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**Niranjan Khodal and Others Vs. Sukra Khodal**

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**SooperKanoon Citation** : sooperkanoon.com/952365

**Court** : Guwahati

**Decided On :** Sep-14-2011

**Judge** : B.D. Agarwal

**Appeal No.** : Civil Revision Petition No. 173 of 2009

**Appellant** : Niranjan Khodal and Others

**Respondent** : Sukra Khodal

**Judgement** :

Oral:

1. This revision petition is at the instance of the plaintiffs. The petitioners are challenging the legality and correctness of the order dated 04.04.2009, passed by the learned Munsiff, Tezpur, in Title Suit No. 49 of 2007, whereby, the learned trial Judge expunged the affidavit evidence of PW-3, who, incidentally was impleaded in the suit as proforma defendant No. 1.

2. Heard Sri P Sundi, learned counsel, for the petitioners as well as Sri R Bordoloi, learned counsel for the sole respondent/principal defendant.

3. The learned counsel for the petitioners submitted that both the parties in the suit are related to each other. The main contest is between the plaintiffs and their uncle. For a fair decision of the suit, the cousin of the plaintiffs, being the children of the brother of the defendant, they were also impleaded in the suit as proforma

defendants. The proforma defendants are the brother and sisters.

4. After receiving summons from the Court, none of the proforma defendants contested the suit or filed their written statements. However, the proforma defendant No. 1 gave his affidavit evidence as PW-3, in favour of the plaintiffs. However, the learned Munsiff has declined to accept the evidence of proforma defendant No. 1 on the ground that since he did not file his written statement the said proforma defendant is not permitted to adduce evidence in favour of the plaintiffs. The impugned order has been passed relying upon a Judgment passed by this Court in Anu Das -Vs- Padumi Das, reported in (2007) 1 GLR 538.

5. Order XVI of the Code of Civil Procedure lays down the procedure for summoning and attendance of witnesses. Order XVI Rule 1 (A) authorizes the parties to the suit to bring any witness to give evidence or to produce documents in their favour by obtaining summons from the Court. Order XVI CPC nowhere stipulates any embargo upon summoning any non-contestant defendant as a witness by either party.

6. In the case before me, the situation is a little better, inasmuch as, PW-3 was impleaded in the suit as proforma defendant and not as a principal defendant. Hence, there was no bar for the plaintiffs to examine one of the proforma defendants as their witness.

7. In the case of Anu Das (supra), the defendant No. 1 had given affidavit evidence on behalf of principal defendant and the said evidence was not accepted by the Court. This Court affirmed the trial Court’s order on two grounds. Firstly, the defendant No. 1 did not contest the suit by way of filing written statement. Secondly, the defendant No. 2 had also not cited the defendant No. 1 (her husband) as a witness in the Court.

8. In the case at hand, PW-3 is the proforma defendant and no relief has been sought for against him by the plaintiff.

9. For the foregoing reasons, I hold that the impugned order is contrary to the spirit of Order XVI CPC. Consequently, it is set aside. The revision petition stands

allowed. The trial Court is directed to take on record the evidence of PW-3 and proceed further.

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