
(2012) 04 GAU CK 0034
In the Gauhati High Court
Case No : CRP No. 45 of 2012

Shri Gautam Saha and Smti. Nilima Saha APPELLANT
Vs
Sri Haradhan Saha RESPONDENT

Date of Decision : 03-04-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 17, 151
Constitution of India, 1950 — Article 227

Citation : (2012) 2 GLD 709 : (2012) 3 GLT 196

Hon'ble Judges : Subhasis Talapatra, J

Bench : Single Bench

Judgement

S. Talapatra

1. Heard Mr. S.M. Chakraborty, learned senior counsel, assisted by Ms. P. Chakraborty, Learned Counsel for the petitioners. Also heard Mr. K.N. Bhattacharjee, learned senior counsel and Mr. S. Roy, Learned Counsel for the respondent. By this petition filed under Article 227 of the Constitution of India, the order dated 05.03.2012 as passed by the learned Civil Judge, Senior Division No. 1, Agartala, West Tripura, in Title Suit No. 113/2010 has been put under challenge on the fundamental ground that at the time of passing that order there had been no consideration of relevant factors as required for passing any order u/s 151 of the Code of Civil Procedure, 1908.

2. For appreciation, the facts of the case are required to be briefly noticed.

The respondent filed a Title Suit against the petitioners in the court of the Civil Judge, Senior Division No. 1, Agartala, West Tripura, for declaration, perpetual injunction and recovery of possession, being Title Suit No. 113/2010. After receipt of the summons from the court, the petitioners appeared and jointly filed written statement on 09.02.2011 in their defence. After completion of the examination of the witnesses of the plaintiff, the suit was fixed for filing examination-in-chief by the petitioners as defendants, firstly on 22.09.2011 and thereafter, on accommodating the petitioners-defendants, the suit was fixed for

the same purpose on 14.11.2011, 05.12.2011, 23.12.2011 and lastly on 14.02.2012.

3. The admitted position is that on those days the examination-in-chief could not be submitted by the petitioners-defendants for the assigned grounds and it appears from those orders that the learned court also liberally accepted those grounds as assigned in the petitions seeking adjournments on those days. Ultimately, the last date for filing the examination-in-chief was fixed on 14.02.2012. It is stated by the petitioners-defendants that on 14.02.2012, Learned Counsel who was holding the brief, namely Sri S. Bhattacharjee, could not prepare the examination-in-chief after consulting the petitioners-defendants as he was suffering from illness from 11.02.2012 to 13.02.2012 and by assigning the said illness as ground a petition was filed in the learned court below, seeking a fortnight for filing the examination-in-chief. The learned court below did not allow that prayer and rejected the said petition. As consequence thereof, the case was fixed for argument on 05.03.2012. On 05.03.2012, a petition was filed by the petitioners-defendants u/s 151 of CPC to allow them to submit their examination-in-chief and for facing the cross examination. But the learned court did not allow the said petition and rejected the same assigning the impugned reasons. Usefully, the said order dated 05.03.2012 is excerpted hereinbelow :

A petition is filed on behalf of the defendant u/s 151 of CPC to allow the defendants to submit their examination in chief for facing cross-examination by reopening the scope of DWs stating that on 14.2.2012 the date was fixed for cross of DWs, but on the date the petition was filed seeking time as DWs as their engaged counsel failed to prepare the same.

On perusal of the case record it appears that on 08.09.2011 after closing the chapter of evidence for the plaintiff the defendants were directed to file examination-in chief by way of affidavit fixing the next date on 22.9.2011. Again on 2.9.2011 the defendants again sought time. Thereafter, on 14.11.2011, 05.12.2012, 23.12.2011 the defendants also sought time on the same ground following by which ultimately on 14.2.2012 the chapter of evidence of the defendants was closed.

The case was fixed for argument.

Now the plea of the defendant is that they were only directed on 14.12.2011 for submission of examination in chief and cross-examination of the PWs, but their submission has got no force in view of the above facts as I narrated.

