Sri Nirode Baran Ghosh Vs Smt. Deb Rani Mondal and Another

C.O. No. 2527 of 2008

Court: Calcutta High Court

Date of Decision: Aug. 16, 2011

Acts Referred:
Civil Procedure Code, 1908 (CPC) â€" Order 16 Rule 21, Order 3 Rule 1, Order 3 Rule 2, 151

Hon'ble Judges: Syamal Kanti Chakrabarti, J

Bench: Single Bench

Advocate: Siva Prosad Ghosh, for the Appellant;Asis Chandra Bagchi, Prabir Kumar Mishra and Amitabha Roy, for the Respondent

Final Decision: Dismissed

Judgement

Syamal Kanti Chakrabarti, J.
In the instant revisional application the legality and propriety of order No. 58 dated 11.07.2008 passed by

the learned Additional Civil Judge (Junior Division) at Alipore in Ejectment Suit No. 179 of 2004 has been assailed.

2. It is contended on behalf of the Petitioner that the said Petitioner opposite party filed a petition before the learned Court below praying for an

order of personal appearance of Petitioner No. 2 for cross-examination by the learned Advocate for the opposite party. After due consideration of

the matter the learned Court below has rejected the prayer on contest with cost of Rs. 200/-. Being aggrieved by and dissatisfied with such order

the Petitioner has preferred this revisional application contending, inter alia, that the impugned order is contrary to the order passed on 27.06.2008

by allowing the prayer of the Petitioner for recalling the earlier order dated 27.06.1998. Is the outcome of non-application of his mind and in this

way he has acted as appellate Court by recalling his own order which is an abuse of the process of law at the instance of the Petitioner. Learned

lawyer for the opposite parties on the contrary has contended that the learned Court below has rightly passed the order and recalled his earlier

order to prevent miscarriage of justice and there is No. merit in this revisional application which is liable to be dismissed. Under the circumstances

the only point for my consideration is to decide as to whether the learned Court below is justified in recalling his order passed on 27.06.2008.

3. It appears from record that the Petitioners in Ejectment Suit No. 179 of 2004 filed a petition contending, inter alia, that on 27.06.2008 the

opposite party filed a petition seeking permission to summon the Petitioner No. 2 as witness without any reason which was allowed by the Court

inadvertently and contrary to law because the same prayer was earlier rejected by the Court itself. In their written objection the opposite party,

however, claimed that as per law either of the parties can call the other party as witness of his case in appropriate situation and so they wanted to

tender the opposite party No. 2 as defence witness who may not support the Petitioner''s case. The above petition was filed while 24.06.2008

was fixed for evidence of DW-2, in default for argument. However, on 27.11.2006 the learned Trial Court considered the submissions made by

both the parties and rejected the prayer on two grounds.

4. Firstly, it was observed by the learned Court below that in the above case DW-1, the daughter of Plaintiff/Petitioner No. 1 has already deposed

on behalf of both the Petitioner Nos. 1 and 2 and evidence of PW-1 was closed after her exhaustive cross-examination by the opposite party.

Therefore, the testimony of PW-1 will be treated as testimony of PW-2 also and he cannot be twice tendered once for the Petitioner and second

time for the defence witness since PW-1 was cross-examined on behalf of both Petitioner Nos. 1 and 2 and No. objection was raised at the time

of cross-examination of PW-1 for self and Petitioner No. 2.

5. Secondly, the learned Trial Court further held that the opposite party tried to bring the Petitioner No. 1 before the Court in person for cross-

examination and such prayer was earlier rejected by the Court by order dated 29.11.2006 on the grounds recorded therein. The opposite party

never challenged the said order before the competent Court and as such the said order has attained its finality. Without disclosing the above fact of

rejection of same prayer the opposite party filed the petition for securing attendance of the Petitioner No. 2 in person for cross-examination once

again as defence witness and, therefore, obviously the Court passed the order allowing such prayer on 27.06.2008 under misleading circumstances

without any knowledge of the existence of the earlier order dated 29.11.2006. Relying upon the principles reported in AIR 1967 Mys 37 it has

been held that though the Petitioner has a right to summon the other party to the suit and examine him as a witness which was possible in the Court

acting under its inherent powers u/s 151 CPC to disallow the application.

6. Without going through unnecessary details I find that No. plausible explanation is forthcoming from the opposite party/Petitioners as to why he

has suppressed the fact of the earlier order of rejection of his prayer by the Court which has reached its finality. Obviously he has tried to obtain an

order from the Court though permissible under Order 16 Rule 21 CPC by misleading the Court. The learned Trial Court has held that such an

order was obtained by suppressing material fact which amounts to abuse of the process of Court and to prevent such abuse of the process of

Court he has rejected the prayer which was very much within the inherent power of the Court contemplated u/s 151 Code of Civil Procedure.

Therefore, I hold that in the given circumstances the learned Court below is justified in recalling his earlier order in exercise of the powers

conferred u/s 151 CPC to prevent abuse of the process of the Court and as such there is No. illegality or impropriety in his findings which calls for

any interference by this revisional Court.

7. Learned lawyer for the Petitioner has also argued that the examination of PW-1 on behalf of the Petitioner Nos. 1 and 2 is not legally tenable

because the defence has been deprived of cross-examining the Petitioner No. 2 on the acts which he himself has done. He has relied upon and

referred to the principles laid down in Janki Vashdeo Bhojwani and Another Vs. Indusind Bank Ltd. and Others, in support of such contention. In

the said case the Hon''ble Court has held, inter alia, that:

Order 3 Rule 1 and 2 empowers the holder of power of attorney to ''act'' on behalf of the principal. The word ''acts'' employed in Order 3, Rule 1

and 2, confines only in respect of ''acts'' done by the power of attorney holder in exercise of power granted by the instrument. The term ''acts''

would not include deposing in place and instead of the principal. If the power of attorney holder has rendered some "acts" in pursuance to power

of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and

not by him. Similarly, he cannot depose for the principal in respect of the mater which only the principal can have a personal knowledge and in

respect of which the principal is entitled to be cross-examined.

8. Since the order dated 27.11.2006 has reached its finality the Petitioner/ opposite party has already forfeited his right to seek same relief by

suppressing the material facts under order 20 CPC which amounts to abuse of the process of law as well as barred by the doctrine of stopple by

conduct. Therefore, the principle laid down in the aforesaid case will not be applicable in the facts and circumstances of this case.

9. Under the circumstances I hold that there is No. merit in this revisional application which is accordingly dismissed. Interim order granted earlier,

if any, stands vacated.

10. Since the matter is pending for a long time the learned Court below is directed to proceed with the suit as per law and to dispose of the same

as expeditiously as possible, preferably within a period of three months from the date of communication of this order without granting unnecessary

adjournments to the parties.

11. Urgent certified photocopies of this order, if applied for, be supplied to the parties, on compliance of all requisite formalities.