

HON' BLE SRI JUSTICE C. PRAVEEN KUMAR

CIVIL REVISION PETITION No. 3071 of 2018

ORDER:

1) Assailing the order dated 03.04.2018, passed in I.A.No.596 of 2018 in O.S.No.105 of 2016 on the file of the Principal Junior Civil Judge, Kakinada, wherein the petition filed by the petitioner/ 1st defendant under Order XVI Rule 1(2) and 14 and Section 151 of the Code of Civil Procedure seeking to issue summons to the 2nd plaintiff-Penkey Anand Kumar was dismissed, the present Civil Revision Petition came to be filed under Article 227 of the Constitution of India.

2) The facts in issue are as under:-

The petitioner and respondents 1, 2 and 4 to 7 herein are own brothers, whereas the 3rd respondent herein is their mother. The respondents 1 and 2 herein are the plaintiffs and they filed the suit in O.S.No.105 of 2016 against the petitioner and respondents 3 to 7 herein seeking partition of the plaint schedule property into 8 equal and equitable shares and allot one such share to each to the plaintiffs. During the course of trial, the petitioner/ 1st defendant filed I.A.No.596 of 2018, to summon the 2nd respondent/ 2nd plaintiff to give evidence with regard to attestation of the Will, as he attested the un-registered Will dated 16.02.2009, wherein their father bequeathed the plaint schedule property in favour of the 1st

defendant. It is stated that the 2nd plaintiff is willfully avoiding to enter into the witness box to depose about the said fact.

3) A counter came to be filed by the respondents 1 and 2 denying the allegations made in the petition. It is their case that the 2nd plaintiff never acted as an attester to the un-registered Will dated 16.02.2009 and that Late Kannaya never executed the alleged Will in favour of the petitioner/ 1st defendant.

4) Considering the rival arguments advanced and in view of the plea taken by the 2nd plaintiff that he never acted as an attester, the trial Court rejected the said application. Aggrieved by the same, the present Civil Revision Petition came to be filed.

5) Sri E.V.V.S Ravi Kumar, learned counsel for the petitioner mainly submits that though the 2nd plaintiff has denied in his counter about the execution of the Will, but that by itself does not debar the petitioner from summoning him and question him about the attestation. He further submits that the entire case is based on the un-registered Will and great prejudice would be caused if the 2nd plaintiff is not summoned as a witness.

6) Sri G.L.Nageswara Rao, learned counsel appearing for the respondents, opposed the same contending that having regard to the contents of the counter filed, no useful purpose would be

served in summoning the 2nd plaintiff as a witness. Apart from that he would contend that the 2nd plaintiff cannot be forced to give evidence, which is contrary to the provisions of law.

7) The question now would be whether the defendants can summon the 2nd plaintiff as a witness to depose about the attestation of the un-registered Will, when he denied in the counter filed to the I.A.

8) It is to be noted that the present application came to be filed under Order XVI Rule 1 (2) and 14 and Section 151 of C.P.C.

9) Order XVI deals with summoning and attendance of witness. Rule 1 of Order XVI deals with list of witnesses and summons to witnesses. Order XVI Rule 1 states that the 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. Clause (2) of Order XVI Rule-1 states that 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. Clause (4) of Rule-1 of Order XVI states that subject to the provision 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).

10) Rule 14 of Order XVI prescribe that subject to the provisions of the 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.

11) A reading of the application made by the 1st defendant would show that he not only invoked Order XVI Rule 14 which gives power to the Court to summon a witness if it thinks to necessary to examine him and not called as a witness by a party to the suit, also invoked Order XVI Rule 1 (2) for summoning the witness. As per Order XVI Rule 1 (2) a party desires to obtain any summons for the attendance of any person shall file in Court an application stating the purpose for which the witness is proposed to be summoned.

12) Situation on hand in my view does not permit the petitioner to invoke Order XVI Rule 1 (2) of C.P.C., for the reason that the application came to be filed much beyond the time limit prescribed in the provision. However, the trial Court did not go into that aspect and the only ground on which it rejected the application appears to be that as the 2nd plaintiff denied execution of the un-registered Will, no purpose would be served in examining him.

