



GAHC010226352022

Page No.# 1/9



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRP(IO)/261/2022

GYAN CHAND JUNEJA
S/O LT. RAM SWAROOP JUNEJA,
ALL INDIA HANDLOOM, OPP. A.S.T.C. OFFICE, A.T. ROAD, PALTANBAZAR,
P.O.- GUWAHATI- 781008,
DIST.- KAMRUP (M), ASSAM.

VERSUS

MITUN GHOSE @ MITUN SEN
D/O LT. KAMAKHYA GHOSE, A.T. ROAD, PALTANBAZAR,
P.O. GUWAHATI- 781008,
DIST.- KAMRUP (M) ASSAM.

Advocate for the Petitioner : MR. D MOZUMDER

Advocate for the Respondent :

BEFORE

HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

Advocates for the petitioner : Shri D. Mozumder, Sr. Adv.
Shri S. Biswas

Advocates for the respondent : N. Dhar

Date of hearing : **11.11.2022**

Date of Judgment : **05.12.2022**

JUDGMENT & ORDER

The present petition has been filed under Article 227 of the Constitution of India read with Section 151 of the Code of Civil Procedure, 1908 challenging, *inter alia*, orders dated 02.03.2020 and 18.02.2021 in Title Suit No. 470/2017. In the aforesaid Title Suit, the learned Civil Judge, Sr. Division, No. 3, Kamrup (M) (hereinafter, learned Judge) had closed the evidence of the plaintiff witness without being cross examined and the defendant evidence has also been closed. It is contended that the aforesaid orders suffer from legal infirmity and are not sustainable in law. Therefore, the present application has been filed.

2. Before going to the issue which has arisen for determination, the brief facts of the case can be narrated as follows.

3. The present petitioner is the defendant, who is the tenant in the aforesaid suit which was instituted for ejectment. The respondent is the plaintiff, who had instituted the Suit for ejectment on the ground of default.

4. By the initial order of challenge dated 02.03.2020, the learned Judge recorded that the defendant was absent without steps and the report of the learned Advocate Commissioner was also perused. It was also submitted on behalf of the plaintiff that the defendant, despite being given several opportunities did not turn up to cross examine the plaintiff witnesses before the Commissioner. Even opportunities given by the Court for such cross examination in this regard. The learned Court accordingly held that it was presumed that the defendant had declined to cross examine the plaintiff witnesses. By the subsequent order dated 18.02.2021 the learned Court after recording that the date was fixed for DW but the defendant was absent without steps, the matter was posted for arguments.

5. Shri D. Mozumder, learned Senior Counsel for the petitioner has submitted that though the suit has been instituted for ejectment of the tenant, the fact was that there were security deposit of Rs.10(ten) lacs and therefore, there was no occasion of any default. It is submitted that various efforts were made by the plaintiff to cause inconvenience to the petitioner so



that he leaves the premises. Amongst others, in front of the shop of the petitioner, a transformer was installed so as to disrupt the business of the petitioner for which the petitioner had to institute WP(C)/452/2017 in this Court.

6. It is the contention of the petitioner that though an Advocate was engaged for conducting the case, it appears that the said Advocate did not take any effective steps, which the petitioner was not aware of. On 01.02.2019 the plaintiff had submitted the evidence on affidavit and the matter was referred to the Advocate Commissioner for cross examination directing the parties to appear between 02.02.2019 and 03.04.2019 and the date fixed for Commissioner's Report was 04.04.2019. However, the learned counsel for the petitioner did not appear before the Commissioner on the dates for cross examination and when the matter was taken up on 04.04.2019, the Commissioner had submitted the Report to the effect that cross examination could not be completed due to absence of the defendant side. The Court accordingly directed the parties to appear before the learned Commissioner on 24.04.2019, failing which it would be presumed that cross examination is declined. The next date was accordingly fixed on 18.06.2019. The said date had to be extended further due to further default of the defendant. On the next date i.e. 29.08.2019, the Court was informed that due to some intervening factor, a new Commissioner had to be appointed. Accordingly, the same was done directing the parties to appear on 18.09.2019 before the Commissioner and the next date was fixed on 28.11.2019. As there was further default, another chance was given to the defendant for cross examination on 11.12.2019, fixing the next date as 02.03.2020.

7. On 02.03.2020, the defendant again defaulted to appear before the Court and on the said date, the learned Advocate Commissioner submitted a Report. After perusal of the Report, the learned Court has passed an order presuming that the defendant had declined to cross examine the plaintiff witnesses and accordingly, 15.05.2020 was fixed on the next date.

8. It is submitted that in between, the functioning of the Court was adversely affected due to onslaught of the pandemic. Therefore, on 17.09.2020 the learned Court had fixed the matter for DW on 15.12.2020. However, the defendant did not appear and the case was accordingly fixed on 18.02.2021, on which date, the learned Court had fixed the matter for orders. On the said date, i.e. 18.02.2021, the learned Court after taking note of the absence

of the defendant or his counsel had fixed the matter for argument.