Hence I find no reason to accept the same filed u/s 151 of CPC.

Accordingly the petition stands rejected.

The examination in chief filed by the defendants are not accepted.

Since a petition filed by the defendants in connection with violation case on the ground for adjournment to take part in the hearing on the next date, I allow the

petition.

Fix 14.3.2012 for argument.

A bare perusal of the said order dated 05.03.2012 would demonstrate that the learned court below was vexed by the conduct of the petitioners-defendants and the petition as filed by the petitioners-defendants u/s 151 of CPC for the purpose as discussed was rejected. However, it appears from the said order that on 05.03.2012 no argument took and the date of argument was deferred to 14.03.2012. Being aggrieved by the said order dated 05.03.2012, the present petition has been filed.

4. The petitioners' grievance centers around that there was no consideration of the petition as filed u/s 151 of CPC and for such non-consideration it has resulted in failure of justice as the petitioners-defendants have been deprived of the rebuttal evidence, highly necessary for adjudicating the real controversy in the suit.

5. On the other hand, the plaintiff-respondent by filing an objection to this petition, refuted the grounds as have advanced by the petitioners-defendants. While making the submission against the prayer of the petitioners-defendants, resort to the various orders passed by the learned court below, which are available at Annexure-A series to the written objection as filed by the plaintiff-respondent was taken. this Court has considered those orders at Annexure-A series and finds that on 23.12.2011 the petitioners were given caution by fixing the next date on 14.02.2012 as the last chance for furnishing the examination-in-chief by way of affidavit but they preferred not to file the said affidavit, rather a petition on the ground that the Learned Counsel who was holding the brief was suffering from ailments prior to 14.02.2012 was filed. It was stated in the petition that the said counsel could not prepare the evidence by affidavit on consultation with the petitioners. That ground did not find favour from the learned court below, as a result, the impugned order dated 05.03.2012 was passed.

6. Mr. K.N. Bhattacharjee, learned senior counsel supplementing the submissions of Mr. S. Roy, Learned Counsel for the respondent, submits that the lapse of the petitioners-defendants cannot deserve any liberal consideration from this Court inasmuch as they have adopted a tactic to drag the suit for continuing in the possession by frustrating the ends of justice. Moreover, he submits that whenever illness of the petitioners' counsel was taken as a ground some documentary evidence was required to be furnished before the court for its satisfaction. But no such document was submitted.

7. In rejoinder, Mr. S.M. Chakraborty, learned senior counsel for the petitioners submits that technicality cannot take place of justice. When he quite candidly acceded that there was some lapse on the part of the petitioners but those were not outcome of intentional attempts to frustrate the ends of justice as alleged by Mr. Bhattacharjee, learned senior counsel for the respondent. In support of his

contention that a petition u/s 151 of CPC whenever is filed, it warrants serious consideration by the civil court and the same is not to be casually discarded. Such petition has to be considered on merit in the backdrop of a case. He relied a decision of the Apex Court in K.K. Velusamy vs. N. Palanisamy as reported in 2011 AIOL 234, where the Apex Court held that Section 151 of CPC is not a substantive provision which creates or confers any power or jurisdiction on courts. It just spells out the discretion of the court. Provisions of the Code are not exhaustive and Section 151 is an attempt to cover those peculiar procedural aspects, which have not been covered otherwise in the Code. There is no specific provision in the Code enabling parties to re-open evidence for purposes of further examination-in-chief or cross-examination. Section 151 provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent powers of Court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court. In absence of any provision providing for re-opening of evidence or recalling any witnesses for further examination or cross-examination, for purposes other than securing clarification required by the Court, the inherent power, subject to its limitations, can be invoked in appropriate cases to re-open evidence and/or recall witnesses for further examination. The Apex Court further held that this inherent power is unaffected from express powers under Order 18 Rule 17 and at the same time, Section 151 cannot be routinely invoked for that purpose.

