

IN THE COURT OF PRL. CIVIL JUDGE & J.M.F.C.
AT BELTHANGADY.

Present:-

Sri. Sandesha.K.,_{MA.LLB}

(Prl. Civil Judge & J.M.F.C., Belthangady)

Dated: 15th Day of April 2024

ORIGINAL SUIT NO. 139/2021

Plaintiffs:

1. Sri. Shubhakara N.
S/o Late Padmayya Poojary,
Aged about 61 years,
2. Smt. Bhavani,
D/o Late Padmayya Poojary,
W/o Narayana
Aged about 59 years,
(D1 and 2 are R/at Himaradda House,
Thenkakrandoor Village & Post
Belthangady Taluk)
3. Smt. Thriveni.N
W/o Yathish D.
D/o Late Padmayya Poojary,
R/at Sourabha House,
Near Padavu, Megina Mane,
Opposite Babbu swamy Temple,
Kulashekhara Village & Post,
Mangalore Taluk.

(By: Sri. S.K., Adv.)

-.:V/S:-

Defendants:

1. Smt. Malathi.
W/o Late Kunda Poojary,
Aged about 76 years,
R/at Pijakudange House,
Shirlal Village & Post,
Belthangady Taluk.
2. Smt. Kamala,
W/o Late Ramesh Bangera,
Aged about 65 years,

3. Smt. Prameela,
W/o Prabhakara ,
D/o Late Ramesh Bangera,
Aged about 35 years,
D2 and 3 are R/at Sharada Nagara,
Devigudi Post, Somanthadka,
Mundaje Village, Belthangady Taluk.

4. Sri. Sooraj Bangera,
S/o Pramod Bangera.
Aged about 31 years,

5. Sri. Pramod L. Bangera,
S/o Lakshmana Bangera,
Aged about 64 years,

D4 and 5 are R/at Kemana Bailu house,
Kapinadka, Thenkakarndoor village,
Belthangady Taluk.

6. Sri. Umesh Kannada,
S/o Veerappa Kannada,
Aged about 43 years,
R/at Yermadadda House,
Kapinadka ,
Thenkakarandoor Village & Post,
Belthangady Taluk.

(By: Sri. A.T.R. Adv. For D1 to 3)

(By: Sri.P.K.S. Adv. For D6)

(D4 and 5 are exparte)

1.	Provision under which application filed.	Under order 16 rule 2 and 3 and section 151 of CPC
2.	Relief sought	Seeking summon to the Witness as mentioned in the IA to give a evidence regard to Will executed by the Puttamma which was registered on 27.09.1990.
3.	The date on which application filed.	07.12.2023

4.	Number of application	IA No.III
5.	The date of which the objection filed by the respondent /defendant	12.01.2024
6.	The date on which the order were passed on the said application	15.04.2024

**ORDER ON IA No.III FILED BY THE PLAINTIFF
UNDER ORDER 16 RULE 2 and 3 and SECTION
151 of CPC.**

The plaintiff has filed I.A.No.III U/o 16 Rule 2 and 3 and Section 151 of C.P.C., seeking summon to the Witness as mentioned in the IA to give a evidence regard to Will executed by the Puttamma which was registered on 27.09.1990.

2. At the stage of further plaintiff evidence, The counsel for the plaintiff has filed IA No.III seeking issue summons to witness with regard to Will.

3. In the affidavit filed in support of I.A.No.III, the Plaintiff has stated that, plaintiff have filed this suit for declaration of Will with respect to plaint schedule property. Plaintiff grandmother Puttamma executed a Will in respect of plaint schedule property in favour of plaintiff father Padmayya Poojary. Said will was registered in Book No.III volume No.33 at page No. 86-89, For the year of 1990-91 as document No.42/91-92 dated 27.09.1990. The said Will was prepared by John Milton Muliyl and the witnesses are one Ramesha Bangera and Ithappa Poojary. Plaintiff grandmother Puttamma is no more. In order to

prove the execution of the Will, the sub registered Belthangdy as examine and produce document and give evidence. In order to prove the case of the plaintiff the evidence of the witness is absolutely necessary. If the application is allowed and summons as given to the witness no hardship and injury caused to the defendant hence this application.

4. In return learned counsel for defendant No.6 has filed objection by contending that, the application filed by the plaintiff is not maintainable. The person sought for summoning and the document sought for summoned is irrelevant for the purpose of leading evidence in contemplation of section 68 of Indian Evidence Act and section 3 of Indian Succession Act. The sub registered is not competent witness to speak about due attestation of the document and the registered document maintained in the department of registered is also irrelevant for the purpose.

5. If is further contended that, the plaintiff ought to have placed original will before the court and established by produced one of the attest witness before the court. There is no foundation in the plaint, the plaintiff is not in the custody of original document and he is relying on the secondary evidence. Lacuna cannot be cured out by summoning the sub registered. This application is not maintainable under rule 23 of Civil Rules of Practice. Hence pray for the dismiss the application with exemplary cost.