13) At this stage, learned counsel for the petitioner would submit that as per Order XVI Rule 14 of C.P.C., a party can seek summons to any person as a witness but the only thing is that the Court has to see the necessity to examine such person. In other words, the counsel wanted the Court to summon the said witness as a Court witness to speak about the attestation of the un-registered Will in spite of denying the same in the counter.

14) From a reading of Rule 14 of Order XVI, it makes clear that the power to summon strangers to the suit, as a witness is to be exercised by the Court "on its own accord". The same is fortified by the usage of phrases "where the Court at any time thinks" and "the Court may, of its own motion". It is no doubt true that under Order XVI Rule 14 of C.P.C., the Court has got the power to summon a person as Court witness. The purport of the provision appears to be that the Court must feel that notwithstanding the fact that the parties have adduced

evidence, there are certain aspects which become necessary for effective adjudication of the dispute.

15) In *P.S. Chetty v. K.E. Reddy*¹, this Court observed as under:

"Order 16 Rule 14 C.P.C. provides that the Court may of its own initiative or *suo motu* cause any person to be examined as a witness through either of the parties did not choose to take steps for summoning such person as a witness. This power obviously intended in the interests of justice is aimed at clarifying certain situations and remove ambiguities and fill up lacuna and thereby further justice. The parties may refrain from summoning a crucial witness in the event of their apprehension of full fledged support and in such a situation the Court may summon such person to give evidence to arrive at the correct factual picture and this witness is called a 'Court witness'. Order 16 Rule 14 visualises the initiative by the Court only to examine any person and it is for the Court to consider of its own accord the necessity of invoking power under this rule without propulsion or application by the parties. The exercise of this power is in the nature of "self-starter" without extraneous pressure or pull."

It is further observed that:

".....It is true that the Court is not obligated to invoke the power at the instance of the parties and the parties have no right to move an application under this rule. But however either of the parties can bring to the notice of the Court the necessity for examining any person as Court witness. On such application the Court may scan the totality of facts and circumstances apart from the

¹ 1988 (1) ALT 279

situations projected by the parties and arrive at an independent conclusion as to the necessity of a Court witness. The parties are not totally barred from bringing to the notice of the Court by application or otherwise and the Court is not bound to take action on the averments or allegations contained in the application and it is the sole discretion of the Court. The application by the parties may be considered as passing on the information so that the Court may examine the issue in depth on the facts and circumstances set out in the application and other aspects.

It is finally observed that:

".....There is no bar for such application and the move by the parties may be considered as bringing to the notice of the Court and thereupon it is for the Court to invoke power under Order 16 Rule 14 CPC."

16) In *Veesam Mohan Reddy v. Rebba Pedda Agaiah*² this Court took a slightly different view and held as under:

"As could be seen, Order 16 Rule 14 of the Code of Civil Procedure empowers the Court to summon on its own any person to give evidence or to produce any document in his possession if the Court is satisfied that the evidence of such witness is necessary to arrive at a just conclusion. The said power includes to summon even a party to the proceeding. Though the language of Rule 14 shows that such discretion has to be exercised by the Court at its own motion, the law is well settled that such a power can be exercised even on an application made by a party to the proceedings, since the application if any, can be taken as an information to the Court."

² (2008) 2 ALT 329

17) In *Kosuru Kalinga Maharaju v. Kosuru Kaikamma*³ this Court held that a reading of Order XVI Rule 14 would leave no doubt in the mind to say that either party to the suit proceedings can summon a person including a party to the suit who is not called as a witness by a party to the suit, as a witness.

18) In *National Insurance Company Limited And Others Vs. Susru Sea Foods, Visakhapatnam*⁴ this Court held as under:

“In the instant case, it is not as if, one of the defendants is summoned to give evidence on behalf of the plaintiff - though there are no legal impediments, as such, for even summoning a defendant to be examined as a witness at the instance of the plaintiff; if not as a witness on behalf of the plaintiff. The Court, in the interest of justice, can always summon even a stranger and in a given case any of the parties to the suit to give evidence if such evidence is required for resolution of the dispute in an effective manner.”

