

HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.2149 OF 2016

ORDER:

This revision, under Article 227 of the Constitution of India, is filed challenging the Order dated 19.02.2016 in I.A. No.592 of 2016 in O.S. No.9 of 2014 passed by the VI Additional District Judge, at Sompeta, Srikakulam District, whereby the summons were issued to the witnesses to give evidence and to produce documents, allowing the application filed under Rule 14 of Order XVI read with Section 151 of the Code of Civil Procedure, 1908 (for short, 'CPC').

02. The petitioners herein are the defendants 3, 4 and 6, the first respondent herein is the plaintiff and the respondents 1, 2 and 5 herein are the defendants 1, 2 and 5 in the suit. The parties will hereinafter be referred to as arrayed in the petition before the trial court, for convenience.

03. The petitioner/plaintiff filed suit for declaration that the registered settlement deed dated 30.05.1990 allegedly executed by Seshamma, W/o. late Balaramayya is a void one and not binding on him, and to declare that the registered sale deed dated 08.05.1992 executed by Gonapa Seshamma, w/o. Balaramaya in favour of the third defendant is also void to the extent of 1/3rd undivided share of the first respondent herein and to evict the defendants from the property.

04. The petitioner/plaintiff filed I.A. No.34 of 2015 to cause production of the documents by the first respondent, who remained *ex parte* in the suit, under Rule 8 of Order XII of CPC, seeking leave to issue notice to the first respondent to appear before the court for production of documents, accordingly, the first respondent appeared and undertook to produce the documents, thereupon the trial court dismissed the petition with an observation that the certified copy of the document can be produced and the same can be received as secondary evidence. Consequently the petitioner filed the present

petition in I.A. No.592 of 2016 to summon the first respondent to produce the document, since he failed to produce the documents as undertaken by him, under Rule 14 of Order XVI of CPC, to substantiate the contentions of the petitioner in the main suit.

05. The respondents 1 to 3 and 5 did file no counter.

06. The respondents 4 and 6 filed counter before the trial court contending that the first respondent cannot be directed to produce the document as mentioned in the petition, as the petitioner was permitted to produce secondary evidence and that the first respondent/ first defendant before the trial court is a party to the suit, he can be examined as a witness before the court, through him the document can be marked since the first respondent/ first defendant is a custodian of the document and that the first respondent alone is behind the litigation. Since, the petition in I.A. No.34 of 2015 was dismissed on 04.08.2015, the Order passed therein attained finality, the present petition is not maintainable and prayed to dismiss the petition.

07. The trial court, upon hearing both the counsel, allowed the petition to issue summons to the first respondent-Gonapa Dasappa, S/o. Abbayi, to give evidence by producing list mentioned documents i.e. 1) original Will dated 25.01.1949 executed by Gonapa Jogulu in favour of Varahalu, 2) Relinquishment deed dated 04.10.1947 executed by Seshamma w/o. Balaramayya, 3) the certificate of death of Gonapa Jogulu and 4) the certificate of death of Gonapa Balarama Murthy on the ground that the document can be proved only by examining the person, who is in possession, those documents are the basis for defendants claim and unless the original document is produced, it is difficult to prove the case of the plaintiff.

08. Aggrieved by the order in I.A. No.592 of 2016 in O.S. No.9 of 2014 the present revision is filed challenging the order on various grounds, mainly contending that when I.A. No.34 of 2015 was dismissed, the present petition is not maintainable and that apart Rule 14 of Order XVI of CPC is applicable only to exercise the power by the

Court to issue summons to the witnesses as a court witness, not for summoning the witnesses on the application by any party to the suit. Even otherwise, in the order in I.A. No.34 of 2015, the court permitted the petitioner before the trial court to produce secondary evidence for the purpose of identifying the signatures of the testator on the original Will through the evidence of P.W.2, but the trial court did not consider the impact of the Order in I.A. No.34 of 2015 filed under Rule 8 of Order XII of CPC, passed the impugned order exercising the jurisdiction illegally and prayed to set aside the same.

09. During hearing, Sri K. Manik Prabhu, learned counsel for the revision petitioners, almost reiterated the contentions urged in the grounds of revision, however, the main endeavour of the learned counsel for the petitioners is that the power conferred on the Court under Rule 14 of Order XVI of CPC is *suo motu* and not on the application of any of the party before it, but the petitioner before the trial court filed a petition under Rule 14 of Order XVI of CPC to issue summons to the witnesses, which is misconceived. It is further contended that when the petitioner was permitted to adduce secondary evidence while dismissing I.A. No.34 of 2015, question of summoning any witness does not arise and it is only to obviate or circumvent the procedural law which cannot be permitted by the courts and prayed to dismiss I.A. No.592 of 2016 setting aside the order dated 19.02.2016 while allowing the revision.

10. Whereas, Sri B. Sridhar Babu, learned counsel for the first respondent, would contend that, at best, the quoting of wrong provision is only a mistake of the petitioner/first respondent herein and mere quoting of wrong provision of law is not a ground to dismiss the petition and the intention of the petitioner/ first respondent herein is only to summon the first respondent before the trial court to produce the documents and to give evidence, but not otherwise, therefore, the trial court rightly exercised the jurisdiction. He also further contended that dismissal of I.A. No.34 of 2015 while permitting the petitioner to adduce

secondary evidence would not come in the way of the petitioner, since the petitioner is required to prove the Will and Settlement Deed as provided under Section 68 of the Indian Evidence Act, 1872 and it is difficult to identify the signatures on the certified copies of the documents issued by the registering authority. Therefore, the trial court rightly exercised the power to summon the witness.