6. Head the IA No.III of learned counsel for the both parties and perused the material on record.

7. For disposal I.A.No.III following points arise for court consideration:

1. Whether the plaintiff has made out sufficient grounds to summon to the witnesses by allowing IA No.III?.

2. What Order?

8. Court findings to the above points are as under.

Point No.1 : In the ***Affirmative***

Point No.2 : As per the final order for the following:

REASONS

9. Point No.1:- The plaintiff has filed suit against the defendant for the relief of declaration declared that, Will dated 27.09.1990 executed by the Smt. Puttamma in favour of Padmayya Poojary is genuine and valid and consequential relief of injunction. After the institution of the suit has contemplated under law suit summons to came to the defendants, the defendant No.1 to 3 and 6 appear before the court through their counsel and defendant No.6 has filed his written statement.

10. It is the case of the plaintiff that, the plaint A schedule property is originally belongs to the Smt. Puttamma governed by Aliyasanthana law. Said property is allotted to the Puttamma to ancestor. Father of the plaintiff Padmayya Poojary helped the Smt. Puttamma in agricultural work how step mother of the father of the

plaintiff. During the life time of Puttamma, hence she was sound disposing of mind. She executed a testamentary document on 27.09.1990 in respect of plaint A schedule property in favour of the Padmayya Poojary father of the plaintiff. Plaintiff is constructed a house in the said property. Smt. Puttamma was died on 03.01.1993. The father of the plaintiff has filed an application for changing of katha in his name. Plaint A schedule property are belongs to the plaintiff, when the matter is thus the defendants trying to take forcible possession of the portion of the plaint A schedule property by removing the fence, defendant No.6 and hired labours trespass the plaint A schedule property. Hence plaintiff has filed this suit. The witness mentioned in the above said IA is necessary for execution of Will. The witness mentioned in the IA in the sub registered who registered the Will. Hence said witness is necessary for giving evidence for the proper adjudication.

11. Learned counsel for the plaintiff argued before this court that on the strength of the registered Will the plaintiff has filed this suit for relief of declaration and consequential relief of injunction. In response of suit summons the defendant No.6 has filed written statement. For proving of execution of Will executed by Smt. Puttamma in favour of Padmayya Poojary, the witness mentioned in the IA.No.III who registered Will is necessary to examine. The witness of the Will and scribe of the will was died. Hence the witness mentioned in the IA No.III who registered the Will is necessary for examination

hence pray for allow the application. The Ld counsel for the defendant No.6 argued before this court that, sub registered is not competent witness to speak about the due attestation of the documents. The plaintiff ought to have been place original Will before the court and established it by producing the one of the attesting witness before the court. There is no foundation in the plaint, but plaintiff is not in the custody of original document and he relying on the secondary evidence. Hence pray for dismissing the application.

12. The object of sub Rule (2) of Rule (1) of order 16 of CPC is that a party desirous of obtaining any summons from the attends of any person shall file in court an application stating there in the purpose for which the witnesses is proposed to be summonsed. The object disclosing such a purpose is to enable the court to decide as to whether the examination of such witnesses is of a material benefit to decide the dispute. A duty is therefore to cost on the court consider whether the purpose of siting party as a witnesses speak of any material of fact.

13. In the present case on hand the plaintiff has filed this suit for relief of declaration and consequential relief of injunction against the defendant. The learned counsel for the plaintiff argued before this court that the witness mentioned in the IA No. III who is the registered the Will is necessary for examine the to prove the execution of Will. Hence his evidence is necessary for proper adjudication of the suit.

14. Have a heard the arguments on behalf of the both parties and carefully perused the record. It is settle position of law that witnesses evidences require to the summoned should be relevant for just and fair adjudication of case. In the present case on hand the as per the argument of learned counsel for the plaintiff, the witnesses mentioned in the IA No.III who registered the Will that to be sub-registrar, hence it is necessary to examine the said witnesses for proper effective adjudication.

15. Order 16 rule 1 is mandates that list witlessness is to filed with in 15 days from the framing of issues and thereafter the court has to be informed has to out list. Which of the witnesses the parties desirous of summoning through court process. On perusal of the order sheet is revise that issues framed on 19.12.2022. The plaintiff concluded his evidence 05.10.2023. Thereafter the case is posted for further evidence of plaintiff. On perusal of the order sheet it appears that the plaintiff has not filed list of witness sought to be examined immediately after framing of issues. It is settle law that a party cannot be allowed to obtain advantage of the delay caused by him in course of trial of case. However, the court should make every end over to disposal of the case on merits a party to the proceeding must be vigilant and must ensure that no hardship caused to the other side due to his conduct. Since the plaintiff has not done so that the defendant is put to un-necessary in conveniences which is required to be compensated to the in the fact and

circumstances of the suit it is deem to fit impose a cost of Rs. 500/- accordingly in the above said discussion, this court answered point No.1 in the **Affirmative.**

16. Point No.2: In the result, this court proceed to pass the following:

ORDER

I.A.III filed by the plaintiff and under 16 rule 2 and 3 and section 151 of CPC is here by allowed subject to cost of Rs.500/- and plaintiff is permitted to examine the witness as mentioned in the application.

Issues summons to witness as mentioned in the IA No.III if paid.

(Dictated to the stenographer, transcribed by him corrected and signed by me and then pronounced in the Open Court on this 15th day of April 2024)

(Sandesha K.)
Prl. Civil Judge & JMFC.,
Belthangady.