19) In the instant case, the petitioner/defendant made an application to summon the 2nd plaintiff to give evidence with regard to attestation of the un-registered Will. Order XVI Rule 1 (A) of C.P.C., states that 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 produce documents. It is also to be noted here that the counter which has been filed before the trial Court, wherein the 2nd

³ (1999) 6 ALD 789

⁴ (2005) 1 ALD 464

plaintiff has denied the attestation of the Will was not in the form of an affidavit. In fact no document evidencing filing of an affidavit denying the averments in the affidavit filed in support of the petition is placed before the Court.

20) In *Babu Singh and others v. Ram Sahai alias Ram Singh*⁵ the Apex court was dealing with the cases where one of the attesting witness died and the other witness did not appear for proving the attestation. The Trial court held that execution of the Will was not proved. The first appellate court held that Harnek Singh who attested the Will is alive but the counsel for the plaintiff as well as the plaintiff himself made a representation on 29.10.1999 that Harnek Singh has joined hands with the opposite party and moreover, he has intentionally left for a foreign country. The question was whether the statement of the deed writer who also knew the executor can be relied upon or not and whether he can be treated as an attesting witness or not? Not convinced with the argument advanced, the second appeal was dismissed stating that no substantial question of law arose for its consideration. Challenging the same, an S.L.P., came to be filed before the Apex Court and the Apex Court set-aside the judgments of trial court and appellate court, holding that even taking the course of Order XVI of the Code of Civil Procedure, might not be necessary, what was imperative was a statement on oath made

⁵ (2008) 14 Supreme Court Cases 754

by the plaintiff. A deposition of the plaintiff as a witness before the Court and not the statement through a counsel across the Bar, such a statement across the Bar cannot be a substitute for evidence, warranting invocation of Section 69 of the Evidence Act.

21) As observed by me earlier, even in the instant case, the second plaintiff who attested the Will and who is alive denied attesting the same in a petition, which was not on oath. Learned counsel submits that since the said denial is not on oath and since there is no verification petition to the said petition, it would be just and proper to summon him and in case if he denies his signature in court on oath he will avail the appropriate remedy. The Will has to be attested by two witnesses in terms of Section 63(1)(c) of the Succession Act, 1925 and compliance of Section 68 of the Evidence Act is required for proving a Will. Section 63(1)(c) of the Succession Act mandates attestation by two witnesses. Thus, not only the execution of Will must be proved, but the execution must also be attested by atleast two witnesses. Attestation of execution of Will must be in conformity with the provisions of Section 3 of the Transfer of Property Act. In terms of Section 68 of the Evidence Act it is not necessary to call more than one attesting witness to prove the execution of a Will, but that would not mean that an attested document shall be proved by the evidence of one attesting witness only and two or more

attesting witnesses need not be examined at all. Section 69 of the Evidence Act would apply, inter alia, in a case where the attesting witness is either dead or out of the jurisdiction of the court or kept out of the way by the adverse party or cannot be traced despite diligent search. Only in that event, the will may be proved in the manner indicated in Section 69. Ordinarily a Will must be proved keeping in view of the provisions of Section 63 of the Succession Act and Section 68 of the Evidence Act (Babu Singh v. Ram Sahai)

22) Though the attestor is alive and shown as second plaintiff, the request of the petitioner to summon him as his witness to speak to the attestation of the Will cannot be allowed. But definitely the Court has got the power to summon him as a Court witness, if the court feels that summoning of such witness is essential to resolve the dispute. As observed by me earlier, the denial by the second plaintiff was not on oath, but by way of petition verified by a lawyer. Such a statement cannot be a substitute for evidence, more so when the attestor of the Will is available, and the said Will has to be proved in the manner indicated in Sections 68 and 69 of the Evidence Act.

20) For the aforesaid reasons, the Civil Revision Petition is disposed of directing the trial court to examine, as to whether the second plaintiff is required to be summoned as a court witness in which event the same shall be dealt with in

accordance with law. There shall be no order as to costs. As a sequel to it, miscellaneous petitions pending if any in this Civil Revision Petition shall stand dismissed.

JUSTICE C. PRAVEEN KUMAR

Dt:10.08.2018
GKV/ GM

