

CIVIL REVISION PETITION No. 1725 OF 2016

ORDER:

This civil revision petition arises out of the order dated 15-06-2015 passed in O.S.No. 33 of 2009 on the file of the Court of Senior Civil Judge, Parvatipuram (for short, 'the trial Court'), whereby the trial Court refused to receive chief evidence affidavit of the 1st defendant in the evidence adduced by the 5th defendant.

2. Being aggrieved by the order passed by the trial Court in refusing to receive chief evidence affidavit filed by the 5th defendant in the suit, the 5th defendant has preferred this civil revision petition.

3. Heard arguments of learned counsel for the revision petitioner and learned counsel for the respondents and perused the material on record.

4. The contention of the revision petitioner is that he is the 5th defendant in the suit and at the stage of adducing evidence on his behalf before the trial Court, he intended to examine the 1st defendant, who had remained *ex parte*, as a witness on his behalf to prove his case. The trial Court did not permit him to examine the 1st defendant as his witness on the ground that the 1st defendant had remained *ex parte* and, as such, he cannot give evidence in the suit. In this regard, learned counsel for the revision petitioner has placed reliance on the provisions of Order XVI Rule 1-A of the Code of Civil Procedure (for short, 'C.P.C.') which reads as follows:

"Subject to the provisions of sub-rule (3) of Rule 1, any party to the suit may, without applying for summons under Rule 1, bring any witness to give evidence or to produce documents."

5. Learned counsel for the revision petitioner, placing reliance on ***Mange Ram Vs. Brij Mohan and others***^[1], contended that as per Order XVI Rule 1-A C.P.C., whether name of the witness is mentioned in the list or not, he can be brought as a witness to give evidence or to produce documents. It is relevant to refer to the observations of the Apex Court hereunder:

"Sub-rule (1) of Rule 1 whom the party would produce before the Court without the assistance of the Court, it was not necessary to provide in Rule 1 A that the party may bring any witness to give evidence or to produce documents without applying for summons under Rule 1. Rule 1 A of Order 16 clearly brings to surface the two situations in which the two rules operate. Where the party wants the assistance of the Court to procure presence of a witness on being summoned through the Court, it is obligatory on the party to file the list with the gist of evidence of witness in the Court as directed by sub-rule (1) of Rule 1 and make an application as provided by

sub-rule (2) of Rule 1. But where the party would be in a position to produce its witnesses without the assistance of the Court, it can do so under rule 1 A of Order 16 irrespective of the fact whether the name of such witness is mentioned in the list or not."

6. In the instant case, it is obvious that the 5th defendant intends to examine a witness on his behalf and that witness happens to be the 1st defendant. There is no impediment for examining the 1st defendant in this case though he remained *ex parte* and he did not file written statement into the Court.

7. Learned counsel for the respondents-plaintiffs contended that the 1st defendant had remained *ex parte*, slept over the matter for 5 years, he did not approach the Court within a reasonable time and he approached only after evidence has commenced which is not in accordance with the provisions of Order XVI Rule 3 and Order XVI Rule 14 C.P.C.

Order XVI Rule 3 C.P.C. reads as follows:

"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."

Order XVI Rule 14 C.P.C. reads thus:

"Subject to the provisions of this Code as to attendance and appearance and to any law for the time being in force, where the Court at any time thinks it necessary to examine any person, including a party to the suit, and not called as a witness by a party to the suit, the Court may, of its own motion, cause such person to be summoned as a witness to give evidence or to produce any document in his possession, on a day to be appointed, and may examine him as a witness or require him to produce such document."

8. In view of the judgment relied upon by learned counsel for the revision petitioner in **Mange Ram** (*supra*), it is obvious that where a party would be in a position to produce its witnesses without assistance of the Court, it can do so under Rule 1 A of Order XVI C.P.C. irrespective of the fact whether the name of such witness is mentioned in the list or not. The examination of the 1st defendant, who remained *ex parte*, as a witness of the 5th defendant is not going to cause any prejudice to the rights of the respondents-plaintiffs. The respondents have got opportunity to cross-examine this witness and they can elicit the truth or otherwise of the facts submitted by this defendant in his evidence.

9. The trial Court passed the impugned order placing reliance on **Bhgeral Rai and others Vs. Bhagavan and others**^[2]; and **Siya Sinha Vs.**

Shivadhari Sinha^[3]. However, the judgments relied upon by the trial Court are not applicable to the facts of the present case in view of the judgment in **Mange Ram** (*supra*) *supra* relied upon by learned counsel for the revision petitioner, wherein the scope of Order XVI Rule 1 A is explained. In the instant case, the 1st defendant, who remained *ex parte*, is not intending to cross-examine the plaintiffs' witnesses nor is he going to adduce any evidence on his behalf. The 1st defendant is being called as a witness on behalf of the 5th defendant, which can be permitted in this case, in view of the rationale laid down in **Mange Ram** (*supra*).

11. Considering the facts and circumstances of this case, I am unable to concur with the findings of the trial Court in rejecting the relief of permitting the 5th defendant to call the 1st defendant as a witness in this case.

12. In the result, the civil revision petition is allowed and the trial Court is directed to dispose of the case within six months, from the date of receipt of a copy of this order, since the case pertains to the year 2009. Pending miscellaneous petitions in this revision, if any, shall stand closed in consequence. No order as to costs.

Date: 17-06-2016.

PRASAD, J.

JSK

G.SHYAM

^[1] (1983) 4 SCC 36

^[2] AIR 1962 PATNA 392

^[3] AIR 1972 PATNA 81