

HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

CIVIL REVISION PETITION No.751 of 2015

ORDER:

1. This Civil Revision Petition is filed under Article 227 of the Constitution of India challenging the order dt.18.12.2014 in I.A.No.100 of 2014 in O.S.No.258 of 2009 of the I Additional Senior Civil Judge (Fast Track Court), Mahabubnagar.
2. The petitioner herein is the plaintiff in O.S.No.258 of 2009. The said suit was filed by the petitioner against the respondent for declaration of title of the petitioner in respect of the plaint schedule property and for a consequential permanent injunction restraining the respondent from interfering with the alleged possession of the petitioner of the plaint schedule property.
3. A written statement was filed by the respondent opposing the suit claim. Issues were framed and trial commenced. Evidence on the side of the petitioner was concluded. DW-1 was examined on behalf of the respondent.
4. At that stage, the respondent filed I.A.No.100 of 2014 invoking Order XVI Rule 1 Civil Procedure Code(for short 'CPC') to summon an Advocate-Commissioner by name Sri K.Brahmaiah, who had been appointed to identify the plaint schedule property in a suit O.S.No.42 of 2002 on the file of the Junior Civil Judge, Mahabubnagar filed against the respondent by the father of the vendors of the petitioner.
5. In the affidavit filed in support of the application, it is contended that the said Advocate-Commissioner visited the plaint schedule property with the assistance of a surveyor and also got prepared a map and filed a report dt.21.11.2002; that the issue in the present suit is identical to the issue in the earlier suit; therefore, the respondent wishes to examine the said Advocate-Commissioner by name Sri

K.Brahmaiah, r/o Mahabubnagar, as a witness on behalf of the respondent to prove the said Advocate-Commissioner's report, location map of the suit plot and other plots. He, therefore, prays the Court to permit him to examine the Advocate-Commissioner as his witness by issuing summons through Court.

6. Counter-affidavit was filed by the petitioner opposing the said application contending that it is not maintainable since the petitioner was not a party in O.S.No.42 of 2002 on the file of the Junior Civil Judge, Mahabubnagar and therefore, the alleged report of the Advocate-Commissioner was not binding on him. He also contended that he was not aware prior to filing of the present suit by him that the father of his vendors had filed the said suit against the respondent or that there was an Advocate-Commissioner, by name Sri K.Brahmaiah, appointed to identify the suit plot with the assistance of the surveyor. It was also contended that the Advocate-Commissioner has not visited the plaint schedule site or got the plot Nos.47 to 51 measured as per the plan of the Grampanchayat Yenugonda with the assistance of the surveyor or got prepared a map or identified the plaint schedule plot as Plot No.49 in his report dt.21.11.2002. It is further stated that on enquiry by the petitioner, he has been informed by his vendors that the Advocate-Commissioner never visited the site. It is also contended that the parties in O.S.No.42 of 2002 have not examined the said Advocate-Commissioner or surveyor as witnesses, so they cannot be examined as witnesses in the present suit. Lastly, it is contended that it is open to the respondents to file an application in the present suit for appointment of an Advocate-Commissioner and get localization of her plot and that there was no necessity to seek issuance of summons to said witness.

7. By order dt.18.12.2014, the said application was allowed by the Court below. The Court below opined that since the petitioner is

claiming title through the daughter and son of one Gangisetty Lingaiah, who was the plaintiff in O.S.No.42 of 2002, the proceedings in the suit in O.S.No.42 of 2002 are binding on petitioner. It further observed that the report of the Advocate-Commissioner is not a proved document, but subject to scrutiny. Since the earlier suit and the present suit are in respect of the same subject matter and for identification of the suit plot only the said Advocate-Commissioner had been appointed, he is an important witness and it is necessary to summon him to be examined as a witness on behalf of the respondent.

8. Challenging the same, this Civil Revision Petition is filed.

9. Heard Sri Surya Kiran Reddy, Senior Counsel appearing for the petitioner and Sri Anand Kumar Kapoor, Counsel for the respondents.

10. Counsel for the petitioner contended that the Court below erred in allowing I.A.No.100 of 2014 and summoning the Advocate-Commissioner in O.S.No.42 of 2002 as a witness in the present suit; he cannot be summoned to speak about the report filed in O.S.No.42 of 2002 which was prepared in the absence of the petitioner, since the petitioner was not a party in O.S.No.42 of 2002. It was further contended that the suit in O.S.No.42 of 2002 had been dismissed for default and there was no final adjudication in the suit and anything stated in the report of the Advocate-Commissioner would not bind the petitioner.