11. Considering the rival contentions, perusing the material papers on record, the point that arise for consideration is,

Whether quoting of wrong provision of law is fatal to the petition and whether the dismissal of I.A. No.34 of 2015 by Order dated 04.08.2015 debars the petitioner before the trial court, first respondent herein, to file a petition to summon the witness? If not, the order passed by the trial court is sustainable?

POINT:

12. Admittedly the petition was filed before the trial court under Rule 14 of Order XVI of CPC to issue summons to the first defendant to give evidence and to cause produce the document stated above. Rule 14 of Order XVI of CPC confers power on the Court to issue summons to any person including a party to the suit, and not called as a witness by a party to the suit, on its own motion, and to cause produce any document in his possession on the day fixed by the Court, examine him as a witness, receive the document, if any, summoned. _

13. Thus, it is clear from Rule 14 of Order XVI of CPC, it is the power that conferred on the court to summon any person or document, but not on the application of any party to the proceedings or suit pending before the trial court. But Rule 1 of Order XVI of CPC permits a party to the suit to apply for summoning and attendance of any person, to examine as a witness, and to cause produce any document, which is in the custody of such person and on receipt of summons, the person summoned has to appear before the court on the appointed day, subject to bearing expenses as contemplated under Rule 2 of Order XVI of CPC, thus, Rule 1 of Order XVI of CPC permits the party to the

proceedings to summon the witness or document or both. There is a thin difference between Rule 1 and Rule 14 of Order XVI of CPC. Rule 1 of Order XVI of CPC enables a party to the proceedings to take summons with the permission of the court, whereas, Rule 14 of Order XVI of CPC conferred power on the court to summon the witness or document or both, calling upon the witness to appear before the court, witness including a party to the suit to appear before the trial court or produce document, if any.

14. The only mistake committed by the first respondent herein is; instead of filing a petition under Rule 1 of Order XVI of CPC, filed petition under Rule 14 of Order XVI of CPC. But unmindfully the court allowed the petition even without looking at the provision. However, mere quoting of wrong provision of law is of no consequence and the Court can grant relief, if the party is entitled, based on the pleadings before the Court. Wrong quoting of provision of law is not a ground as held by this Court in **BHUPATI PRAMEELA V. SUPERINTENDENT OF POLICE, VIZIANAGARAM**^[1]. Therefore, in view of the law declared by this Court and the Apex Court, mere misquoting or wrong quoting of provision of law is not a ground to dismiss the petition, if the petitioner is otherwise entitled to such relief. Therefore, on this ground the petition cannot be dismissed.

15. One of the contentions of the revision petitioners is that when I.A. No.34 of 2015 was dismissed by the trial court while permitting the petitioner to let in secondary evidence, the first respondent herein is not entitled to file application, at best, he may let in secondary evidence as permitted by the trial court.

16. It is the case of the petitioners that Gonapa Jogulu executed a Will dated 25.01.1949 in favour of Varahalu, Seshamma executed relinquishment deed dated 04.10.1947 and later Gonapa Jogulu died. To prove the execution of the Will, the special rules of evidence under Sections 68 to 71 of the Indian Evidence Act, 1872, subject to the circumstances of the case, be followed. Atleast one of the attesting

witness has to be examined to prove the execution of the Will. If the secondary evidence is introduced as permitted by the trial court, it is impossible for the attesting witness to identify signature on the Will as required under Section 68 of Indian Evidence Act, 1872. In such circumstances, letting secondary evidence would not serve any purpose. Therefore, summoning of witness by the trial court on the application filed by the petitioner/ plaintiff is in accordance with law and mere granting permission while dismissing the application under Rule 8 of Order XII of CPC is not a bar to exercise the power under Rule 1 of Order XVI of CPC, that would not operate as *res-judicata* and in fact, under Rule 8 of Order XII of CPC, no application need be filed and mere issue of notice in Form No.12 in Appendix C of CPC supported by the affidavit of the pleader, or his clerk is sufficient, and when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice.

17. Therefore, the order, to summon the first respondent before the trial court to give evidence and to produce document, instead of serving notice in Form 12 in Appendix C of CPC, is not required to pass by the trial court, and, at best, if the party who received notice did not produce the document, the course open to the court to draw an adverse inference against him. In any view of the matter, the order in I.A. No.34 of 2015 would not debar the petitioner/ plaintiff to summon the first respondent, who remained *exparte* before the trial court, to give evidence and to produce document.

18. The learned counsel for the first respondent, during hearing, submitted that since no stay was obtained by the revision petitioner, the court issued summons, witnesses were examined, produced document and entire evidence of the first respondent/ first defendant before the trial court was completed. Therefore, no cause in the revision survives. The learned counsel for the petitioner admitted about examination of witness and production of document, but still contended if the revision is allowed, the evidence of the witness can be eschewed from the record.

19. No doubt mere examination of witness summoned by the trial court by itself is not a ground to deny the relief, if the petitioner is otherwise entitled. But in the present case, I find no merits, warranting interference of this court exercising the power under Article 227 of the Constitution which conferred on this Court only to set aside the orders passed by the subordinate courts or tribunals when they passed orders exercising the jurisdiction conferred on it illegally or failed to exercise the jurisdiction conferred on it. Thus, the Article 227 conferred power on the High Court only to keep the subordinate courts within the boundaries and though the order is not in accordance with law, while exercising the power under Article 227 the High court cannot set aside such orders.

20. Keeping in view of the powers conferred under Article 227 of Constitution, and in view of my foregoing discussion, I find no merit in the revision and the revision is liable to be dismissed. Accordingly, the point is answered against the petitioner and in favour of the first respondent.

21. In the result, the revision is dismissed. No costs.

Miscellaneous petitions, if any, pending in this revision shall stand closed.

M. SATYANARAYANA MURTHY, J

-07-2016
BV

[\[1\]](#) 2010(4) ALD 531 (DB)