8. Mr. Chakraborty, learned senior counsel for the petitioners further underlined taking support from the said judgment that the learned court below did not consider the aspect that whether the evidence that has been sought to be produced before the court is required for a just and effective adjudication of the suit or not and that aspect should be the paramount consideration for a civil court whether it should exercise its inherent powers as conferred by Section 151 of CPC. While Mr. Chakraborty, learned senior counsel was laying emphasis on the said decision of the Apex Court, it might sound that such power as conferred u/s 151 of CPC is to be used as liberally as practicable to avoid any sort of interpretational ambiguity. It is made clear that the purpose of engrafting Section 151 in the Code is not to allow filling up the lacunae in the evidence. In this regard, Vadiraj Naggapa Vernekar (D) Through Lrs. Vs. Sharad Chand Prabhakar Gogate, may be recalled. The report as heavily relied by Mr. Chakraborty, learned senior counsel also crystalises as under :

There is no specific provision in the Code enabling the parties to re-open the evidence for the purpose of further examination-in-chief or cross-examination. Section 151 of the Code provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent powers of the Code to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court. In the absence of any provision providing for re-opening of evidence or recall of any witness for further examination or cross-examination, for purposes other than securing clarification required by the court, the inherent power u/s 151 of the Code, subject to its limitations, can be invoked in

appropriate cases to re-open the evidence and/or recall witnesses for further examination. This inherent power of the court is not affected by the express power conferred upon the court under Order 18 Rule 17 of the Code to recall any witness to enable the court to put such question to elicit any clarifications.

9. Apart that, it has been held "The deletion of the said provision does not mean that no evidence can be received at all, after a party closes his evidence. It only means that the amended structure of the Code found no need for such a provision, as the amended Code contemplated little or no time gap between completion of evidence and commencement and conclusion of arguments. Another reason for its deletion was the misuse thereof by the parties to prolong the proceedings under the pretext of discovery of new evidence". This observation has been made in reference to the un-amended provision of Order 18 Rule 17 of the Code, which has been done away with by the amendment to the Code as carried out and effected in 2002.

10. In the backdrop of the case, it is writ large on the records that the petitioners-defendants were not diligent in furnishing the examination-in-chief and producing the witness for cross-examination by the adverse party. However, the impugned order dated 05.03.2012 appears to have been passed so hastily that there was hardly any consideration of the consequence of disallowing the petitioners-defendants from submitting the examination-in-chief and from cross-examination by the adverse party. It is the paramount duty of any court to hinge the procedural requirement to subserve the ends of justice, else the golden principle of justice that the justice has not only done, justice has to be shown to have been done would be fossilised. It is apparent from the impugned order that there was no consideration by the Court that whether denying the petitioners-defendants from submitting the examination-in-chief and from cross-examination by the adverse party would finally affect the adjudication of the real controversy or not. The court has to make a balance between the non-diligent lapse and the ends of justice.

11. On consideration of the rival contentions as advanced by the Learned Counsel for the parties, this Court is inclined to interfere with the impugned order dated 05.03.2012 and accordingly the said order is set aside with observation that the petitioners-defendants were definitely not diligent in prosecuting their defence to the detriment of the respondent-plaintiff and as such they have become amenable to the compensatory cost couched with the condition as delineated hereinafter.

12. In view of interference of the impugned order dated 05.03.2012 by this Court, the learned Civil Judge, Senior Division No. 1, West Tripura, Agartala, is directed to fix a date for cross-examination of the witnesses of the petitioners on 21.04.2012. If no defence witness is produced for cross-examination on that day, the case would be finally closed so far the recording of the evidence is concerned and the argument would recommence from the stage where the same was left inconclusive. This order is passed subject to payment of Rs. 4,000/- (rupees four

thousand) only to the plaintiff-respondent as cost within a period of 1 (one) week from today. It is made clear that if the examination-in-chief of any other defence witness is submitted within a week from today, the said witness also be allowed to be cross-examined by the plaintiff-respondent on 21.04.2012. It is made further that there should not be any further accommodation for cross-examination as indicated. With these observations and directions, this petition stands allowed to the extent indicated above and accordingly disposed of.