

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

CM(M) No. 51/2022
CM No. 3030/2022

Pronounced on: 06.09.2022

Vijay Singh Petitioner/Appellant(s)

Through:- Mr. Amarveer Manhas, Advocate.

V/s

Lalita Karki and othersRespondent(s)

Through:- Mr. R.K. Jain, Sr. Advocate with
Mr. Pranav Jain, Advocate.

CORAM: HON'BLE MRS. JUSTICE SINDHU SHARMA, JUDGE

JUDGMENT

01. Through the medium of this writ petition, the petitioner has invoked the jurisdiction of this Court under Article 227 of the Constitution of India, assailing the order dated 06.04.2022, passed by the 3rd Additional Munsiff, Jammu (hereinafter referred to as 'trial Court') in a suit titled '*Colonel Vijay Singh vs. Col. Dalbir Singh (deceased) through Legal Representatives Lalita Karki and others*'.

02. A suit for mandatory injunction was instituted by the petitioner against the defendant or any party claiming through him to handover vacant and peaceful possession of the house-Durga Niwas, situated at Amphala, Jammu in Survey No. 287 min, measuring 5 Kanals 11 Marlas along with the said land to the plaintiff and the same is pending before the trial Court. The litigation between the parties continued and the original defendant Lt. Col. Dalbir Singh died on 11.10.2006 without deposing before the trial Court in his defence, his legal representatives were brought on record on 15.11.2006. An application was filed by the

respondents/defendants for permitting them to examine seven witnesses in place of the list of witnesses already submitted by the respondents and also the witnesses who had already filed their evidence by way of an affidavit. The petitioner/plaintiff objected to the same on the ground that the respondents having submitted a long list of witnesses are shying away from examining them and are only trying to prolong the trial and frustrate the proceedings, as such, the same was devoid of any merit. The learned trial Court by the impugned order dated 06.04.2022, allowed the application of the defendants under Order XVI with cost of Rs. 5,000/- to be paid to the opposite party for inconvenience caused.

03. The petitioner has challenged the impugned order dated 06.04.2022, on the ground that the same is perverse and illegal as the same was passed without taking into consideration any cause much less a good cause shown by the respondent who had filed three different applications for examination and summoning the witnesses. Learned counsel for the petitioner submits that the grounds carved out in the application are only an afterthought to defeat and delay the trial. The trial Court, it is submitted had erroneously accepted the affidavits of two persons namely Abhimanyu Partap Singh Jamwal and Amit Dutta who were cited in as witnesses even though the application for permitting them to examine witnesses was yet to be decided, this has resulted in delay in the proceedings. It is urged that the trial Court has acted with material irregularity in allowing the application which has resulted in failure of

justice, therefore, the impugned order is required to be quashed in exercise of supervisory jurisdiction.

04. Learned counsel for the respondents submitted that during the pendency of the suit, the original defendant expired and his daughters being the legal representatives were brought on record. The legal representatives of the defendant, it is stated, despite availing all efforts were unable to contact many witnesses, as some had died and some had left the place of residence and moved elsewhere, they have thus even deleted ten witnesses as mentioned in the list. It is submitted that in order to expedite the proceedings, they were also ready to delete the name of witnesses at Serial Nos. 11, 12, 13, 14, 17, 18, 20 and 22. It is urged that the respondents, had moved an application for allowing them to examine witnesses as given in the list in place of list of witnesses already submitted by the defendant. The respondents also undertook to produce the witnesses on their own and filed their affidavits in support of their defence to prove issue Nos. 5 and 6. They, however, sought assistance of the trial Court in summoning only one witnesses, i.e., witness No. 7. The respondents also stated in the trial Court that they do not want to press the application filed on 18.05.2016.

05. The assistance of the Court to summon witness No. 7 was sought only to produce the record regarding pension payment order record of the pension pertaining to Col. Dalbir Singh. It is further stated that the respondents had earlier also sought deletion of almost eleven witnesses from the list of witnesses, which were accordingly deleted. They further

sought deletion of witnesses at Serial Nos. 11, 12, 13, 14, 17, 18, 20 and 22.

06. The learned trial Court, after hearing both the parties allowed the application of the respondents under Order 16 Rule 1 (3) and Order 16 Rule 1(A). The provisions of Order 16 of the Code of Civil Procedure being relevant are set out as under:

“Rule 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 summons 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), summons referred to in this rule may be obtained by parties on an application to the Court or to such officer as may be appointed by the Court in this behalf.

30. Rule 1A which allows production of witnesses without summons provides as under:

Rule 1A. Production of witnesses without summons.