9. On the next dates i.e. 14.09.2021 and 01.10.2021, there were further default of the defendant. The argument had to be deferred on 15.12.2021 on a petition by the defendant and on the next date i.e. 21.12.2021, the defendant had filed the petition bearing No. 2365/2021 under Order IX Rule 7 read with Section 151 of the CPC. The aforesaid petition was however rejected vide an order dated 16.03.2022 against which Misc. Appeal No. 14/2022 was preferred which was also dismissed on 31.08.2022 by the learned Court of the Additional District Judge No. 2, Kamrup (M).

10. Shri Mozumder, learned Senior Counsel has drawn the attention of this Court to the Trial Courts' and the First Appellate Subordinate Courts' (under the Gauhati High Court) Case Management Rules, 2007 and submits that the time stipulated for recording of evidence of suit of the present nature is nine months. He further submits that the present situation has arisen only because of the fault of the learned counsel for the petitioner who represented him in the Trial Court. He submits that not only the counsel had defaulted in appearing, even the advice to file an application under Order IX Rule 7 of the CPC and thereafter, the Misc. Appeal were palpably erroneous.

11. Assailing the impugned order dated 18.02.2021 the learned Senior Counsel for the petitioner has submitted that a perusal of the record would reveal that the said date was fixed only for necessary orders vide the earlier order dated 15.12.2020 and therefore, the matter could not have been straight away posted for argument as the date was not for hearing.

12. Summarizing his arguments, Shri Mozumder, the learned Senior Counsel has submitted that the party should not suffer because of the negligence of his counsel and the intervening pandemic had also added to the confusion regarding dates for which the present situation has arisen. It is submitted that the act of Court should prejudice none.

13. In support of his submissions, the learned Senior Counsel for the petitioner places reliance upon the following case laws-

i. (1981) 2 SCC 788 [Rafiq and Anr. Vs. Munshilal and Anr.]

ii. (2010) 9 SCC 437 [Kalabharati Advertising Vs. Hemant Narichania and Anr.]

iii. (2013) 4 SCC 465 [Ayaaubkhan Noorkhan Pathan Vs. State of Maharashtra and Ors.]

14. The case of **Rafiq (supra)** has been cited to support the proposition that the party should not suffer because of omission of his lawyer.

15. The case of **Kalabharti Advertising (supra)** has been cited to gather support from the maxim *actus curiae neminem gravabit* meaning that the act of the Court should be prejudice none. The relevant paragraph is reproduced hereinbelow:

"15. No litigant can derive any benefit from the mere pendency of a case in a Court of Law, as the interim order always merges into the final order to be passed in the case and if the case is ultimately dismissed, the interim order stands nullified automatically. A party cannot be allowed to take any benefit of his own wrongs by getting an interim order and thereafter blame the Court. The fact that the case is found, ultimately, devoid of any merit, or the party withdrew the writ petition, shows that a frivolous writ petition had been filed. The maxim "Actus Curiae neminem gravabit", which means that the act of the Court shall prejudice no-one, becomes applicable in such a case. In such a situation the Court is under an obligation to undo the wrong done to a party by the act of the Court. Thus, any undeserved or unfair advantage gained by a party invoking the jurisdiction of the Court must be neutralised, as the institution of litigation cannot be permitted to confer any advantage on a party by the delayed action of the Court."

16. The case of **Ayaaubkhan Noorkhan Pathan (supra)** lays down that the opportunity to cross examine a party is the Rule of natural justice and not providing the said opportunity would violate the principles of natural justice. The relevant paragraph is reproduced hereinbelow:

"23. A Constitution Bench of this Court in State of M.P. v. Chintaman Sadashiva Vaishampayan, AIR 1961 SC 1623, held that the rules of natural justice, require that a party must be given the opportunity to adduce all relevant evidence upon which he relies, and further that, the evidence of the opposite party should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party. Not providing the said opportunity to cross-examine witnesses, would violate the principles of natural justice."

17. *Per contra*, Shri N. Dhar, learned counsel for the respondent / plaintiff, who is the landlord, has submitted that all along, the petitioner / defendant has been indulging in dilatory tactics and the present case is also a part of such tactics. He submits that a bare perusal of the order sheet would reveal that there has been continuous default on the part of the defendant as well as by his advocate. Further, the defendant has tried to take advantage of his own default by prolonging the suit which has been instituted for his ejection. He submits that the suit was instituted in the year 2017 and almost six years have already passed and the same is yet to be disposed of by the learned Trial Court and the said delay has been caused by the defendant of which he is now trying to take advantage of. Shri Dhar has accordingly prayed for dismissal of this petition with cost.

18. The rival contentions of the learned counsel for the parties have been duly considered and the materials placed before this Court have been duly examined.

19. The present application has been filed admittedly against two orders namely, 02.03.2020 and 18.02.2021. By the first order, the cross examination of the plaintiff witnesses was closed and by the second order dated 18.02.2021, the evidence of the defendant was closed. The aforesaid two orders are distinct with entirely different connotation and therefore, the maintainability of this petition whereby two orders have been challenged is itself questionable. In fact, on the ground of maintainability itself the present petition ought to be dismissed. However, even assuming that individual challenge has been made, let us examine the merits of the case.

