



GAHC010270562017

Page No.# 1/7



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRP(I/O)/269/2017

KAMAL SHARMA
S/O LATE SATYANARAYAN SHARMA, R/O N.S. ROAD, PO and PS-FATASIL,
GUWAHATI-781009, DIST. KAMRUP METRO, ASSAM

VERSUS

PRANJEET BEZBARUAH and 6 ORS.

2:PRANJAL BEZBARUAH
BOTH ARE S/O- LATE DEBA KR. BEZBARUAH
AMOLAPATTY
BR PATH
P.O AND P.S- DIBRUGARH
DIBRUGARH- 786001
ASSAM

3:PARIMEETA BEZBARUAH PUJARI
D/O- LATE D K BEZBARUAH
W/O- SRI D K PUJARI
P.O AND P.S- PULIBOR
JORHAT- 785006
DIST- JORHAT
ASSAM

4:JURI @ MANJUBALA HAZARIKA
W/O- MD. ASHAN ALI @ KAMAL HAZARIKA
WEST BONKOWAR NAGAR
BESIDE NIRMALA AI-THAN
P.O- KHARGULI
GUWAHATI- 781004
ASSAM



5:ASHAN ALI @ KAMAL HAZARIKA
S/O- MD. HAFIZ ALI
WEST BONKOWAR NAGAR
BESIDE NIRMALA AI-THAN
P.O- KHARGULI
GUWAHATI- 781004
ASSA

Advocate for the Petitioner : MR.P K KALITA

Advocate for the Respondent :

BEFORE

THE HON'BLE MR JUSTICE PRASANTA KUMAR DEKA

For the Petitioner :Mr. PK Kalita, Sr. Advocate
Mr. KR Baruah, Advocate.

For the respondents : Mr. BD Deka,
Advocate.

Date of hearing : 21.10.2020
Date of Judgment/ Order : 18.12.2020

JUDGMENT & ORDER (CAV)

Heard Mr. PK Kalita, learned Senior counsel assisted by Mr. K R Baruah, learned counsel for the petitioner. Also heard Mr. BD Deka, learned counsel for the respondents.

2. The respondents plaintiffs filed T.S. No. 309/2011 in the court of learned Munsiff No. 2, Kamrup (M) at Guwahati against the defendant petitioner seeking for declaration of right, title and interest including cancellation of sale deed bearing Nos. 253/2002 and 2915/2011 and for permanent injunction. The defendant petitioner filed his written statement. While the suit was at the stage of evidence of plaintiff's witnesses on 27.01.2017 a petition under Order XVI Rule 5 and 7 of the CPC was filed by the plaintiff side with a prayer that as five numbers of the witnesses of the plaintiff side were cross-examined and duly discharged as such the official witnesses were required to be summoned to prove the documents supplied by the Government officials. It is pertinent to mention herein that in the said petition, it was stated



that the list of witnesses was filed on 02.09.2015 as recorded in the case records in the court but the same was not available on records on the date of filing the said petition on 27.01.2017. The defendant petitioner filed his written objection. In the said objection, it was specifically stated that as the list of witnesses was not available on records as stated by the plaintiffs respondents, until and unless the said requirements are complied the question of proceeding under Order XVI Rule 5 and 7 of the CPC for summoning the official witnesses does not arise. The learned court below vide order dated 24.03.2017 rejected the said prayer made by the plaintiffs respondents on the grounds that the plaintiffs respondents did not specify as to whom they sought to call for as official witnesses nor official designation of the witnesses were mentioned. Accordingly, on the ground of ambiguity, the said petition was rejected.

3. Again on 09.04.2017 another application under Order XVI Rule 1 (2), 1 (3) and 6 of the CPC was filed seeking the leave of the court to issue summons to the witnesses specified in the said petition along with documents to be brought in. The defendant petitioner filed his written objection. The learned court below of Munsiff No. 2, Kamrup (M) vide its impugned order dated 11.08.2017 allowed the said petition directing the plaintiffs respondents to take steps for calling the official witnesses specified in the said order. While passing the impugned order the learned court below held that vide earlier order dated 24.03.2017 a petition of the same nature was rejected only on the ground that it was silent about the designation of the official witnesses and as such the said order had no effect in the subsequent order.

