

**IN THE GAUHATI HIGH COURT
[THE HIGH COURT OF ASSAM: NAGALAND: MIZORAM AND
ARUNACHAL PRADESH]**

**ITANAGAR BENCH
NAHARLAGUN**

CRP 40 (AP) 2017

Shri Ejum Karbak,

S/o late Hoi Karbak, a resident of
Gumin Nagar, Aalo, P.O. & P.S. Aalo,
West Siang District, Arunachal Pradesh.

.....Petitioner.

Advocate for the Petitioner:

Mr. M. Kato,
Mr. B. Sora,
Mr. B. Lingu,
Mr. N. Sora,
Mr. P. Ete,
Mr. T. Epa,
Mr. M. Tanga,
Mr. R. Kagra,
Mr. A. Timung,

VS

Shri Rayom Jini,

S/o late Gera Jini, resident of Logum
Jini village, P.O. & P.S. Aalo,
West Siang District, Arunachal Pradesh

..... Respondent

Advocate for the Respondent:

Ms. T. Jini,
Ms. H. Jeram,

:::BEFORE:::
HON'BLE MR JUSTICE AJIT BORTHAKUR

Date of hearing : **20.12.2017.**

Date of Judgment & Order : **20.12.2017.**

JUDGMENT AND ORDER (ORAL)

Heard Mr. M. Kato, learned counsel appearing for the petitioner and Ms. T. Jini, learned counsel appearing for the respondent.

2. This is an application under Article 227 of the Constitution of India, read with Section 151 of the Code of Civil Procedure, 1908, filed by the defendant/petitioner herein, praying for setting aside and quashing of the impugned order, dated 16.11.2017, passed by the learned Civil Judge (Senior Division), West Siang District, Aalo in Title Suit No.02/16, whereby the petitioner was denied the opportunity of cross-examination of his witnesses and the learned Court below refused to summon his witnesses, who have declined to appear before the Court without receipt of summons from its end.

3. The defendant/petitioner has contended that in the aforesaid suit relating to land dispute with the plaintiff/respondent herein, which incepted in the year 2001, has been constantly litigating by them over their rights on the suit land in different forums, inclusive 02(two) batches of writ petitions (since disposed of), being WP(C)No.1069(AP)2001 and WP(C)No.3622(AP)2001 [renumbered as WP(C)No.815(AP)2001] and finally their dispute landed in the Court of learned Civil Judge (Senior Division), West Siang District, Aalo where the suit was registered as T.S. No.02/2016. In the aforesaid suit, after the evidence for the plaintiff was closed, the defendant/petitioner submitted the depositions of 03(three)

witnesses in evidence in-chief, on affidavit and accordingly, he was subjected to cross examination, but, 02(two) of his witnesses remained to be cross examined. In the meantime, the defendant/petitioner suffered serious health deterioration (diagnosed cancer) and could not pursue the case personally and on the other hand, the remaining 02(two) witnesses of the defendant have also refused to appear before the learned Court below without receipt of summons from the Court. Therefore, the defendant/petitioner filed an application being numbered 854/2017, on 18.10.2017, praying for adjournment for a period of 06(six) months, as he was undergoing medical treatment in Delhi, which period was required for his recovery from illness. The defendant/petitioner filed another application, being numbered 857/2017, on 16.11.2017, praying for issuance of summons to his witnesses. However, the learned Court below, after hearing both the sides, rejected the aforesaid prayers, vide the impugned order, dated 16.11.2017, and closed the evidence of the defendant's side.

4. The defendant/petitioner herein challenged the above order, *inter alia*, on the grounds that the learned Court below has not taken into consideration of the provision of Rule 2 of Order XVI of the Code of Civil Procedure, which provides that 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 and the Civil Court applying the mode provided in Rule 10 of Order XVI of the Code of Civil Procedure can adopt coercive measures to secure the attendance of witnesses and further, that it is a settled position that in extreme circumstances, the strict rule of limiting to 03(three) adjournments provided in the Rule 1 of Order XVII of the Code of Civil Procedure is not applicable, which the learned Court below failed to appreciate.

5. Mr. M. Kato, learned counsel appearing for the defendant/petitioner herein, strenuously submits that the parties to the suit have been constantly litigating over the suit land for the last about 16(sixteen) years from the year 2001 and due to the ongoing process of separation of judiciary in the State of Arunachal Pradesh, the dispute is yet to be settled finally, as the suit had been transferred from Court to Court during the aforesaid period.

