



GAHC010235962023

Page No.# 1/7

FR



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

Case No. : CRP(IO)/344/2023

KANGKAN KISHORE BORAH
S/O UMESH BORAH, R/O BISHNU PATH, K.K. HANDIQUE ROAD, HOUSE
NO. 14, MATHURA NAGAR, DISPUR, GUWAHATI-6, DIST- KAMRUP (M),
ASSAM

VERSUS

THE STATE OF ASSAM AND 3 ORS
REPRESENTED BY COMMISSIONER AND SECRETARY TO THE GOVT. OF
ASSAM, CULTURAL AFFAIRS DEPARTMENT, DISPUR, GUWAHATI-6,
ASSAM

2:JYOTI CHITRABAN
FILM STUDIO SOCIETY
REPRESENTED BY ITS CHAIRMAN
KAHILIPARA
GUWAHATI-19
ASSAM

3:THE CHAIRMAN
JYOTI CHITRABAN FILM STUDIO
KAHILIPARA
GUWAHATI-19
ASSAM

4:THE SECRETARY
JYOTI CHITRABAN
FILM STUDIO SOCIETY
KAHILIPARA
GUWAHATI-19



ASSA

Advocate for the Petitioner : MR S P DAS

Advocate for the Respondent : GA, ASSAM

**BEFORE
HONOURABLE MR. JUSTICE ACHINTYA MALLA BUJOR BARUA**

JUDGMENT & ORDER (ORAL)

Date : 09-11-2023

Heard Mr. S.P. Das, learned counsel for the petitioner. Also heard Mr. T.R. Gogoi, learned counsel for the respondent No. 1 and Mr. M. Boro, learned counsel for the respondent No. 2.

2. The petitioner Kangkan Kishore Borah instituted T.S. No. 497/2013 in the Court of Civil Judge No. 1, Kamrup at Guwahati praying for a declaration that the letter dated 16.08.2013 issued by the defendant no. 4 therein namely the Secretary Jyoti Chitraban, Film Studio Society to be bad in law, in-operative and not binding upon the plaintiff and further for a declaration that the defendants are jointly and severally liable to pay a sum of Rs.29,02,167/- (Twenty Nine Lakhs Two Thousand One Hundred Sixty Seven) with pendentillite and future interest and certain other reliefs as indicated in the prayer of the plaint.

3. In the proceeding before the learned Civil Judge No. 1, Kamrup, the matter was placed before the learned Advocate Commissioner for the purpose of adducing oral evidence of the witnesses of the parties. The cross examination of DW.2 namely Ranjan Hazarika was fixed before the learned Advocate Commissioner on 21.01.2023. But on the said date, the plaintiff made a request

to the learned Advocate Commissioner that the cross examination be deferred as the learned counsel Mr. S.P. Das who was to lead the cross examination on behalf of the plaintiff was inconvenienced *inasmuch* as he was performing the Annual Shradha of his mother. The learned Advocate Commissioner appears to have refused the request for adjournment and compelled the learned counsel who appeared before the learned Advocate Commissioner to proceed with the cross examination.

4. It is stated that the learned Advocate Commissioner acted in that manner at the behest of the defendants. Accordingly, the learned counsel who made a request for the adjournment was required to proceed with the cross examination and the cross examination that was done was not to the complete satisfaction of the plaintiff but however, the learned Advocate Commissioner closed the further cross examination of DW.2.

5. In the circumstance, the plaintiff instituted petition No. 1378/2023 under Section 151 read with Order 18 Rule 17 of the CPC for recalling the DW.2 for further cross examination. By the order dated 03.08.2023 of the learned Civil Judge No. 1, Kamrup, the petition no. 1378/2023 requesting for recalling the DW.2 and further cross examination stood rejected on the ground that the DW.2 was cross examined and discharged by the learned Advocate Commissioner and if any further question was left out on the side of the plaintiff, the plaintiff could have reserved the further cross examination of DW.2 but instead of doing that the cross examination of DW.2 was closed and consequent thereof he was discharged.

6. On one hand, the learned Civil Judge No. 1 had recorded that on 21.01.2023 there was a request on the part of the plaintiff to defer the cross examination *inasmuch* as the learned counsel for the plaintiff who was to lead

the cross examination was inconvenienced as he was to perform the Annual Shradha of his mother and the plaintiff was compelled to proceed with the cross examination through the learned counsel who was unprepared for the purpose and on the other hand, arrives at its conclusion that the plaintiff could have reserved the further cross examination of DW.2 but instead of doing that the cross examination of DW.2 was closed.