4. Mr. Kalita, the learned Senior counsel submitted that Order XVI Rule 1 CPC stipulates that the parties to a suit are required to submit the list of witnesses within a specific time limit indicating the witnesses proposed to be called for. But in the present case admittedly there was no list of witness on records of the plaintiff respondents so the question of issuance of summons to the witnesses as allowed by the court below does not arise. It is further argued that in order to invoke the jurisdiction by the court below under Order XVI Rule 1 (3) it is mandatory that the list of witnesses must be filed. But the learned court below failed to take note of the said requirement and granted the leave to issue summons to the witnesses of the plaintiffs respondents without there being a list of witness on record. In support of the said submission Mr. Kalita ***relies Gauranga Mandal & Ors. Vs Deba Das***

Sarkar reported in 2012 (5) GLT 144.

5. Mr. Deka, the learned counsel for the respondents submitted that in the first application filed by the plaintiff respondents on 27.01.2017 for issuance of summons to the official witnesses they did not mention the relevancy of the witnesses in the proceeding and designation of the official witnesses and as such the learned court below vide order dated 24.03.2017 rejected the prayer on the ground that no designation of the official witnesses were mentioned. Therefore another application under Order XVI Rules 1(2),1(3), and 6 of the CPC was filed on 09.04.2017 elaborately explaining the nature of evidence to be led by the official witnesses mentioning the designation of the officials. Though the petitioner defendant filed his written objection the learned court below vide the impugned order dated 11.08.2017 allowed the prayer granting the leave to the plaintiffs respondents to take steps for calling the official witnesses. In the said order the court below observed that the earlier petition was rejected as the designations of the officials were not mentioned.

6. I have given due consideration to the submissions made by the learned counsel. It is the contention of the learned Senior counsel appearing for the petitioner that in order to invoke the jurisdiction by a court under Order XVI Rule 1 Sub-rule 3 CPC it is mandatory that there must be a list of witnesses filed by the party and the causes must be shown as to why name/ names of the witnesses proposed to be summoned were omitted from the list. But as admittedly there was no list of witnesses on records as such the exercise of the jurisdiction by the court below under the said provision was bad.

7. The provision of Order XVI Rule 1 and Rule 1A CPC are reproduced hereinbelow:

“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 person 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 ²[Court in this behalf within five days of presenting the list of witnesses under sub-rule (1)].].

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.”

The parties to a suit under Order XVI Rule 1 Sub rule 1 CPC are required to submit the list of witnesses not later than fifteen days after the date of issues are settled whom they proposed to call either to give evidence or to produce documents and obtain summons to such persons for their attendance in court. Sub rule 2 of Order XVI Rule 1 CPC stipulates filing of necessary application for obtaining summons for attendance of any person stating the purpose for which the witness is proposed to be summoned. Sub rule 3 of Order XVI Rule 1 CPC authorizes a court to permit a party to call whether by summoning or otherwise any witness other than those whose names appear in the list referred to Sub rule (1) after the court recorded the reasons on the basis of the explanation by the party as to the reasons for omission of the name/ names of such witnesses from the list. Sub rule 4 of the Rule 1 of Order XVI CPC authorizes the party to obtain summons on an application to the court within five days of presenting the list of witnesses under Sub rule (1). Order XVI Rule 1A authorizes a party to bring any witness to give evidence or produce documents subject to the provision of sub rule (3) of Rule 1 of Order XVI CPC.

