

(2014) 07 CAL CK 0009

Calcutta High Court

Case No: C.O. No. 995 of 2014

Banalata Hazra

APPELLANT

Vs

Anita Mukherjee

RESPONDENT

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**Date of Decision:** July 9, 2014**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 18 Rule 3A

**Citation:** (2014) 3 CALLT 196 : (2015) 5 CHN 54**Hon'ble Judges:** Debabrata Mookerjee, J**Bench:** Single Bench**Advocate:** Sanjoy Ghosh and Anirban Chatterjee, Advocate for the Appellant; Tridib Kumar Sarkar, Advocate for the Respondent**Final Decision:** Dismissed

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**Judgement**

Debangsu Basak, J.

Order No. 104 dated June 4, 2014 passed in Misc. Case No. 66 of 2006 was impugned in the revisional application. By the impugned the learned Judge allowed an application for Commission for the purpose of examining on oath, the petitioner before it, being the opposite party herein as her witness. On behalf of the petitioner here, reliance was placed on Order 18 Rule 3A of the Code of Civil Procedure, 1908 and it was contended that since the opposite party was the petitioner there it was incumbent upon the opposite party to offer herself as the witness in terms of such provisions. Reliance was also placed on 2002 Volume 2 Supreme Court Cases page 184 (N.C. Kaladharan v. Kamaleshwaran & Ors.) for such proposition. It was also submitted that, although the provisions of Order 18 Rule 3A was not mandatory, the learned Judge ought to have recorded the reasons as to why the learned Judge was allowing the opposite party to come as her witness after she had produced another witness prior to her.

2. On behalf of the opposite party it was contended that, the provisions of Order 18 Rule 3A was not mandatory. The opposite party was incapacitated due to medical reasons and as such could not be produce herself as her witness earlier. Therefore, there was no infirmity in the impugned order.

3. I have considered the rival contentions of the parties and the materials on record. The opposite party had applied for her examination on Commission on the ground of illness. She appended a medical certificate and other medical documents in support of such prayer in her application. The learned Judge allowed her application for her examination on Commission.

4. In N.C. Kaladharan (supra) the issue of the priority of examination of the witness in a case was not pronounced upon as the appellant before the Supreme Court volunteered not to appear as a witness to the suit and as such the question of priority of witness lost its credence. Therefore, N.C. Kaladharan (supra) cannot be pressed by the petitioner to contend that, the Supreme Court held on the issue of priority of witness in that case.

5. So far as the provisions of Order 18 Rule 3A of the Code of Civil Procedure, 1908 was concerned it provided that where a party wished to appear as a witness, he had to appear before any other witness on his behalf was examined unless the Court for reasons to be recorded, permitted him to appear as his own witness at a later stage. The provisions of Order 18 Rule 3A of the Code of Civil Procedure, 1908 was not an absolute bar to a party wanting to be a witness in his case to come after other witness on his behalf. However, the provision sought to lay down the priority of witness in a case. It provided that, a party should come first as the witness for his behalf. However, he could come later, if he showed good cause for not adhering to the priority of witness laid down under Order 18 Rule 3A. In the instant case, the opposite party showed good cause of being examined on Commission. It was submitted on behalf of the petitioner that, the causes shown by the opposite party was limited to the examination on Commission and not on the priority of the witness. That submission of the petitioner was with some substance. So far as the priority of the witness of the opposite party was concerned, true the learned Court ought to have considered Order 18 Rule 3A and returned a finding thereon. No such finding was on record.

6. It would not be appropriate to shut out a party from adducing evidence. The reasons shown for examination on Commission were found sufficient by the Court below. There was no infirmity with regard thereto. On the materials on record I am not minded to interfere with the order impugned. My first reason for not interfering with the order impugned was that, a party should not be shut out from adducing evidence. Secondly, the petitioner was not inconvenienced irreparably by the priority of the witness arranged by the opposite party. Thirdly, the opposite party had disclosed materials which prevented her from coming to Court. Such materials were found sufficient for the purpose of allowing her to be examined on

Commission. Such materials were also sufficient to re-arrange the priority of the witnesses for the opposite party. In such circumstances I dispose of C.O. No. 995 of 2014 without interfering with the order impugned. There will be no order as to costs.

Urgent photostat copies of this judgment, if applied for, be given to the parties on priority basis.