

ORDER ON IA 18 & 19

Since both these interim applications are interconnected to each other, therefore taken together for disposal to avoid repetition of appreciation of facts.

IA 18 is filed by the applicant/plaintiff under Sec.151 of CPC and sought to reopen the case to lead the evidence of plaintiff.

2. IA 19 is filed by the applicant/plaintiff under Order XVI Rule 1 and 2 of CPC and sought summons to be issued to witness Raviprakash Advocate, Udupi.

3. Both the interim applications have been accompanied by the affidavit of the plaintiff. On perusal of the affidavit, it is stated that witness now sought to be summoned is advocate who issued reply notice on behalf of the defendants. But now the defendants have denied the contents of notice sent by the Advocate. Therefore clear allegation made against the advocate. Therefore the evidence of the advocate is necessary. Hence sought to reopen the case.

4. Both the applications have been resisted by the opponents/defendants on the ground that advocate cannot be summoned to give evidence with regard to the communication made with the client in view of the specific bar under Sec.126 of Indian Evidence Act. It is further contended that the defendants have not denied the contents of lawyer notice. Therefore they sought to dismiss the applications with costs.

5. Heard the arguments.

6. The points that would arise for my determination are:

1. Whether the plaintiff/applicant has made out a case to summon the witness as prayed for?

2. What order?

7. The above point No.1 is answered in the negative and point No.2 for the following:

REASONS

8. **Point No.1:** The instant suit is filed by the plaintiff for the relief of specific performance of contract. The defendants appeared and denied the case of the plaintiff. In the light of controversy raised, both the parties have led oral as well as documentary evidence. When the case is posted for arguments, the instant applications have been filed.

9. On perusal of Ex.P.4 reply notice issued by defendants dated 23.05.2016 they have categorically denied the execution of the suit agreement of sale and receipt of the earnest money etc. However D.W.1 during the course of cross examination has admitted regarding the contents of Ex.P.4 and it is also admitted that at his instance only the proposed witness has issued the notice. At this point as rightly pointed out by the learned counsel for the defendants, D.W.1 never denied the contents of Ex.P.4. On the contrary, D.W.1 has admitted that through telephone he has instructed the proposed witness to issue reply notice and accordingly he has issued the notice. Therefore when the D.W.1 admits the contents of Ex.P.4, under such circumstances, the advocate who has issued Ex.P.4 cannot be summoned. Had D.W.1 denied the contents of Ex.P.4

and then the question of summoning the proposed witnesses would have arisen.

10. The grievances of the plaintiff/applicant may be that in the written statement, the defendants have taken up the contention that the plaintiff has materially altered the figures '12' as '16'. 16 months time is not fixed for the performance of the contract and such averments not found in Ex.P.4 reply notice. Therefore according to the plaintiff/applicant, the contention taken in the written statement is not found in Ex.P.4. As rightly submitted by the learned counsel for the defendants/opponents, this point can be conveniently argued by the plaintiff to support their case. If the advocate who has issued Ex.P.4 is summoned and the question regarding the instructions given and the communication made by the parties, which amounts to revealing the communication between the client and the advocate which is clearly prohibited under Sec.126 of Evidence Act and exempted as privileged communication. As already stated since the defendants did not dispute the contentions of Ex.P.4 and the omission if any made in the reply notice and addition if any made in the written statement, can be exploited by the plaintiff at the time of arguments. **With this observation I answer point No.1 in the negative and proceed to pass the following:**

ORDER

IA No.18 & 19 filed by the applicant/plaintiff
are hereby rejected with no order as to costs.

Call on for arguments: 17.12.2019

(Vivekananda S. Pandit)

Prl. Senior Civil Judge & CJM, Udupi