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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ CM(M) 900/2016
HOSHIYAR SINGH & ANR Petitioners
Through: Mr. Arun Dhiman, Advocate.

versus

ISHWAR SINGH & ORS Respondents
Through: None.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

ORDER
% **09.09.2016**

C.M. Nos.33212-33213/2016 (for exemption)

Allowed, subject to all just exceptions.

The applications stand disposed of.

CM (M) No.900/2016 & C.M. No.33214/2016 (for stay)

1. By the present petition, the petitioner seeks to impugn the order dated 10.5.2016 by virtue of which the application of the petitioner/defendant No.1 for appointment of a commission for recording evidence of defendant's witness, Sh. K.K. Gupta, was dismissed.
2. The plaintiff/respondent Nos.1 and 2 have filed their suit seeking declaration and permanent injunction. It is prayed that decree of declaration be passed declaring the alleged registered Will dated 21.6.1996 alleged to be executed by Rati Ram as illegal, null and void and cancel the same. Decree of permanent injunction is also sought.
3. The learned counsel for the petitioner submits that the Will in

question had been drafted on the advice of the witness, who is sought to be summoned, namely, Sh. K.K. Gupta. He submits that the witness is a practising advocate aged about 92 years and has suffered a heart bypass. Despite service of various summons on the said person, he did not appear on account of his ill-health. It is not advisable for him to appear in court and it was requested that he may be examined on commission.

4. The trial court noted that on 16.11.2013 summons sent to the witness, Sh. K.K. Gupta, were received back unserved. Same was the position on 16.12.2013. On 7.2.2014, the summons were received back with the report that the witness is extremely old and unable to attend the court. An application was moved by the petitioner for appointment of a commission. On 2.7.2015, the court directed that he may be served at his official address. The summons were received with the report “not available at the moment/out of station”. On 15.12.2015, the court passed a detailed order noting that as per the witness, he would like to be examined in his office and not at his residential address. Keeping in view the fact that the witness can attend office, the request of the petitioner was rejected.

5. The present application has also been dismissed on the same ground, namely, that if he is in a position to attend his office then it is not clear as to why the witness deliberately does not want to attend the court. Accordingly, the present application was again rejected.

6. I have heard the learned counsel for the petitioner. An advance copy of the petition has been served on the counsel appearing for respondent Nos.1 and 2 before the trial court. However, despite service of advance copy, none is present for the respondent.

7. A perusal of the order shows that the trial court has relied upon the provisions of Order 26 Rule 4A CPC. The application that is filed by the

petitioner was under Order 26 Rule 1 CPC. Order 26 Rule 1 CPC reads as under :-

“1. Cases In which court may issue commission to examine witness.- Any court may in any suit issue a commission for the examination on interrogatories or otherwise of any person resident within the local limits of its jurisdiction who is exempted under this Code from attending the court or who is from sickness or infirmity unable to attend it:

Provided that a commission for examination on interrogatories shall not be issued unless the court, for reasons to be recorded, thinks it necessary so to do.

Explanation : The court may, for the purpose of this rule, accept a certificate purporting to be signed by a registered medical practitioner as evidence of the sickness or infirmity of any person, without calling the medical practitioner as a witness.”

8. In view of the explanation, the court is to accept the certificate purported to be signed by the registered medical practitioner as evidence of the sickness or infirmity. The petitioner has placed on record documents which are filed on the day of argument which are the operation notes of Dr. O.P. Yadava, Consultant Cardiac Surgeon and reports of Jaipur Golden Hospital dated 27.5.2015, 11.5.2015 and 7.6.2015. The admitted position is that the person/witness is 92 years old.

9. Keeping in view the medical condition and his age, it is not clear as to why the trial court has taken such a strict view of the matter and has refused to issue a commission for examination of the said witness.

10. It is not in dispute that the witness is a material witness. The dispute centres around the alleged Will executed by the testator Late Sh. Rati Ram on 21.6.1996. It is the case of the petitioner that witness Sh. K.K. Gupta,

Advocate had drafted the Will. His testimony is material to adjudicate upon the validity and authenticity of the said Will.

11. I may note that the admitted position is that the summons were served on the witness yet he has not appeared. If according to the trial court, the witness is not deliberately appearing despite service of summons, the procedure has provided under Order 16 Rule 10 CPC ought to have been applied. The said provision reads as under :-

“10. Procedure where witness fails to comply with summons.- (1) *Where a person to whom a summons has been issued either to attend to give evidence or to produce a document, fails to attend or to produce the document in compliance with such summons, the court—(a) shall, if the certificate of the serving officer has not been verified by affidavit, or if service of the summons has been effected by a party or his agent, or (b) may, if the certificate of the serving officer has been so verified, examine on oath the serving officer or the party or his agent, as the case may be, who has effected service, or cause him to be so examined by any court, touching the service or non-service of the summons.*

(2) *Where the court sees reason to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named, therein; and a copy or Such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides.*

(3) *In lieu of or at the time of issuing such proclamation, or at any time afterwards, the court may, in its discretion, issue a warrant, either with or without bail, for the arrest*

of such person, and may make an Order for the attachment of his property to such amount as it thinks fit, not exceeding the amount of the costs of attachment and of any fine which may be imposed under rule 12:

Provided that no court of small causes shall make an Order for the attachment of immovable property.”

12. The petitioner could not be faulted if summons on a witness are served and he does not appear.

13. In view of the above, the petition is allowed and the impugned order is set aside. The trial court may appoint an appropriate Local Commissioner to examine the said witness, Sh. K.K. Gupta, on such terms and conditions as are necessary for examination of a material witness.

14. *Dasti.*

JAYANT NATH, J.

**SEPTEMBER 09, 2016
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