11. Counsel for the respondent on the other hand contended that the law permits the Court to summon a person as a witness by making provision thereof in Order XVI Rule 1 CPC; there is no bar in the Civil Procedure Code to summon an Advocate-Commissioner in an earlier suit as a witness in a subsequent suit, where the subject matter of the suit is the same property. The evidentiary value of such a witness's deposition or his report is a matter to be considered by the Court below

and no conclusion thereon can be drawn at this stage, when the Court is merely considering whether such a witness should be issued summons to give evidence on behalf of the respondent. He also relied upon the judgment of a Division Bench of Calcutta High Court in ***Sarat Chandra Rakhit v. Sarala Bala Ghosh and others.***^[1]

12. I have noted the contentions of both sides.

13. Order XVI Rule 1 CPC states :

“Order XVI Rule 1 CPC: List of witnesses and summons to witnesses: (1) On or before such date as the Court may appoint, and not later than fifteen days after the date on which the issues are settled, the parties shall present in Court a list of witnesses whom they propose to call either to give evidence or to produce documents and obtain summonses to such persons for their attendance in Court.

(2) A party desirous of obtaining any summons for the attendance of any person shall file in Court an application stating therein the purpose for which the witness is proposed to be summoned.

(3) The Court may, for reasons to be recorded, permit a party to call, whether by summoning through Court or otherwise, any witness, other than those whose names appear in the list referred to in sub-rule(1), if such party shows sufficient cause for the omission to mention the name of such witness in the said list.

(4) Subject to the provisions of sub-rule(2), summonses referred to in this rule may be obtained by the parties on an application to the Court or to such officer as may be appointed by the [Court in this behalf within five days of presenting the list of witnesses under sub-rule(1)].”

14. In the affidavit filed in support of I.A.No.100 of 2014, admittedly, no reasons have been assigned by the respondent for the omission to mention the name of the Advocate-Commissioner Sri K.Brahmaiah in the list filed by him as is mandate under Order XVI Rule 1(3) of CPC.

15. Counsel for the respondent would contend that the respondent/defendant had not filed any list of witnesses as required by Order XVI Rule 1(1) CPC at all and therefore, there is no occasion to apply Sub-Clause 3 of Rule 1 of Order XVI CPC.

16. I am unable to agree with the said submission. The rules of

procedure prescribed in the Code of Civil Procedure, 1908 are based on principles of natural justice. They have been framed to see that each party is aware of the case of the other side and how the other side intends to prove its case. The purpose of Order XVI Rule 1 CPC is to give notice to a party about the witnesses which his adversary is to examine in the case so that he would be in a position to know the nature of evidence it has to meet. It is settled law that filing of such a list of witnesses is not mandatory, but directory(See ***Kailasa Bhoomiah v. Kailasa Eashwara Lingam***^[2]).

17. In fact Order XVI Rule 1-A CPC entitles a party, subject to provisions of sub-rule(3) of Rule 1, to bring any witness to give evidence or to produce documents even without applying for summons under Rule1.

18. So, if a party does not file a list of witnesses sought to be summoned as directed by sub-rule (1) of Rule 1 of Order XVI CPC, he may still file an application to summon the person taking advantage of sub-rule(2) or Rule 1 of Order XVI CPC. But in such an application unless he gives a reason for omitting to file the list and mention the name of such witness earlier, he cannot be granted relief in view of the language in sub-rule (3) of Rule 1 of Order XVI CPC. In ***N.Balaraju v. G.Vidyardhar***^[3], this Court has held that even when no list of witnesses is filed, sub-rule(3) of Rule 1 of Order XVI CPC would apply.

19. If the party, who seeks to summon a witness, whose name was not mentioned in any list prior to filing of the application seeking to summon such a witness under Order XVI Rule 1 CPC, is unable to show sufficient cause, then the said witness cannot be summoned to give evidence.

20. No doubt in ***Sarat Chandra Rakshit***'s case (1 supra), the Court

held that a report and a map prepared by an Advocate-Commissioner can not only be taken into evidence in the suit in which he made the inquiry or survey, but they can also be admitted as evidence in another suit under the Evidence Act, 1872 on being proved by the said Advocate-Commissioner.

21. The above said principle cannot help the respondent in view of the fact that the name of the said witness had not been revealed by him in the list which he is supposed to file within 15 days from the date of settlement of issues and no cause is assigned by him for this lapse.

22. The Court below, in my considered opinion, over looked sub-clause(3) of clause (1) of Order XVI CPC and allowed the application I.A.No.100 of 2014. Therefore, the order of the Court below cannot be sustained.

23. Accordingly, the Civil Revision Petition is allowed setting aside the order dt.18.12.2014 in I.A.No.100 of 2014 in O.S.No.258 of 2009 of the I Additional Senior Civil Judge (Fast Track Court), Mahabubnagar. There shall be no order as to costs.

24. Consequently, Miscellaneous Petitions pending, if any, shall stand closed.

M.S.RAMACHANDRA RAO, J

29th June, 2015.
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[\[1\]](#) AIR 1928 Calcutta 63

[\[2\]](#) 1988 (1) APLJ 268

[\[3\]](#) 2004(4) ALD 490