



HIGH COURT OF ANDHRA PRADESH
FRIDAY ,THE FOURTH DAY OF MARCH
TWO THOUSAND AND TWENTY TWO

PRESENT

THE HONOURABLE MS JUSTICE B S BHANUMATHI
CIVIL REVISION PETITION NO: 2549 OF 2018

Between:

1. MIRZA ZAREENA BEGUM W/o. Mierza Zafar Abbas, Aged about 41 year, Resident of Kuchipudi Village, Movva Mandal, Avanigadda J.C.J.C., Krishna District.

...PETITIONER(S)

AND:

1. SANKA SUBBA RAO S/o. Venkateswarlu, Aged about 53 years, Resident of Kuchipudi Village, Movva Mandal, Krishna District.
2. Sanaka Raja Kumari W/o. Subba Rao, Aged about 46 years, Resident of Kuchipudi Village, Movva Mandal, Krishna District.
3. Chalamalasetti Ranga Rao, S/o. Narasayya, Aged about 80 years, Resident of Kuchipudi Village, Movva Mandal, Krishna District.

...RESPONDENTS

Counsel for the Petitioner(s): P PRABHAKAR RAO

Counsel for the Respondents:

The Court made the following: ORDER



THE HON'BLE Ms. JUSTICE B.S.BHANUMATHI

Civil Revision Petition No.2549 of 2018ORDER:

This civil revision petition, under Article 227 of the Constitution of India, is filed by the unsuccessful petitioner-plaintiff assailing the order, dated 21.03.2018, of the learned Principal Junior Civil Judge, Avanigadda, Krishna District, passed in IA.No.229 of 2018 in OS.No.125 of 2008.

2. Heard Sri P.Prabhakara Rao, learned counsel appearing for the revision petitioner-plaintiff and Sri M.Prasad Rao, learned counsel appearing for the respondents - defendants.

3. The revision petitioner/plaintiff filed petition under Section 151 of the Code of Civil Procedure, 1908 ('Code') to issue bailable warrant to Chalamalasetti Prabhudas S/o Ranga Rao, Nizampet, Hyderabad, and direct the Station House Officer, Kukatpalli Police Station to produce him before the Court, since the witness failed to appear before the Court in response to the summons served upon him.

(b) The 2nd defendant opposed the petition on the ground that the petition is not maintainable under Section 151 of the Code as there is a specific provision under law and this defendant filed a suit in O.S.No.115 of 2014 on the file of the same Court against Prabhudasu and the 3rd defendant in this suit and that the said suit is pending. The contesting defendant stated that there is collusion between Prabhudasu and the plaintiff. The petition was further resisted on the ground of prolonged litigation of the suit since the year 2018 and that this is one more attempt to drag on the proceedings.

4. The Court below dismissed the petition holding that the petition is not maintainable under Section 151 of the Code since there is a specific provision



under Order XVI Rule 10 of the Code, which deals with the procedure where witness fails to appear in compliance of summons served. It is further observed by the trial Court that as per sub-rule (3) of Rule 10 of Order XVI of the Code, when the witness fails to attend in terms of the summons served on him and if the Court feels that non-appearance of summoned witness is without lawful excuse, it may issue proclamation requiring him to attend to give evidence and if even thereafter, the witness does not turn up, the Court may issue warrant either bailable or non-bailable.

5. The point for determination is:

Whether the impugned order suffers from any illegality or irregularity warranting interference by this Court?

POINT:

6. It is settled law that wrong quoting of provision of law is not a ground to decline any relief, if the party is otherwise, entitled to it. Since the relief claimed is covered by Order XVI, Rule 10 of the Code, it is to be examined whether the relief claimed by the petitioner can be granted within the scope of the said provision. For better appreciation, it is apropos to refer to Order XVI Rule 10 of the Code, which is excerpted hereunder:

“10. Procedure whose witness fails to comply with summons.

1. Where a person to whom a summons has been issued either to attend to give evidence or to produce a document, fails to attend or to produce the document in compliance with such summons, the Court-

(a) shall, if the certificate of the serving officer has not been verified by affidavit, or if service of the summons has been effected by a party or his agent, or

(b) may, if the certificate of the serving officer has been so verified, examine on oath the serving officer or the party or his agent, as the case may be, who has effected service, or cause him to be so examined by any Court, touching the service or non-service of the summons.



