

Anu Das Vs. Padumi Das

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Court : Guwahati

Decided On : Aug-08-2006

Judge : A.H. Saikia, J.

Appellant : Anu Das

Respondent : Padumi Das

Advocate for Def. : Mr. B. Islam

Advocate for Pet/Ap. : Ms. F. Ahmed

Disposition : Petition dismissed

Judgement :

A.H. Saikia, J.

1. Heard Mr. H.K. Deka, learned senior counsel assisted by Ms. F. Ahmed, learned Counsel for the petitioner and Mr. B. Islam, learned Counsel for the respondent.

2. On close perusal of the impugned order dated 14.6.2006 passed by the learned Civil Judge (Jr. Division) No. 2, Guwahati in Title Suit No. 284/03 and also upon hearing learned Counsel for the parties, this court proposes to dispose of this revision petition at the admission stage.

3. Having meticulously gone through the impugned order, it appears that the learned Judge expunged the evidence on affidavit filed by D.W. 1 who was the defendant No. 1 in the related Title Suit No. 284/ 03 on the ground that since the defendant No. 1 did not file any written statement and admittedly the case was proceeded against the defendant No. 1 ex parte, he could not be permitted to adduce any evidence.

4. It is seen that the defendant No. 1 at no point of time contested the suit which was filed by his mother, the plaintiff, for occupation of house alleged to have been constructed by the mother-plaintiff and for a decree of recovery of khas possession of the suit premises by evicting the defendants, i.e., defendant Nos. 1 and 2 as well as for permanent injunction against the defendants.

5. In arriving at the above finding of expunging the evidence on affidavit so led by the defendant No. 1, the learned Civil Judge observed that on 22.1.2004 the defendant No. 2, the petitioner herein, filed written statement as well as additional written statement. Thereafter, the plaintiff side filed evidence on affidavit on her behalf on 11.5.2005 and 27.5.2005. After that the PWs were cross-examined by the defendants side and thereafter the case was fixed for DWs.

6. Vide order dated 5.12.2005, the defendant No. 2 was debarred from filing evidence of DWs as she took several adjournments. Against the said order the defendant move this court through Civil Revision and this court vide order dated 27.1.2006 while setting aside the order dated 5.12.2005, allowed the defendant to adduce evidence on affidavit.

7. On 8.2.2006 the defendant side adduced the evidence of Birochan Das as D.W.1 who was the defendant No. 1 in Title Suit and one Atul Chandra Deka as D.W.2.

8. However, the court dismissed the evidence on affidavit filed on behalf of the defendant No. 1 by the impugned order relying on two judicial authorities reported in (i) (1991) 1 GLR 157 (Shri Pada Acharjee v. Sri Hari Pada Acharjee and Ors.) and (ii) : AIR 1989 SC162 (Modula India v. Kamakshya Singh Deo. The ratio of those referred case laws is where a party fails to file a written statement within

time permitted by the court, the court may proceed with the further hearing of the suit and the defaulting party may participate in the hearing but subsequently cannot be allowed to lead any evidence in respect of the defence on the ground of failure to file written statement.

9. In the case in hand, it is admitted position that the defendant No. 1 preferred not to contest the suit and accordingly the suit proceeded against him ex parte. Be it noted that the court can, in such premises, take necessary steps for pronouncement of judgment against him in terms of Order 8, Rule 10 CPC.

10. At the time of hearing, the defendant No. 2, daughter-in-law of the plaintiff and wife of the defendant No. 1, who did not appear before the court, adduced the evidence of the said defendant No. 1 as D.W.I and another witness Sri Atul Chandra Deka.

11. On close perusal of the materials available on record including the evidence on affidavit filed by Sri Birochan Das, the defendant No. 1, it manifestly reveals that the said evidence on affidavit was filed by him, though claimed to be the witness of defendant No. 2, in the capacity of the defendant No. 1 himself. There was no whisper even in the said evidence on affidavit that he had filed the said evidence being a witness of the defendant No. 2.

12. The law is settled that the defendant who fails to present written statement or has already been debarred from filing written statement, cannot examine himself as a witness. This is exactly what has happened in this case.

13. Mr. Deka, has, by an emphatic submission, referring to Order 16, Rule 1(A) CPC, tried to impress upon the court that any party to the suit may, even without applying for summons, bring any witness to give evidence. According to him, in the instant case, the defendant No. 1 though he did not contest the suit by filing written statement, was brought by defendant No. 2 as her witness and that being position, the defendant No. 2, the petitioner has every right to examine her witness, i.e., Sri Birochan Das as D.W.I though he was arrayed as defendant No. 1.

14. Applying the ratio of the above cited cases and also on meticulous consideration of the factual premises herein, this court is hesitant to accept the submission of the learned Counsel representing the petitioner for the simple reason, as already mentioned herein above, that the defendant No. 1 while filing his evidence on affidavit did not mention nowhere in his averments sworn on affidavit that the petitioner adduced him as her defence witness No. 1. Even the petitioner did not examine herself as a witness before any other witness on her behalf was examined as required under Order 18, Rule 3A which provides as follows:

3A. Party to appear before other witnesses. - Where a party himself wishes to appear as a witness, he shall so appear before any other witness on his behalf has been examined, unless the court, for reasons to be recorded, permits him to appear as his own witness at a later stage.

15. In view of what has been discussed and observed, this court does find no illegality or any jurisdictional error in the impugned findings of the court below warranting interference with the same by entertaining an application preferred under Article 227 of the Constitution of India by the petitioner.

16. Consequently, this revision petition fails and stands dismissed at the admission stage. No costs.

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