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

+ **FAO(OS) (COMM) 373/2019**

ATUL KUMAR SINGH Appellant
Through: Appellant in person.

versus

NITISH KUMAR & ORS Respondents
Through:

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MS. JUSTICE ASHA MENON

ORDER

% **20.12.2019**

FAO(OS) (COMM) 373/2019, C.M. No. 54385/2019 (by the appellant for stay), C.M. Nos. 54386-388/2019 (exemption)

1. The appellant/plaintiff is aggrieved by an order dated 13.11.2019, passed by the learned Single Judge dismissing an application moved by him under Order XVI Rule 1 read with Section 151 CPC praying *inter alia* that the respondent No.1/defendant No.1 be summoned as a witness in the suit instituted by him on the Original Side of the High Court.
2. We may note that this is the second round of orders passed on the subject application. Earlier hereto, vide order dated 08.10.2018, I.A. No.3333/2018 moved by the appellant/plaintiff was decided by the learned Single Judge along with I.A. No. 4210/2018 filed by the respondent No.1 under Order XVIII Rule 4 CPC whereunder permission had been sought from the court for conducting his examination by video conferencing.
3. By a common order dated 08.10.2018, both the said applications were

disposed of by the learned Single Judge and the respondent No.1/defendant No.1 was permitted to be examined as a witness through video conferencing, at his expenses. A review of the said order was sought by the respondent/defendant No.1 which was disposed of vide order dated 04.12.2018.

4. Aggrieved by the said order, the respondent No.1 preferred an intra Court appeal registered as FAO(OS) (COMM) No. 307/2018 stating *inter alia* that the order dated 08.10.2018 did not disclose any reasons for allowing the prayer made by the appellant/plaintiff in I.A. No. 3333/2018.

5. Vide order dated 14.2.2019, the aforesaid appeal was disposed of by the Division Bench. With the consent of the parties, the orders dated 08.10.2018 and 04.12.2018 were quashed and set aside and the application was remanded back to the learned Single Judge for a fresh consideration. The learned Single Judge has thereafter passed the impugned order rejecting the prayer made by the appellant/plaintiff in the captioned application, which is why, he has filed the present appeal.

6. It is the submission of the appellant, who appears in person, that the impugned order is perverse and unsustainable, inasmuch as, a consequence of the said order is that he would be deprived of an opportunity to examine the respondent No.1, which opportunity is even otherwise available to him under Order XVI Rule 1, CPC. It is submitted that since the respondent No.1 is not in the control of the appellant therefore, he cannot be produced on his taking steps in that regard and by necessity, respondent No.1 has to be summoned through the court process. The appellant also states that the respondent No.1 is a direct witness in his suit and he ought to be permitted to summon him to prove his case.

7. We have heard the appellant and examined the impugned order as also the pleadings in I.A. No. 3333/2018. The ground taken by the appellant/plaintiff in the application moved by him for summoning defendant No.1 as a witness in the suit is as follows:-

4. That the said witness is to be examined in order to bring on record further evidence with regard to the violation to authorship and authorship right of the literary work titled as "Special Category Status: A case for Bihar", which defendant No.1 is the principal actor.

8. In the reply filed by the respondent No.1 in opposition to the captioned application, it has been averred that the application is liable to be dismissed as the same is a gross misuse of the legal procedure; that the respondent No.1, who is the Chief Minister of the State of Bihar has been impleaded with the *malafide* intention to cause him embarrassment; that in any case, since the plaintiff has impleaded him in the suit and he shall file his affidavit by way of evidence in accordance with the provisions of law, at the appropriate stage.

9. In his rejoinder, the appellant/plaintiff has reiterated the submissions made by him in his application and averred that the defendant No.1 is the principal actor and personally involved in a series of violations of his rights that has compelled him to institute the suit and his examination as the plaintiff's witness is critical for discovering material information required by him to discharge the onus cast on him in terms of issues No.1 and 2 framed in the suit on 03.2.2019. The appellant also cited some decisions in support of his plea that he is entitled to the relief as prayed for in the application.

