

**Order on I.A.No. XLVI filed under Order XVI Rule 1 of
C.P.C. by the defendant**

It is the application of the defendant annexed with his affidavit seeking an order from the court that to receive the additional list of witness mentioned in the application and issue summons to the said witness in order to give evidence in support of the case of the defendant.

2. In the affidavit the defendant stated that the witness mentioned in application is son of late Annappa Shetty. The said Annappa Shetty he who was one of the

attesting witnesses to the Will propounded by the defendant in the suit.

3. Further according to the defendant he has been examined the other attesting witness to the will, but, being the husband of the one of the plaintiffs turned hostile to his case. Though he examined the scribe of the Will but, he has been advised to examine son of Annappa Shetty in order to prove the attestation and signature of his father in the Will propounded by him. Therefore, it become necessary to produce the additional list of witness from his side as it is mentioned in the application.

4. Further he stated that he was not aware of the particulars of the witness in question and could gather the same only a few days ago after making diligent enquiries. Therefore, there has been some unintentional delay in mentioning the name of the witness in the application witness list, therefore prays to issue summons to the witness Sampath Shetty, S/o. late Annappa Shetty, Nadupalu, Herga, Udipi Taluk and District. Accordingly, prays order.

5. It is objected by the plaintiffs on the ground that the alleged witness Sampath Shetty he is having relationship with alleged Annappa Shetty or he was having any kind of role in the suit or alleged Annappa Shetty is one of the attesting witness to the alleged Will or alleged

Will is true and genuine, or the evidence of the said Sampath Shetty is necessary to the case.

6. The D.W.1 turned hostile to the defendant or the defendant was advised to examine the alleged witness named in the application to prove attestation and signature of Annappa Shetty in Ex.D13, or the alleged witness is knowing the signature of the alleged Annappa Shetty or for the said purpose it has become necessary to file the application or the defendant was not aware of the particulars of the alleged witness or he came to know the same only few days ago or the delay in filing the application and witness list is a bonafide and apart from that, in the year 2014 the defendant in the initial stage of the suit, has filed the witness list naming 3 witnesses 1) Sanjeeva Maben, 2) T. Shrikanth Holla, 3) Vishwanatha Shetty, among them witness No.3 Vishwanatha Shetty has been dropped and in the year 2021, through I.A.No.37 filed additional witness list naming 3 witnesses, 1) K. Suguna Shetty, 2) Sankayya Shetty, 3) H. Raghavendra Shetty, among them H. Raghavendra Shetty has been called for evidence and at present filed another witness list naming one Sampath Shetty as witness to be called. The defendant is intentionally delaying the proceedings by filing the application, one after other and introduced number of irrelevant and unnecessary witnesses. The evidence of the present witness Sampath Shetty is not at all necessary to the facts of the case and no purpose will be served.

Accordingly, prays to dismiss the application with exemplary costs.

7. Having heard both side on I.A.No.XLVI filed under Order XVI Rule 1 of C.P.C. to issue summons to the witness Sampath Shetty, S/o. Late Annappa Shetty as sought by the defendant in his application, the following points that would arise for consideration;

1. Whether the applicant / defendant by filing I.A.No.XLVI under Order XVI Rule 1 of C.P.C. has made out grounds to allow him to examine witness Sampath Shetty, S/o. Late Annappa Shetty by issuing the summons to him in view of the the application filed by him?

2. What Order?

8. My findings on the above points are as follows:

Point No.1: In the affirmative;

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

REASONS

Point No.1:

9. The contentious matter between the parties is that the defendant put-forthing his case i.e. his father has

executed a Will in his favour by bequeathing the suit properties, but, the plaintiffs being mother and sisters of the defendant are seriously disputing the Will said to be executed by his father. Therefore, the crux of the matter in the case is Will put forth by the defendant that it is executed by his father in his favour. On going through the previous days order sheet till date, the cross - examination of D.W.1, the defendant Jaya Poojary who is examined as D.W.3 and evidence of D.W.4 it appears that the defendant is much concentrating in proving the Will said to be executed by his father. At the same time, the plaintiffs being mother and sister of the defendant are seriously contesting the said Will.

10. According to the defendant, as mentioned in the annexed affidavit to the I.A.No.XLVI stated that one of the attesting witness Annappa Shetty is no more, but, his son Sampath Shetty is there, therefore, by summoning him he can prove the attestation and signature of his father in the Will propounded by him.

11. It is also arguments canvassed by the learned counsel for the defendant Jaya Poojary that if an application is not allowed, there is irreparable loss and injury to the defendant, since the defendant is proposed to examine the son of attesting witness, therefore, according to them, it is very much necessary to allow the application. On going through the objection filed by the plain Sampath

Shetty, S/o. late Annappa Shetty, Nadupalu, Herga, Udupi Taluk and District tiffs, shows that they have denying the execution of the Will and apart from that they have denied the averments made by the defendant in his affidavit of I.A.No.XLVI and they have also denied the fact that, the witness named in the application to prove the attestation and signature of late Annappa Shetty in Ex.D13 and he may not be a witness or he may not knowing the signature of late Annappa Shetty, therefore, the defendant is trying to introduce number of irrelevant and unnecessary witnesses and further according to them, the evidence of a present witness Sampath Shetty is not at all necessary to the case and no purpose will be served by summoning him as witness. Further according to the plaintiffs, the alleged signature which is said to be Annappa Shetty and proposed to be marked by the said witness Sampath Shetty has already been marked as Ex.D13(L), (H) by D.W.2, therefore, there is no need to allow the application. In the above background, no doubt it is true that always the Will is the suspicious document. However, it is burden on the propounder to prove the due execution of the Will, under such circumstances, an opportunity is to be provided to the propounder of the Will to prove it, if he able to proves it. Therefore, when the defendant come up with the application that by examining the son of attesting witness it is in support of his case in order to prove the Will, then, opportunity to be provided. Since the plaintiffs are having ample opportunity to cross – examine the witness to elicit

truth. In view of the reason, at this stage, no ground is made out to dismiss the I.A.No.XLVI, accordingly, I answer the ***point No.1 in the affirmative.***

Point No.2 :

12. For the foregoing reason, I proceed to pass the following :

ORDER

The I.A.No.XLVI filed under Order XVI Rule 1 of C.P.C. to summon the witness Sampath Shetty, S/o. late Annappa Shetty, is hereby allowed and permitted to lead his evidence by way of affidavit. Accordingly, issue summons to the witness Sampath Shetty, S/o. late Annappa Shetty, Nadupalu, Herga, Udupi Taluk and District.

If summon is not served to the said witness to the given address then, defendant will loose the opportunity, accordingly, issue summons to the said witness if P.F. paid and for evidence of said witness is posted to 24.11.2022.

(Natesha R.)

Addl. Senior Civil Judge & A.C.J.M.,
Udupi.