

(2014) 11 GAU CK 0014
In the Gauhati High Court
Case No : CRP 188/2014

Begum Bahar

APPELLANT

Vs

Motiur Rahman

RESPONDENT

Date of Decision : 12-11-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 16 Rule 1, Order 16 Rule 1(3), Order 16 Rule 1(A), Order 18 Rule 4, 30
Constitution of India, 1950 — Article 227
Evidence Act, 1872 — Section 67

Citation : AIR 2015 Guw 32 : (2014) 5 GLT 211

Hon'ble Judges : Nishitendu Chaudhury, J

Bench : Single Bench

Advocate : R.P. Singh, N.T. Nath and S.S. Singh, Advocate for the Appellant;
H.R. Choudhury, M. Bora and F.U. Borbhuiya, Advocate for the Respondent

Judgement

Nishitendu Chaudhury, J.—By this application under article 227 of the Constitution of India, defendants in Title Suit No. 340 of 2014 of the Court of learned Munsiff No. 3, Kamrup (M), Guwahati has challenged the order dated 10.03.2014 whereby prayer of the petitioners/defendants for examining one Suratan Nessa as DW3 was rejected by the learned trial Court.

2. Predecessor of the opposite parties No. 1(a) to 1(f) as sole plaintiff instituted Title Suit No. 340/2014 in the Court of learned Munsiff No. 3, Kamrup(M) at Guwahati against the predecessor of the present petitioner and others praying for a decree for declaration of his right of pre-emption in respect of Schedule-B land alongwith other prayers including prayer for adjudging sale deed No. 3766/2009 dated 01.04.2009 as null and void, illegal, inoperative, etc. On being summoned the defendants appeared and by filing written statement contested the claim of the plaintiff not only in regard to pre-emption but also as to legality and validity of the aforesaid sale deed. Issues were framed and parties were put to prove their respective cases. Plaintiff examined his witnesses and thereafter the case was fixed for evidence by the defendants' side. Defendants filed the list

of witnesses which did not contain the name of Suratan Nessa. But after DW1 and DW2 were examined, the DW2 was cross-examined and discharged and while cross-examination of DW1 is pending, defendants filed an application on 28.09.2012 praying for examining Suratan Nessa as DW3 in this case on the ground that she was the identifier in the concerned sale deed. Plaintiff filed objection against this application and the learned Court after hearing both sides passed the impugned order on 10.03.2014 observing that the application for examining Suratan Nessa as DW3 having been filed late and understandably to fill-up the lacuna the same was liable to be rejected and it was accordingly rejected. The learned Court also held that the defendants were at liberty to file such an application at the threshold and in that event the case would have been different.

3. I have heard Mr. R.P.N. Singh, learned counsel for the petitioners and Mr. H.R.A. Choudhury, learned senior counsel assisted by Mr. F.U. Borbhuiya, learned counsel for the opposite-parties. I have also perused the relevant documents placed by the learned counsel for the parties.

4. Factually the evidence of the defendants is yet to be complete. Evidence of the defendants has not yet been closed and DW1 is to be cross-examined on the next date. So during continuance of the evidence by the defendants' side, present application under Order XVI Rule 1(3) of the Code of Civil Procedure has been filed by the defendants for examining a witness who is none other than the identifier in the concerned sale deed which is subject matter of the main title suit. Citing Suratan Nessa as witness, therefore, cannot be said to be an afterthought but a mere lapse on the part of the defendants to mention her name in the list of witnesses originally filed in due course. Under the normal practice the names of attesting witnesses and identifiers always find place in the list of witnesses to prove execution of the sale deed in compliance of the provision of Section 67 of the Indian Evidence Act. Under the provision of Order XVI Rule 1, there is a total prohibition against granting leave to a party to examine witness beyond the list of witnesses. Order XVI Rule 1(3) empowers a Court to permit any party to examine witness beyond list if the Court is satisfied that there was sufficient cause for omission or to mention name of such witness in the list. In application dated 28.09.2012 (Annexure-6) herein, petitioner stated that omission of the name of Suratan Nesa was a mere mistake but fact remains that she is a material witness for the purpose of the case. By paragraph 4 of the objection filed, plaintiff though denied correctness of the statement made in paragraph 1 of the application filed by the defendants, but whether omission was by way of mistake or not, cannot be in the knowledge of the plaintiff. The assertion made in paragraph 1 of the application that Suratan Nessa is a material witness cannot be denied. Under Order XVI Rule 1(A) Court has power and jurisdiction to permit examination of witness for whom no summon was applied for, provided the condition precedent enumerated in Clause (3) of Rule 16(1) exists in a given case. So on joint reading of Order XVI Rule 1(3) as well as Order XVI Rule 1(A) of the Code of Civil Procedure what is required is

that a party applying for examining any witness beyond the list of witnesses is duty bound to furnish reasons for omission of the name in the list of witnesses filed in appropriate time. Once such reason is disclosed, the Court is to arrive at an objective satisfaction as to whether such reason comes, within the sweep of that sufficient cause within the meaning of Order XVI Rule 1(3) of the Code of Civil Procedure. In arriving at such a finding some amount of subjectivity is always possible but if some amount of plausible ground is made out, it is expected that Court cannot exercise the power for purpose to bring witness to prove his respective case. This remains more important in view of the provision of Section 30 of the Code of Civil Procedure which not only vests power and jurisdiction on the Court to suo moto examine a witness and/or to call for records for proper adjudication of the matter in dispute, it also enjoins a responsibility on the Court to exercise power under Section 30 in the interest of finding out the real truth underlying a given dispute. It is established law that trial of a civil litigation is nothing but a voyage for quest of justice and technicality cannot stand on the way of catering to that need. Here in this case defendant has cited some reasons which apparently do not appear to be utterly impossible and so this Court is satisfied that in the fitness of things it would be proper to permit the defendant to examine Suratan Nessa as DW3. The order dated 10.03.2014 is hereby set aside.

5. Parties shall appear before the learned trial Court on 24.11.2014 to receive necessary order.

6. The defendant shall submit examination-in-chief of DW3 under Order XVIII Rule 4 of the Code of Civil Procedure on that day itself. Thereafter both DW1 and DW3 shall be cross-examined by the plaintiff side provided cross-examination of DW1 is not complete in the meantime.

7. Revision petition stands allowed.

8. No order as to costs.