Subject to the provisions of Sub-rule (3) of Rule 1, any party to the suit may, without applying for summons under Rule (1), bring any witness to give evidence or to produce documents.”

07. The party, thus, 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. This disclosure enables the Court to decide as to whether the examination of

such witness to decide is necessary to decide the dispute or not. Sub-rule (3) of Rule 1 of Order XVI confers a wider jurisdiction on the Court to cater to a situation where the party has failed to name the witness in the list or the party is unable to produce him or her on his own under Rule 1A and in such a situation, the party out of necessity may seek the assistance of the Court under sub-rule (3) to procure the presence of the witness, such a situation on being shown sufficient cause, the Court may summon the witness. The trial Court accepted the application of the respondents on sufficient cause being shown by them as they were not able to produce the same. Rule IA of order XVI enables a party to bring in any witness without recourse to summons, if he/she wants to ensure the attendance of the witness, he/she applies for and obtains witnesses summon.

08. The law with regard to production of witnesses with the assistance of the Court is well settled by the Hon'ble Supreme Court in "**Mange Ram vs. Brij Mohan and others**", AIR 1983 SC 925, in which it has been held that:

"11. The analysis of the relevant provisions would clearly bring out the underlying scheme under order XVI Rules 1 and 1A, and Rule 22 of the High Court Rules would not derogate from such scheme. The scheme is that after the Court framed issues which gives notice to the parties what facts they have to prove for succeeding in the matter which notice would enable the parties to determine what evidence oral and documentary it would like to lead, the party should file a list of witnesses with the gist of evidence of each witness in the Court within the time prescribed by sub-rule (1). This advance filing of list is necessary because summoning the witnesses by the Court is a time consuming process and to avoid the avoidable delay an obligation is cast on the party to file a list of witnesses whose presence the party desires to procure with the assistance of the Court. But if on the date fixed for recording the evidence, the party is able to keep his witnesses present despite the fact that the names of the witnesses are not shown in the list filed under sub-rule (1) of Rule 1, the party would be entitled to examine these witnesses and to produce documents through the witnesses who are called to produce documents under Rule 1A. The only jurisdiction the Court has to decline to examine

the witness is the one set out in proviso to Sec. 87 (1) of '1951 Act', the discretion being confined to refusing to examine witnesses on the ground that the evidence is either frivolous or vexatious or the evidence is led to delay the proceedings. Save this the Court has no jurisdiction to decline to examine the witness produced by the party and kept present when the evidence of the party is being recorded and is not closed, and the Court has no jurisdiction to refuse to examine the witness who is present in the Court on the short ground that the name of the witness was not mentioned in the list filed under sub-rule (1) of Rule 1 of order XVI. This scheme clearly emerges from the various provisions herein discussed.”

09. In view of the aforesaid, the learned trial Court has rightly allowed the application for examination of the witnesses. The contention of the petitioner that this application is only to delay the trial is also without any merit, in view of the fact that the respondents have already deleted almost eighteen witnesses and two have died during the pendency of the trial. The respondents were also burdened with costs of Rs. 5,000/- for the inconvenience caused to the petitioner.

10. The next contention is whether the supervisory jurisdiction under Article 227 can be invoked in the present case or not. The proceedings under Article 227 of the Constitution of India are supervisory in nature. The power of superintendence conferred by Article 227 is to be exercised sparingly and only in appropriate cases, in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors. The Hon'ble Apex Court in **“Shalini Shyam Shetty and another vs. Rajendra Shankar Patil”**, 2010 (8) SCC 329, has delved upon the nature and scope of jurisdiction to be exercised under Article 227 and it has been held that the power under Article 227 can be exercised only in cases occasioning grave injustice or failure of justice such as, when; (i) the court or tribunal has assumed a jurisdiction which it does not have, (ii)

the court or tribunal has failed to exercise a jurisdiction which it does have, such failure occasioning a failure of justice, and (iii) the jurisdiction though available is being exercised in a manner which tantamount to overstepping the limits of jurisdiction.

11. In “**D. N. Banerji vs. P. R. Mukherjee and others, AIR 1953 SC 58**”, the Hon’ble Supreme Court has held as under:

“Unless there was any grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under articles 226 and 227 of the Constitution to interfere.”

12. The trial Court has exercised the jurisdiction vested in it and while passing the impugned order, there is neither any manifest failure of justice nor any perversity in the impugned order, as such, no ground for interference is made out.

13. In view of the aforesaid discussion, this petition is without any merit and the same is, accordingly, **dismissed** along with connected applications.

(Sindhu Sharma)
Judge

Jammu
06.09.2022
Michal Sharma

Whether the judgment is speaking : Yes
Whether the judgment is reportable : Yes