8. The combined effect of the provisions under Order XVI Rule 1 Sub rule (3) and the one under XVI Rule 1A CPC is culled out by the Apex Court in ***Vidhyadhar Vs Mankikrao and Anr. Reported in AIR 1999 SC 1441*** as follows:

“30. These two Rules read together clearly indicate that it is open to a party to summon the witnesses to the Court or may, without applying for summons, bring the witnesses to give evidence or to produce documents. Sub-rule (3) of Rule 1 provides that although the name of a witness may not find place in the list of witnesses filed by a party in the Court, it may allow the party to produce a witness though he may not have been summoned through the Court. Rule 1A which was introduced by the CPC (Amendment) Act, 1976 with effect from 1.2.1977 has placed the matter beyond doubt by providing in clear and specific terms that any party to the suit may bring any witness to give evidence or to produce documents. Since this Rule is

subject to the provisions of Sub-rule (3) of Rule 1, all that can be contended is that before proceeding to examine any witness who might have been brought by a party for that purpose, the leave of the Court may be necessary but this by itself will not mean that Rule 1A was in derogation of Sub-rule (3) of Rule 1. The whole position was explained by this Court in [Mange Ram v. Brij Mohan and Ors.](#), in which it was held that Sub-rule (3) of Rule 1 and Rule 1A operate in two different areas and cater to two different situations. It was held:

There is no inner contradiction between Sub-rule (1) of Rule 1 and Rule 1A of Order XVI. 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 and yet the party is unable to produce him or her on his own under Rule 1A and in such a situation the party of necessity has to seek the assistance of the Court under Sub-rule (3) to procure the presence of the witness and the Court may if it is satisfied that the party has sufficient cause for the omission to mention the name of such witness in the list filed under Sub-rule (1) of Rule 1, the Court may still extend its assistance for procuring the presence of such a witness by issuing a summons through the Court or otherwise which ordinarily the Court would not extend for procuring the attendance of a witness whose name is not shown in the list. Therefore, Sub-rule (3) of Rule 1 and Rule 1A operate in two different areas and cater to two different situations. Therefore, sub rule (3) of Rule 1 and Rule 1A operate in two different areas and cater to two different situations."

9. The learned Single Judge of this court after considering the aforesaid decision of the **Apex Court in Vidhyadhar Vs Mankikrao and anr.(supra) held in Gauranga Mandal Vs Debadass Sarkar (Supra)** that for application of Sub-rule (3) of Rule (1) of Order XVI CPC, a list of witnesses must have been filed in terms of Sub-rule (1) of Rule (1) of Order XVI and application of Sub-rule (3) of Rule 1 cannot arise in a case where no such list of witnesses had been filed. Respectfully I agree with the said finding of the Hon'ble Single Judge. Considering the said proposition and the one in **Vidhyadhar Vs Mankikrao and anr. (supra)** it can be inferred that the witness referred in Rule 1A of Order XVI CPC need not be a witness whose name is mentioned in the list of witnesses but the party is unable to produce him on his own under Rule 1A inasmuch as both the provisions viz Rule 1 Sub-rule (3) and Rule 1A are applicable in two specified areas. In such a situation the party requiring the presence of the said witness shall take recourse to Sub-rule (3) of Rule (1) of Order XVI CPC to procure the presence of the said witness subject to the condition that the party requiring the presence of the witness must satisfy the court the grounds for omission of his name from the list of witness and the relevancy of the witness in the issue before the court and only on satisfaction the court may issue summons.

10. In the present case in hand it is specifically stated in the petition which was filed on 27.01.2017 that the list of witnesses was filed on 02.09.2015 showing the official witness



which was recorded by the learned court below but the learned court below in its order held that the same was not on record. Subsequently after dismissal of the said petition another petition was filed on 09.04.2017 on the basis of which the impugned order was passed. The present factual matrix shows that the list of witness was filed by the plaintiff respondent but was not on records. The requirement of filing the list of witnesses is satisfied for the purpose of Sub-rule (3) of Rule 1 of Order XVI inasmuch as there is a specific statement of submission of list of witnesses and recorded in order sheet dated 02.09.2015 though it was not on records. In view of the same the learned court below rightly exercised its jurisdiction in granting the leave to the plaintiff respondents for taking steps for issuance of summons to the official witnesses.

11. Accordingly, in my considered opinion the impugned order requires no interference as it fulfils the criteria for invoking the jurisdiction under Order XVI Rule 1 Sub-rule (3) CPC as discussed above. This revision petition stands dismissed. No costs. Interim order passed stands vacated.

JUDGE

Comparing Assistant