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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 23.08.2016

+ CM(M) 800/2016

INDIAN HERITAGE RESEARCH FOUNDATION..... Petitioner
Through Mr. Balvinder Ralhan, Advocate.

versus

STATE & ORS Respondents
Through Mr. Sharat Kapoor, Advocate for R-1
Mr. Yogender Nath Bhardwaj, Advocate for R2-R8

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

CM Nos. 30152-30153/2016 (exemption)

Exemption is allowed subject to all just exceptions.

CM(M) 800/2016 and CM No. 30151/2016 (stay)

1. By the present petition, the petitioner seeks to impugn the order dated 14.05.2016 by which the application filed by the petitioner under Order 18 Rule 17 CPC was dismissed.
2. The petitioner has filed a probate petition seeking grant of letter of administration of the alleged Will/Codicil dated 27.04.2000 in respect of the estate of late Sh. Prem Kumar Goyal. The petitioner is a Trust said to be running an Ashram in Rishikesh. Respondents No.2 to 8 are the LRs of the deceased Prem Kumar Goyal who have filed objections to the present

probate petition.

3. The petitioner after closing its evidence has now filed the present application under Order 18 Rule 17 CPC seeking to summon the Sub-Registrar of Rishikesh, Uttarakhand to produce the alleged original registered Will of late Sh.Prem Kumar Goyal.

4. The trial court vide impugned order noted that the probate petition has been filed in the year 2002. Issues have been framed on 08.01.2007. The evidence of the petitioner was closed on 05.05.2007. The present application has been filed after a gap of 9 years. No plausible reason has been given for not calling the Sub-Registrar at the stage of the petitioner's evidence. The trial court also noted that the petition was dismissed for non-prosecution on 28.01.2013 and has now been restored vide order dated 23.01.2016. The application being belated was dismissed.

5. Learned counsel appearing for the petitioner has sought one last opportunity to summon the said witness as stated in the application. He points out that the respondents have also been delaying leading of evidence. The evidence of the respondents is yet to commence.

6. Learned counsel appearing for the respondents No. 2 to 8 has vehemently opposed the present petition. He has submitted that with the passage of time, a vested right has accrued in the favour of the respondents which cannot be defeated by allowing the present petition on the request of the petitioner. It is further denied that there has been any delay on the part of the respondents in commencing evidence. He submits that the parties were trying to settle the matter and the same had been referred to Mediation and that is why there has been a delay in leading evidence by the respondents.

7. The application has been filed under Order XVIII Rule 17 CPC. Order

18 Rule 17 CPC permits the court at any stage of a suit to recall any witness who has been examined and may put such question (subject to the law of evidence for the time being in force) as the court thinks fit. It is not the case of the petitioner that the Sub-Registrar was earlier summoned. He is being summoned for the first time. Appropriate provision in this regard would be Order XVI Rule 1(3) CPC.

8. I may treat the application as one under Order XVI Rule (1)(3) CPC. The said section reads as follows:

“Order XVI Rule(1)(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.”

Hence, the court may, for reasons to be recorded, permit a party to call, whether by summoning through court or otherwise, any witness, if any party shows sufficient cause for the omission to mention the name of such witness in the said list.

9. Provisions of Order XVI Rule 1 CPC provides that 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. Order XVI Rule (1)(3) permits a party to call by summoning through court or otherwise, any witness whose names does not appear in the list referred to above. The time fixed in Order XVI Rule 1 CPC cannot be said to be mandatory. To the said effect, it has been held by Andhra Pradesh High Court in the case of ***Kailasa Bhoomiah v. Kailasa Eashwaralingam***,

1988 (1) APLJ (HC) 268/(MANU/AP/0290/1987) as follows:

“3. Though Sub-rule (1) of Rule 1 gives an impression that filing of the list-witnesses within 15 days from the date of settlement of issues is mandatory, but when it is read with Sub-rule (3) the impression gets faded because it permits calling of a person as a witness to the court though his name is not included in the list of witnesses, of course for sufficient reasons to be recorded. Thus, there is sufficient power vested in the court to condone the non-mention of a name in the list of witnesses, Equally Rule 1A permits any party to the suit to bring any witness to give evidence without applying for summons. A comprehensive reading of Rule 1 and 1A leads to an interpretation that filing of list of witnesses within 15 days is not mandatory and the party can file the same even beyond that but reasons to be explained for the delay. This interpretation is also one leaning towards the ultimate object of the ends of justice being met with.”

10. The Madhya Pradesh High Court in the case of ***Sethurajan v. Rajalakshmi*, 2012-5-LW167/(MANU/TN/1331/2012)**, held as follows:

“12. From the ingredients of Order 16 Rule 3, it is latently and patently quite clear that for reasons to be recorded in I.A. No. 436 of 2009, a Court below may allow a party to summon of any witness through Court or otherwise, if concerned party shows sufficient cause for the omission to mention the name of such witness in the said list. As a matter of fact, Order 16 Rule 1 which speaks of summoning of witness and the list of witnesses to be presented by a party, speaks of filing of the application not later than fifteen days after the date on which the issues are settled and the parties to present a list of witness before a Court of Law. In regard to the persons, though either summoned to give evidence or to produce document etc., the said provision, in the considered opinion of this Court is only directory in nature and it is not mandatory in character.”

Hence, if a party shows sufficient cause, the said witness can be

summoned through the court.

11. A perusal of the application shows that the only ground on which the application was filed is that to avoid ambiguity in future the Sub-Registrar be summoned to produce the alleged original registered will of late Sh.P.K.Goyal. The application also notes that the respondents' evidence is yet to be started.

12. Be that as it may, in my opinion, the witness in question, namely, the Sub-Registrar of Rishikesh is an official witness. The evidence of the Sub-Registrar would be of vital evidence for adjudication of the probate petition. It was always the case of the petitioner that the alleged will is registered. Hence, no new case is sought to be introduced.

13. The trial court notes that the present application is filed after a gap of 9 years. Hence, delay was one of the grounds on which the application has been refused. It would be useful to look into the progress of the case. The respondents are yet to commence their evidence. The evidence of the petitioner was closed on 25.08.2009. On that date, the respondents were permitted to lead their evidence on the next date, namely, 27.10.2009. On 27.10.2009, though witness for the respondents was present, on the request of both the parties, the case was adjourned. On 6.01.2010, the next date, the parties stated that they were trying to settle the matter. Thereafter, several adjournments were taken by the parties. On 01.12.2011 the court was informed that the matter could not be settled before the mediator and the matter was fixed for 25.01.2012 for the evidence of the respondents. Thereafter, on 25.01.2012 and 28.05.2012 no evidence was led. Again on 30.07.2012 a submission was made that an attempt is being made to settle the matter. The matter was dismissed in default on 28.01.2013. An

application for restoration was filed and taken up by the court on 17.07.2013. The application was allowed on 23.01.2016. It is clear from the record that the matter has been meandering around on account of lackadaisical approach of both the parties.

14. It is in the interest of justice that one last opportunity as sought for be granted to the petitioner to summon the said Sub-Registrar. The present petition is accordingly allowed subject to payment of costs of Rs. 20,000/-. The petitioner shall be granted only one opportunity by the trial court to summon the concerned sub-Registrar, District Rishikesh, Uttrankhand. It will be the responsibility of the petitioner to serve the summons on the said Sub-Registrar.

15. With these observations, the petition stands disposed off.

JAYANT NATH, J

AUGUST 23, 2016/rb