20. The principal ground of challenge is that a party should not suffer because of the fault

of the Advocate and in this connection, the case of **Rafiq (supra)** was relied upon. In paragraph 3 the following has been observed:

"3. The disturbing feature of the case is that under our present adversary legal system where the parties generally appear through their advocates, the obligation of the parties is to select his advocate, brief him, pay the fees demanded by him and then trust the learned advocate to do the rest of the things. The party may be a villager or may belong to a rural area and may have no knowledge of the Court's procedure. After engaging a lawyer, the party may remain supremely confident that the lawyer will look after his interest. At the time of the hearing of the appeal, the personal appearance of the party is not only not required but hardly useful. Therefore, the party having done everything in his power to effectively participate in the proceedings can rest assured that he has neither to go to the High Court to inquire as to what is happening in the High Court with regard to his appeal nor is he to act as a watchdog of the advocate that the latter appears in the matter when it is listed...

...The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative. May be that the learned advocate absented himself deliberately or intentionally. We have no material for ascertaining that aspect of the matter. We say nothing more on that aspect of the matter. However, we cannot be a party to an innocent party suffering injustice merely because his chosen advocate defaulted..."

21. There is no dispute to the aforesaid proposition of law. However, the said proposition has to be examined from the point of view of the facts and circumstances of the case. In the said case of **Rafiq (supra)**, the Hon'ble Supreme Court was making the observation on the presumption that a party may be a villager or belonging to a rural area without having any knowledge about the Court procedure. However, in the instant case, the dispute is between the landlord and the tenant and the defendant is running a shop in the suit premises in the

heart of the city of Guwahati. The defendant is a businessman and, as transpired in the proceedings that rent is also deposited in the Court on regular basis in a connected case. That being the position, the defendant cannot be allowed to take advantage of his own fault as the situation has arisen for his continuous default.

22. The second ground is the importance of cross examination and the element of principles of nature justice for which the cases of **Kalabharti (supra)** and **Ayaaubkhan (supra)** have been referred to. In the case of **Kalabharti (supra)**, the maxim *actus curiae neminem gravabit* was explained and reference of this case has been made for closing the DW on a date which was fixed for necessary orders. The case of **Ayaaubkhan (supra)** is of the point of principles of natural justice.

23. Though it appears that 18.02.2021 was fixed for necessary orders on which date, the DW was impliedly closed by posting the matter for argument, one cannot lose sight of the conduct of the defendant in the *lis* pending before the Trial Court. A perusal of the order sheet would reveal that the negligence / laches on the part of the defendant is gross which would lead one to presume that the same has been deliberately done to delay the proceedings. As discussed above, there has been continuous default on the part of the defendant or even his counsel, both before the Advocate Commissioner for recording of statements in the period from 02.02.2019 to 03.04.2019 and again on 25.04.2019 and 08.07.2019. Further, whenever the matter was taken by the Court for Report of the Commissioner, the learned Court while fixing a next date for appearance had observed that such appearance has to be without fail, failing which it will be assumed that the cross examination is declined. Such, observation was made by the learned Court continuously in the orders dated 04.04.2019, 18.06.2019, 28.09.2019 and ultimately on 02.03.2020 the presumption was drawn. Similarly, before closing the DW, the Court had granted further opportunities on 15.12.2020 and on 18.02.2021, the DW was closed.

24. The further conduct of the defendant in filing an application under Order IX Rule 7 of the CPC being the petition No. 2365/21 against the aforesaid orders is even more intriguing as such petition is not the remedy. Thereafter, the defendant went to the extent of filing Misc. Appeal No. 14/2022 against the order of dismissal of the petition dated 16.03.2022 and the

appeal was dismissed on 31.08.2022. It is seen that almost nine further months were consumed in the aforesaid process which apparently is an erroneous one. This Court is therefore inclined to accept the submission made on behalf of the respondent that the defendant who is a tenant facing an ejectment suit has taken recourse to various dilatory tactics to delay the suit.

25. The case of **Ayaubkhan (supra)** is otherwise also not applicable to the present facts and situation where it is seen that the learned Court had indeed granted a number of opportunities and there was continuous default on the part of the defendant. The present is not a case of denial of the right to cross examine or adduce evidence but a case where in spite of adequate opportunities, such right was not exercised and that too without any reasons and simply by way of default.

26. The exercise of discretion is always accompanied by the concept of equity. In the instant case, though the discretionary powers of this Court has been sought to be invoked, this Court is of the opinion that going by the principles of justice, equity and good conscience, no case for interference is made out. The present situation is directly an outcome of the gross and continuous negligence of the defendant which cannot be overlooked by this Court.

27. Accordingly, the present petition is dismissed. For the reasons, which would appear above and the facts and circumstances, this Court further imposes cost of Rs.10,000/- (Rupees Ten Thousand) upon the petitioner for delaying the proceedings. The cost be deposited in favour of the High Court Legal Services Committee within 45 days from today.

28. No order as to cost.

JUDGE

Comparing Assistant