

**ORDER ON I.A.NO. VII and VIII**

The applicant/defendant has filed the I.A. No.VII under Order 16 rule 1 of CPC praying this Court to permit her to file witness list and I.A.No. VIII under Order 18 rule 16 of CPC praying this Court to permit her to lead evidence.

2. The applications are supported with the affidavits of the defendant, wherein she deposed that she has filed her written statement in this case. Her mother by name Smt. Tarabhai w/o Hanmant Naik had executed the Will in her favour and this Court has framed issue No. 3 in that regard and burden of proving the said issue is on her. One of the attesting witness by name Sri. R.N.Naik died on 11/05/2011 and another attesting witness by name Sri. S.V.Naik also died on 06/01/2015. The scribe of the said Will died on 30/01/2022. Now another attesting witness by name Sri. Hariyappa S/o Thimmappa Naik is alive and he has undergone open heart surgery in the month of February. Therefore, now it is necessary to record his evidence. If delay is caused, then it will cause irreparable injury to this defendant. Therefore, before recording the evidence of the plaintiffs, it is very much necessary to record the evidence of attesting witness. Hence, she filed these applications.

3. Contrary to this, the plaintiffs have filed their objection and contended that the application is not maintainable. Further they have contended that the

defendant has created the false documents and based on the false documents, the defendant is claiming right over the properties. Only with an intention to drag on the case, the present applications were filed. Hence, prayed to dismiss the applications.

4. I have heard the learned advocate for the plaintiff and the learned advocate for the defendant.

5. The applicant has filed I.A.No. VII under order XVI rule 1 and 2 of CPC. The provision Order 16 rule 1 of CPC reads as follows,

**“1. List of witnesses and summons to witnesses.—**

**(1) 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.**

**(2) 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.**

**(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.**

**(4) Subject to the provisions 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).**

6. On perusal of the above provision of law, the application under the said provision of law has to be filed within the stipulated time period. If not filed in prescribed period, then the applicant has to show sufficient and proper reasons in that regard. The Court should exercise the power under Order 16 rule 1 of CPC very sparingly and that too when sufficient and valid grounds are made out by the applicant.

7. The I.A.No. VIII is filed under Order 18 rule 16 of CPC. The provision reads as follows,

**“16. Power to examine witness immediately.—(1) Where a witness is about to leave the jurisdiction of the Court, or other sufficient cause is shown to the satisfaction of the Court why his evidence should be taken immediately, the Court may, upon the application of any party or of the witness, at any time after the institution of the suit, take the evidence of such witness in manner hereinbefore provided.**

**(2) Where such evidence is not taken forthwith and in the presence of the parties, such notice as the Court thinks sufficient, of the day fixed for the examination, shall be given to the parties.**

**(3) The evidence so taken shall be read over to the witness, and, if he admits it to be correct, shall be signed by him, and the Judge shall, if necessary, correct the same, and shall sign it, and it may then be read at any hearing of the suit.”**

8. On perusal of the above cited provision of law, it is clear that where a witness is about to leave the jurisdiction of the Court, or other sufficient cause is shown and if the Court satisfied with such reason, the Court should record the evidence of such witness immediately. In support of his case, the learned advocate for the defendant has produced the judgment reported in ILR 2003 KAR 1507 (Channabasappa Yallappa Karaddi vs Hanamappa Channabasappa Karaddi). I have perused the cited judgment and it aptly applicable to the case on hand.

9. On reading of an applications, this Court feels that the defendant is claiming her right over the properties based on Will dated 11/09/2000 and out of three attesting witness, two attesting witnesses have already dead and one attesting witness is alive and he too is suffering from heart problem. Therefore, recording his evidence prior to recording the evidence of the plaintiffs is very much necessary. If this Court proceed with its usual way of recording the evidence of the plaintiffs, then it may cause irreparable injury to the defendant. On the other hand, if this Court allows the applications, no injuries will be caused to the plaintiffs. However, the plaintiffs will get full opportunity to cross examine the witness. With this observations, I proceed to pass the following;

**ORDER**

I.A.No. VII and VIII filed by the defendant are hereby allowed.

OS No.87/2019

For Defendant Evidence.

Call on 28/11/2022.