

**IN THE HIGH COURT AT CALCUTTA
Civil Revisional Jurisdiction
Appellate Side**

Present:

The Hon'ble Justice Debi Prosad Dey

C.O. No.1904 of 2015

Sawagat Ali Mullick.....Petitioner

Versus

Sk. Akbar Ali & Ors.....Opposite party

**For the Appellant/
Petitioner** : **Mr. Debjit Mukherjee**
: **Ms. Susmita Chatterjee**

**For the plaintiffs/
Respondents** : **Mr. Haradhan Banerjee**
: **Mr. Sayan Sinha**

Heard on : **30.11.2015, 10.12.2015**

Judgment on : **11.12.2015**

Debi Prosad Dey, J. :-

The petitioner has filed this application under Article 227 of the Constitution of India being aggrieved by order dated 30th March, 2015 passed by learned Civil Judge(Jr. Divn.), 4th Court, Howrah in Misc case No.12/11 arising out of title suit no.227/2005.

It may be mentioned here that exparte order of stay of the misc case was granted by this Court on the application of the petitioner.

Learned Advocate for the opposite parties mentioned before this Court that despite service of notice of caveat, learned Advocate for the petitioner did not even care to inform the Court about filing of such caveat.

Learned Advocate for the petitioner however contended that no notice of caveat was served upon him and as such he had no knowledge about filing of such caveat by the opposite party.

Instead of recalling the earlier order, on consent of both the parties the case is taken up for final hearing.

It would not be out of place to mention in brief about the fact of the case which gives rise to filing of this application under Article 227 of the Constitution of India. Opposite parties/ plaintiffs have filed title suit no.227/2005 for eviction, recovery of possession and khas possession against the present petitioner before the learned Civil Judge(Jr. Divn.), 4th Court, Howrah which was registered as title suit no.227/2005. The said suit was decreed exparte against the defendant/petitioner. The petitioner thereafter filed an application under Order 9 Rule 13 of the Civil Procedure Code read with Section 151 of the Code of Civil Procedure for setting aside the exparte decree and the said application has been registered as misc case no.12/2011.

The specific defence case of the petitioner in the said misc case is that no notice was ever served upon him and virtually the exparte decree was passed without any intimation or knowledge of the defendant/petitioner. The opposite parties/plaintiffs tried to summon the process server Sri Saroj Ghosh to prove his report which was accepted by the Court but the whereabouts of the said process server could not be obtained by the opposite parties/plaintiff. Thereafter the opposite parties/plaintiffs filed an application under Section 74 and 35 of the Indian Evidence Act read with Section 151 of the Code of Civil Procedure for marking the report of the process server as exhibit. After giving adequate opportunity of hearing to both the parties learned trial Judge marked the said report of the process server as exhibit.

Being aggrieved by the said order of learned trial Judge the petitioner/defendant has filed this application under Article 227 of the Constitution of India.

Learned Advocate Mr. Mukherjee appearing on behalf of the defendant/petitioner contended that learned trial Judge ought to have invoked Order 16 Rule 10 of Civil Procedure Code and thereby could have compelled by force of law the appearance of the witness under reference.

It is further submitted by learned Advocate that learned trial Judge has accepted the said report of the process server without assigning any reason and as such the order impugned has been suffering from serious infirmity and ought to be set aside. Mr. Mukherjee learned Advocate appearing on behalf of the petitioner invited the attention of the Court with regard to explanation appended with Article 123 of the Limitation

Act. It is apparent from such explanation that substituted service under Order V of Rule 20 of the Civil Procedure Code shall not be deemed to be due service.

On that score learned Advocate appearing on behalf of the defendant/petitioner contended that the order impugned ought to be set aside.

Learned senior Advocate Mr. Haradhan Banerjee appearing on behalf of the opposite parties / plaintiffs contended that learned trial Court has rightly admitted the report of process server under Section 35 of the Indian Evidence Act as exhibit. Learned Senior Advocate Mr. Haradhan Banerjee appearing on behalf of the opposite parties/plaintiff further contended that mere admission of such document under Section 35 of the Evidence Act would not ipso-facto prove the authenticity of the said document but learned trial Judge is required to examine the probative value of such document at the time of final hearing of the misc case under reference. In support of his contention learned Advocate Mr. Banerjee appearing on behalf of the opposite parties/plaintiffs has referred the following decisions reported in AIR 2010 SC 2933(Madan Mohan Singh & Ors. V. Rajni Kant & Anr.) and AIR 1983 SC 684(State of Bihar & Ors. V. Sri Radha Krishna Singh & Ors.).

Saroj Ghosh the then process server of Howrah Court has retired on superannuation and his whereabouts could not be obtained by the opposite parties/plaintiffs. A government employee cannot remain untraced even after his retirement since the government employee is entitled to get retiral benefits and accordingly he needs to have a permanent address to receive such retiral benefits as well as the pension.

Secondly, the report of the process server reveals that such report was endorsed by at least two witnesses of the locality.

Therefore, it cannot be said that there was absolutely no scope on the part of the opposite parties/plaintiffs to adduce sufficient evidence in order to prove the report of the process server.

Be that as it may, such report has been prepared by the process server in due discharge of his official duties and accordingly the said report being part of the record may safely be admitted in evidence on the strength of Section 35 of the Evidence Act even without examination of the process server. Learned trial Court did not commit any mistake on that score.

The question cropped up as to the probative value of such exhibit.

Hon'ble Supreme Court in the decision reported in AIR 2010 SC 2933 has specifically observed in paragraph 16 of the said judgment that :-

“So far as the entries made in the official record by an official or person authorized in performance of official duties are concerned, they may be admissible under Section 35 of the Evidence Act but the Court has a right to examine their probative value. The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. The entry in School Register/School Leaving Certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases.”

In the decision reported in AIR 1983 SC 684 Hon'ble Supreme Court has given some guidelines in respect of relying on the genealogy and its admissibility.

It is crystal clear from the decision referred to herein above that though a document may be admitted in evidence yet the Court is duty bound to examine the probative value of such exhibit. The authenticity of the entries made in such report ought to be looked into at the time of considering such exhibit during disposal of the misc case. I do not like to make any comment with regard to the submission made by learned Advocate appearing on behalf of the petitioner/defendant with regard to explanation appended with Article 123 since any such comment shall have telling effect in the disposal of the misc case by learned trial Judge. In the premises set forth above it may safely be stated that learned trial Judge should have noted the objection of the petitioner/defendant while exhibiting such report of the process server and learned trial Judge should consider the probative value of such document at the time of final disposal of the misc case. Learned trial Judge is thus requested to continue with the proceedings in the light of the observations made in the forgoing paragraphs.

The interim order is vacated. The application under Article 227 of the Constitution of India is thus dismissed.

Urgent photostat certified copy of this order, if applied for, be given to the parties as expeditiously as possible.

(Debi Prosad Dey, J.)