2. Where the Court sees reason to believe that such evidence or production is material, and that such person has, without lawful excuse, failed to attend or to produce the document in compliance with such summons or has intentionally avoided service, it may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein; and a copy of such proclamation shall be affixed on the outer door or other conspicuous part of the house in which he ordinarily resides.
3. In lieu of or at the time of issuing such proclamation, or at any time afterwards, the Court may, in its discretion, issue a warrant, either with or without bail, for the arrest of such person, and may make an order for the attachment of his property to such amount as it thinks fit, not exceeding the amount of the costs of attachment and of any fine which may be imposed under rule 12:

Provided that no Court of Small Causes shall make an order for the attachment of immovable property.”

7. To understand Order XVI Rule 10 of the Code, in simple form, it can be stated that on receipt of summons, when a witness fails to appear ‘without lawful excuse’, subject to the procedural rider in Rule 10(1), a Court can issue (1) a proclamation requiring him to appear as prescribed under Rule 10(2) or; (2) without or while or at any time after issuing such proclamation, (i) issue a bailable or non-bailable warrant for arrest of such witness or (ii) order attachment of his property.

(a) Before resorting to such stringent measure(s), a procedural safeguard is provided under Rule 10(1) to protect the interest of witness against such impending hardship, by requiring the Court to examine on oath (i) the service officer or (ii) the party or (iii) his agent, as the case may be, touching the service or non-service of the summons -

(i) Mandatorily, (a) if the certificate of the serving officer has not been verified by affidavit, or (b) if service of the summons has been effected by a party, or (c) if service of the summons has been effected by an agent of a party; or

(ii) Discretionarily (may or may not), if the certificate of the serving officer has been so verified.



(b) In other words, if certificate of serving officer has been verified by affidavit, the serving officer may or may not be examined, but, if certificate of the serving officer has not been verified by affidavit, the serving officer shall be examined. Whereas, in case, service of summons has been effected by party or his agent, it is mandatory to examine such party or his agent, as the case may be.

8. In the present case, except filing the petition annexed affidavit of the petitioner stating that the witness had not attended before the Court in spite of receipt of summons issued by the Court, certificate of the serving officer is not shown to have been verified by an affidavit.

9. Learned counsel submitted that the affidavit filed by the party in support of the petition is sufficient compliance of the said provision. Such argument cannot be countenanced for the reason that it is not the party who has served the summons. What is contemplated under Rule 10(1) is a certificate of serving officer verified by affidavit but not the affidavit of the party certifying the service of summons by serving officer. Under Rule 10(1) of the Code, as discussed above, such procedure has to be adopted in this case as well.

10. Then, the Court has no option of issuing proclamation under Rule 10(2) or bailable/non bailable warrant or ordering attachment of property under Rule 10(3) as stated in the proceeding paragraph. But the stage under Rule 10(2) or (3) arises on complying the conditions laid down in sub-rule (1) thereof. In this case, the lower Court failed to examine the provisions in proper perspective and thereby, erred in dismissing the petition merely on the ground that a relief of issuance of warrant cannot be granted under Section 151 of the Code without taking proper recourse to the provisions of Order XVI Rule 10 of the Code.



11. Irrespective of the provision of law cited, the trial Court ought to have directed the petitioner to file the petition in a proper manner as required under Order XVI Rule 10 of the Code and comply with Rule 10(1) and thereafter, could have proceeded further under Rule 10(2) or (3) as it deems fit. Therefore, this Court finds that the trial Court has failed to properly exercise its jurisdiction and that the order impugned is liable to be set aside by directing the trial Court to take steps under Order XVI Rule 10 by considering this petition as one filed under Order XVI Rule 10 of the Code.

12. In the result, the Civil Revision Petition is allowed and the impugned order, dated 21.03.2018, passed in IA.No.229 of 2018 in OS.No.125 of 2008 is set aside and the petition is restored to file to take recourse to the provisions of Order XVI Rule 10 of the Code by directing the petitioner to comply with the procedure contemplated therein.

There shall be no order as to costs.

Miscellaneous petitions pending, if any, shall stand closed.

04th March, 2022
RAR

B.S BHANUMATHI, J