7. No material is available to show that the plaintiff on his own volition had required the cross examination to be closed, in the background of the circumstance that there was a prior request for deferring the cross examination *inasmuch* as the learned counsel leading the cross examination was at inconvenience on the given day.

8. The conflicting materials as recorded by the learned Civil Judge No. 1, Kamrup does not reflect that the cross examination of the DW.2 was closed by following the due procedure of law. In either view of the matter, when there is a request by the learned counsel for deferring the cross examination on a pious ground that the learned counsel is required to perform the Annual Shradha of his mother it would be rather incongruent to accept the situation that such prayer for adjournment would also be refused and the cross examination be compelled to be conducted by the learned counsel who was not prepared for the purpose and thereafter, as no further question was forthcoming, to close the cross examination as if the plaintiff did not want to further cross examine the witness.

9. Order 18 Rule 17 of the CPC provides that the Court may at any stage of a suit recall any witness who has been examined and may put such question to him as the Court thinks fit.

10. From a reading of the provisions of the Order 18 Rule 17 as indicated by the Hon'ble Supreme Court in its judgment in *K.K. Velusamy vs. N. Palanisamy reported in (2011) 11 SCC 275* in paragraphs 19 and 20, we accept that the present case may not have been the appropriate matter to invoke the provisions of the Order 18 Rule 17 of the CPC to recall the DW.2 *inasmuch* as the power under Order 18 Rule 17 is a restricted power to be exercised only upon the satisfaction of the conditions provided therein, more particularly in paragraphs 19 and 20 of the pronouncement of the Hon'ble Supreme Court in *K.K. Velusamy (supra)* and apparently in the case of the petitioner plaintiff such conditions do not appear to have been satisfied.

11. The provisions of the paragraphs 19 and 20 of the judgment of the Hon'ble Supreme Court in *K.K. Velusamy (supra)* are extracted as below:

“19. We may add a word of caution. The power under Section 151 or Order 18 Rule 17 of the Code is not intended to be used routinely, merely for the asking. If so used, it will defeat the very purpose of various amendments to the Code to expedite trials. But where the application is found to be bona fide and where the additional evidence, oral or documentary, will assist the court to clarify the evidence on the issues and will assist in rendering justice, and the court is satisfied that non-production earlier was for valid and sufficient reasons, the court may exercise its discretion to recall the witnesses or permit the fresh evidence. But if it does so, it should ensure that the process does not become a protracting tactic. The court should firstly award appropriate costs to the other party to compensate for the delay. Secondly, the court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly, if the application is found to be mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs.

20. If the application is allowed and the evidence is permitted and ultimately the court finds that evidence was not genuine or relevant and did not warrant the reopening of the case recalling the witnesses, it can be made a ground for awarding exemplary costs apart from ordering prosecution if it involves fabrication of evidence. If the party had an opportunity to produce such evidence earlier but did not do so or if the evidence already led is clear and unambiguous, or if it comes to the conclusion that the object of the application is merely to protract the proceedings, the court



should reject the application. If the evidence sought to be produced is an electronic record, the court may also listen to the recording before granting or rejecting the application."

12. From such point of view, no infirmity is noticed in the order of the learned Civil Judge No.1 in rejecting the application under Order 18 Rule 17 of the CPC but at the same time what is noticed is that an illegality had crept in on 21.01.2023 when in an unreasonable and arbitrary manner the cross examination of DW.2 Ranjan Hazarika was closed by the learned Advocate Commissioner without taking note of the genuine request for deferment of the cross examination and compelling the petitioner to proceed with the cross examination through the learned counsel who may not have been prepared for the purpose on the given day.

13. From such point of view, the closure of the cross examination of DW.2 at the instance of the defendants appears to be arbitrary and unacceptable. If the closure of the cross examination of the DW.2 Ranjan Hazarika is unacceptable in the facts and circumstance as well as in law, it would be more of a case of continuing with the cross examination of DW.2 rather than a case of recalling the DW.2 for further cross examination. Accordingly, the closure of the cross examination of DW.2 is set aside and the Trial Court is required to enable the plaintiff to cross examine the DW.2 Ranjan Hazarika to the required extent and to the satisfaction of the plaintiff. Accordingly, the matter is remanded back to the Civil Judge No. 1, Kamrup at Guwahati to enable the petitioner plaintiff to complete the cross examination of DW.2 on any given date as may be fixed by the Court and thereafter, proceed with the matter as per law.

14. The order dated 08.03.2023 is interfered with to a limited extent as indicated above.



Civil Revision Petition stands disposed of in the above terms.

JUDGE

Comparing Assistant