10. After considering the pleadings in the captioned application, the learned Single Judge first examined the scope of an application moved under

Order XVI of the CPC and distilled the law on the aforesaid aspect in para 30 of the impugned order, which is as follows:-

“30. On a reading of the above judgments relied upon by the parties, some of the factors need to be considered while considering an application of this nature, are as under:

- 1. Order XVI of the Code, which deals with the summoning of the witness does not bar one party from applying for the examination of the other as his witness.*
- 2. It is not that everyone who is included in the list of witnesses is automatically summoned.*
- 3. The Rule is if the grounds are made out for summoning of witness, he will be called not if the demand is belated, vexatious or frivolous.*
- 4. An application for summoning of the witness should not be granted as a matter of course, but at the appropriate stage, the court can pass such order keeping the facts of the case and conduct of the contesting party in mind.*
- 5. In an application for summoning of witness cogent reasons needs to be mentioned. In the absence of any cogent reason, the application liable to be dismissed.*
- 6. Motives of the party should be looked into by the court while deciding the application for summoning of witness Under Order XVI Rule 1 CPC.*
- 7. Strong evidence needs to be adduced by the party opposing an application for summoning of witness to show that it is not a bona fide and the granting of such application shall be permitting an abuse of the process of the court.*
- 8. The summoning or examination of an opposite party of a suit must be allowed by the court only in the rarest of rare cases when it is unavoidable in the interest of justice.”*

11. Thereafter, the learned Single Judge took note of the dispute raised in

the suit instituted by the appellant/defendant that hinges on whether the respondents have violated the copyright in his original work. The court also considered the following issues framed in the suit on 03.2.2016:-

*“(i) Whether the plaintiff is the owner of the copyright in the work “Special Category Status: A Case for Bihar” and if so, whether the defendants are infringing the copyright of the plaintiff? **OPP***

*(ii) Whether the plaintiff is entitled to damages, if so, of what amount? **OPP***

*(iii) Whether the work “Special Category Status: A Case for Bihar” is a Government publication of the defendant no.4 and accordingly whether the defendant no.4 is entitled to relief filed in its counter claim against the plaintiff? **OPD***

(iv) Relief”

12. Having regard to the fact that the onus to prove issues No.1 and 2 is placed on the appellant/plaintiff, the learned Single Judge observed that at the respective stages, both sides shall have to lead evidence to prove their case. It follows that just as the appellant would have to prove issues No.1 and 2 as the onus has been cast on him, the respondents would also have to prove issue No.3. It was in this context that the learned Single Judge observed that as and when the respondent No.1 would enter the witness box, he shall have to lead evidence to make good the stand taken by him in his written statement and he would not be expected to prove the case of the appellant/plaintiff. Further, the learned Single Judge opined that the respondent No.1 being the Chief Minister of State of Bihar, it appeared that the captioned application had been moved by the appellant/plaintiff only to pressurise him and not in the normal course. As a result, the application moved by the appellant/plaintiff was dismissed.

13. Having perused the impugned order, as also the case law cited by both the sides as noted therein, we are of the opinion that only in exceptional circumstances can a plaintiff be permitted to summon a party arrayed as a defendant in the suit, as a witness and it is not in routine that such a permission can be granted. No exceptional or out of the ordinary circumstances have been offered by the appellant/plaintiff that would entitle him to summon the respondent No.1 as a witness to prove the case set up by him. This is all the more so, when the respondent No.1 is not supporting the appellant/plaintiff but has filed a written statement in opposition to the pleas taken by him in the suit. It is for the appellant/plaintiff to stand or fall on his own legs and to prove his case, by summoning necessary witnesses but that is not to say that he can insist that the defendant No.1 be summoned as his witness to make good the stand taken by him in his suit.

14. We do not find any illegality, arbitrariness or perversity in the impugned order that warrants interference. Resultantly, the present appeal is dismissed in *limine* as meritless along with the pending applications.

HIMA KOHLI, J

ASHA MENON, J

DECEMBER 20, 2019

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