6. Ms. T. Jini, learned counsel appearing for the plaintiff/respondent herein, submits that the defendant/petitioner by petition No.854/17 prayed for adjournment of the suit for 06(six) months, till his recovery from ailment although adjournment was granted on 06(six) consecutive dates to enable him to produce his remaining DWs for cross-examination, but failed to do so and in the meantime, on the prayer of the defendant/petitioner, under Order XXVI of the Code of Civil Procedure he was allowed by the Court below for cross-examination of himself through commission and accordingly, the commissioner recorded the cross-examination of the defendant/petitioner. According to Ms. Jini, Order XVII, Rule 1 of the Code of Civil Procedure does not provide for more than 03(three) adjournments to a party to examine his witnesses and therefore, the defendant/petitioner cannot claim more than 03(three) adjournments to cross examine his remaining 02(two) witnesses under the aforesaid Rule and that the provisions of Order XVI, Rule 10 of the Code of Civil Procedure cannot be invoked in the backdrop of the aforesaid facts of the instant long pending case of 2001.

7. It is pertinent to be mentioned that although Rule 1 of Order XVII of the Code of Civil Procedure provides that the Court may, if sufficient cause is shown, at any stage of the suit, grant time to the parties or to any of them, for hearing and may from time to time adjourn the hearing of the suit, for reasons to be recorded in writing, provided that no such adjournment can be granted for more than

03(three) times to a party. Therefore, undoubtedly the Court is bound by the aforesaid rule of adjournment of hearing limiting to only 03(three) such adjournments. However, the aforesaid maximum limit of 03(three) adjournments provided in Rule 1 of Order XVII of the Code of Civil Procedure, it is settled by the Supreme Court in ***Salem Advocate Bar Association Vs. Union of India***, reported in, ***AIR (2005) 6 SCC 344***, that the limitation is not mandatory, but directory and as such, more than 03(three) adjournments can be granted at the discretion of the Court, if it is shown that the circumstances were beyond the control of the party. The grant of adjournment by the Court has to be on a party showing special and extraordinary circumstances. It cannot be in routine. While considering the prayer for grant of adjournment, it is necessary to keep in mind the legislative intent to restrict the grant of adjournments. Considering the aforesaid ground of serious illness cited by the defendant/petitioner for adjournment, this Court finds that the refusal of the learned Court below to grant further time as prayed was not proper.

8. It is further noticed that the defendant's remaining 02(two) witnesses, who filed their examination, in-chief on affidavit, refused to appear before the learned Court below for their cross-examination and therefore, the defendant/petitioner submitted petition to summon those witnesses. However, the learned Court below rejected the prayer, on the ground that the ground for issuance of summons from the Court does not arise in a civil suit, where the parties are responsible for bringing up their witnesses in the Court for examination and there is no other previous application, filed by the defendant for this purpose. The learned Court below observed that the grounds were baseless, as the suit was a long pending one, where the defendant availed several adjournments to produce his witnesses. In case when the witness, who has submitted his

examination in-chief on affidavit, refuses to appear before the Court for cross-examination, the defendant may recourse to Order XVI, Rule 1 of the Code of Civil Procedure and after he is summoned by the Court. In other words, in all cases the examination in-chief has to be conducted by way of affidavits, and in case when the witness is not under control of the party, who wants to examine him as a witness, recourse can be taken to Rule 1 of Order XVI, of the Code of Civil Procedure and after he is summoned by the Court. Under Order XVI, Rule 12 of the Code of Civil Procedure, the civil Court has the power to impose even fine upon such party, who fails to appear on being summoned by the Court. Therefore, closure of evidence of defendant by the Court, in the opinion of this Court was not proper, when failure to produce witness by the party was apparently not occasioned by any deliberate negligence or inaction of the defendant. The learned Court ought to have allowed the petition for issuing summons to secure the attendance of the witnesses of the defendant/petitioner.

9. In the case of ***Vidhyadhar Vs. Manikrao & Anr.***, reported in ***(1999) 3 SCC 573***, the Supreme Court held-

"Rule 1 and 1-A of Order 16 CPC 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, Since Rule 1-A 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 1-A was in derogation of sub-rule (3) of Rule 1."

10. Therefore, having regard to the aforesaid special and extraordinary circumstances arising out of the defendant's serious illness during the period of his inability, this Court is of the opinion that the learned Court below ought to have allowed his petitions, so as to ensure proper adjudication of the issues between the parties towards settlement of their prolonged land dispute by producing his witnesses.

11. Accordingly, the impugned order, dated 16.11.2017, is set aside with a direction to the learned Court below to issue summons to the witnesses of the defendant/petitioner, as per the provisions provided in Order XVI of the Civil Procedure Code, subject to payment of requisite expenses for service of summons as per prescribed rules in this regard. The defendant/petitioner shall make a sincere endeavor to assist the Court in disposal of the suit within a period of 60(sixty) days from the date of receipt of a certified copy of this judgment and order by the learned Court below.

12. Accordingly, petition stands allowed, with a cost of `3,000/- (Rupees Three Thousand only) to be paid by the defendant/petitioner to the plaintiff/respondent herein.

Both the parties shall appear before the learned Court below on **16.01.2018** to receive further instructions from the Court.

JUDGE

Cha Gang