

SL.9
03.12.2024
Court No.3
S. Gayen

**IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
APPELLATE SIDE**

CO 151 of 2023

**Goutam Buddha Das
Versus
Ashis Kumar Das & Anr.**

Mr. Bhaskar Roy Mahashaya
...for the Petitioner.

Mr. Bikramaditya Ghosh
Ms. Supriya Singh
...for the Opposite Party Nos. 1 & 2.

1. Challenging the Order No.70 dated 15th September, 2023 passed by the learned Civil Judge (Junior Division), Jalpaiguri in TS No. 29 of 2013 renumbered as TS No. 1249 of 2014, whereby the application filed by the defendants under Order 26 rules 1 and 4 read with Section 151 of the Code of Civil Procedure (for short 'the Code') had been allowed, the revisional application has been filed.

2. To understand the scope of the aforesaid application, it is necessary to record the facts leading to the institution of the above petition under Order 26 Rules 1 and 4 of the Code. The instant suit has been filed by the plaintiff against his brother, Ashis Das and his sister, Smt. Shyama Das, the parties are interrelated. It is a plaintiff's case that his mother, Smt. Golap Rani Das, since deceased, during her life time, had executed a deed of gift concerning 4 decimals of land in respect whereof she was the absolute owner, details of the said land are set out in the schedule of plaint. Since, the defendant Nos. 1 and 2 were claiming interest over the suit property on the basis of a deed of gift executed by their mother Smt. Golap Rani Das, allegedly executed on 4th October, 2010, the instant suit had been filed praying for a declaration of title as also for a declaration that the deed of gift dated 4th October, 2010 registered with the Office of the ADSR, Jalpaiguri is illegal, invalid and void as also for other consequential relief.
3. In the aforesaid suit, an application was filed by the defendants by invoking the provisions of Order 26 Rules 1 and 4 read with Section 151 of the

Code praying for a direction to appoint a commissioner for the purpose of taking evidence of one, Sri Salil Kumar Das who happens to be the attesting witness in the deed of gift executed in favour of the plaintiff.

4. Mr. Roy Mahashaya, learned advocate representing the plaintiff/petitioner by drawing attention of this Court to the Order No. 70 dated 15th September, 2023, would submit that although the learned Court is empowered to issue an order under the provision of Order 26 Rules 1 and 4 of the Code, prior to issuing such direction, the learned Court is duty bound to record his satisfaction as regards, the conditions set forth for issuing direction for commission to examine the witness. He would also submit that the application filed by the defendants under Order 26 Rules 1 and 4 of the Code does not disclose particulars of any medical certificate in support of the contention that the witness is unable to attend before the Court. He would submit that the learned Judge also did not record his satisfaction in the order that the witness is unable to attend Court on account of sickness or any infirmity. He submits that the order passed by the learned

Judge is a mechanical order, the same cannot be sustained and should be set aside. In support of his submission he relied upon a judgment delivered by a Coordinate Bench of this Court in the matter of ***Adhir Chandra Banerjee vs. Smt. Lilabati Mukherjee*** reported in ***AIR 1993 Cal 296***.

5. Mr. Ghosh, learned advocate appearing on behalf of the defendants/opposite parties, on the other hand, would submit that the order impugned is a discretionary order and the learned Judge has exercised his discretion in the facts of the case. There is no infirmity in the order. A specific case had been made out in the petition that the witness is an aged person and due to physical illness, he is confined to bed. The learned Court had accepted such contention and had allowed the petition. No interference is thus called for.
6. Having heard the learned advocates for the respective parties and considering the materials on record, it would transpire that the learned Court had allowed the witness to be examined on commission, on the basis of an application filed under Order 26 Rules 1 and 4 of the Code. It is true that the aforesaid order passed by the learned

Judge is a discretionary order. It is also equally true that a discretionary order is ordinarily not to be interfered with, but at the same time, it must be noted that while allowing an application for commission, the learned Judge must record his satisfaction as regards, the existence of the circumstances under which the witness is being allowed to be examined on commission. Such recording of satisfaction may not be elaborate but a finding as regards such satisfaction must be noted in the order.

7. Admittedly, in this case a perusal of the aforesaid order, as rightly pointed out by Mr. Roy Mahashaya, learned advocate for the petitioner, would demonstrate that the learned Court did not record any satisfaction as regards the existence of the circumstances under which the witness was being allowed to be examined on commission. Though, the order is a discretionary order, such discretion ought to have been exercised judiciously.
8. The aforesaid order in my opinion which does not record satisfaction as to the existence of sickness or infirmity of the witness, cannot be construed to

be a valid exercise of discretion by the learned Court.

9. The aforesaid order directing the witness to be examined in commission thus appears to be perverse. The same cannot be sustained and is accordingly set aside.
10. The matter is remanded back to the learned Civil Judge (Junior Division), Jalpaiguri to reconsider the aforesaid issue afresh. At this stage, Mr. Ghosh prays for leave to rely on additional documents to establish the factum of infirmity and or sickness of the witness.
11. Having considered the submissions, I am of the view, in the event, the defendants/opposite parties are so interested, such documents can be filed before the learned Court on or before the matter is taken up next by way of firisti, with an advanced copy thereof to the learned advocate representing the petitioner/plaintiff before the learned Trial Court. It is expected that the learned Civil Judge (Junior Division), Jalpaiguri shall hear out the aforesaid application under Order 26 Rules 1 and 4 of the Code as expeditious as possible, preferably within a period of eight weeks from the date of communication of this order.

12. With above observations and directions the civil revisional application is allowed.

13. There will be, however, no order as to costs.

(Raja Basu Chowdhury, J.)