that the legal heirs including himself declared that Usha Rani died intestate on the date of execution and/or

registration of Deed of conveyance. Deed of conveyance was relating to the properties of Usha Rani Barua. In the said deed of conveyance, all the legal heirs of the deceased Usha Rani Barua including the petitioner executed and registered the same on 27.03.2002 contending therein that Usha Rani died intestate. Knowledge of such averment is also known to the petitioner while executing and registering the deed in the year 2002 but he wants to produce the said deed of conveyance in the year 2022 by filing of application under Order XVIII Rule 17 read with Section 151 of CPC at the stage of argument. Furthermore, such plea has not been taken in his written objection at the time of filing. So, without pleading it would not be allowed to adduce evidence to cover such lacuna at belated stage. The case is pending between the parties with regard to the letter of administration of a will in question. Petitioner has to be established and to be proved as per the law irrespective of title of the schedule property.

7. It would be appropriate to mention the provision of Order XVIII Rule 17 for ready reference:

“Court may recall and examine witness.- *The Court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit.”*

8. After perusal of the aforesaid provision, it appears Order XVIII Rule 17 of the code of civil procedure is not a provision intended to enable the parties to recall any witness for their further examination-in-chief or cross-examination or to place additional material or evidence not produced when the evidence was being recorded. Order XVIII Rule 17 of the code of civil procedure is primarily a provision enabling court to clarify any issue or doubt. But where the application is found to be bonafide and where the additional evidence oral or documentary will assist court to clarify the evidence on the issues and will assist in rendering justice and court is satisfied that non-production earlier was for valid and sufficient reasons. Court may exercise its discretion to recall the witness or permit the fresh evidence. Here the fact is different. Petitioner wants to recall the witness to produce a document i.e. Deed of Conveyance dated 27.03.2002 after expiry of more than 11 years of filing suit. He has not raised this issue at the time of filing his written objection or at the time of cross-examination of the witnesses examined by the opposite party. It is not for the purpose of assisting the Court in rendering justice or clarify of any issue or doubt raised by the Ld. Court.

It cannot be allowed in a proceeding after deletion of Order XVIII Rule 17A, the Court has limited power for examination or cross-examination or to adduce additional materials or evidence. Court can

exercise its discretion to permit reopening of the evidence and/or recalling of witness for further examination or cross-examination after evidence laid by the parties is concluded and arguments have commenced or even when arguments have concluded and case has been reserved for judgment but that should be bonafide and for securing justice. Another result for its deletion was the misuse thereof by the parties to prolong the proceeding under the pretext of discovery of new evidence. It is admitted facts that the suit is pending for more than 11 years but petitioner neither take such plea in his written objection nor put such question at the time of examination-in-chief or cross examination of the witnesses. Hence, it seems petitioner is trying only to prolong the proceeding under the pretext of unintentional delay due to demise of former counsel.

9. Under such circumstances, this case is not fallen within the referred judgments and facts and circumstances of the instant case, is different from the referred case.

10. Accordingly, I do not find any illegality, perversity in rejecting application under XVIII Rule 17 of the CPC. Therefore, this Civil Revision has devoid of merit and requires to be dismissed. The order passed by the learned Additional District Judge, 2nd Court, Siliguri in OC (P) 3/2012 is hereby affirmed.

11. Accordingly, **C.O. 122 of 2023** is, thus, dismissed with above observations.

12. There shall be no order as to costs.

13. Let the judgment and order of this Court be communicated to the Trial Court for information.

14. Urgent photostat certified copy of this Judgment , if applied for, be supplied to the parties expeditiously upon compliance of all required formalities.

(Ajay Kumar Gupta, J)

P. Adak (P.A.)