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\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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*Judgment Reserved on 28.10.2024  
Judgment Delivered on 08.01.2025*

+ **CS(OS) 1546/2009 & I.A. 5315/2023 & I.A. 4224/2024**

SH. VIJENDER SINGH & ORS .....Plaintiff

Through: Mr. Vishal Maan, Mr. A. Singh and  
Mr. Kartik Dabas, Advocates

versus

SH. NARINDER SINGH & ORS .....Defendant

Through: Mr. Preet Pal Singh, Mr. Pradeep  
Khatri, Mrs. Tanupreet Kaur, Mr.  
Sahil Bhardwaj and Ms. Akanksha  
Singh, Advocates

**CORAM:  
HON'BLE MR. JUSTICE VIKAS MAHAJAN**

**JUDGMENT**

**VIKAS MAHAJAN, J.**

**I.A. 4224/2024 (under Order XVI Rule 1 read with Section 151 CPC for  
summoning of witness)**

1. The present application has been filed by the defendants under Order XVI Rule 1 read with Section 151 CPC seeking permission to produce and examine Sh. Ajay Gopal as witness, who is stated to be the attesting witness of the Will dated 24.05.2002 executed by Late Sh. Ram Chander.



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2. The present suit has been filed by the plaintiffs praying for declaration, partition, permanent injunction, rendition of accounts, *mesne* profits and damages, in respect of the estate left behind by Late Sh. Ram Chander.

3. It is the case of the plaintiffs that both the plaintiffs, as well as, the defendants are co-parceners/co-owners of the ancestral and joint family properties left behind by Late Sh. Ram Chander.

4. The defendant nos. 1 to 7 filed a joint written statement wherein they propounded a registered Will dated 24.05.2022 executed by Late Sh. Ram Chander in favour of the defendant no.1 and predecessor-in-interest of defendant nos. 2 to 4 to the exclusion of the plaintiffs and defendant nos. 8 and 9.

5. Learned counsel appearing on behalf of the applicants/defendants submits that the Will has been attested by the two witnesses namely, Ajay Gopal and Ved Pal. He submits that in so far as attesting witness–Ved Pal is concerned, he had passed away on 08.12.2008, however, the other attesting witness namely, Ajay Gopal was cited as witness by the defendants in the list of witnesses. However, since the said witness was won over by the plaintiffs and defendants were not expecting him to be truthful, therefore, the defendants sought permission to examine another witness namely, Deepak Sharma who was present at the time of signing, execution and registration of the said Will dated 24.05.2002. However, the said witness had also refused to complete his cross-examination.

6. He submits that later on, learned counsel appearing for the defendants made a statement that defendants do not wish to examine any other witness,



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which was recorded by the learned Joint Registrar in his order dated 21.07.2023. He submits that on 07.02.2024, Shri Ajay Gopal, the attesting witness, had contacted defendant no. 1 and showed his intention to appear in the witness box in the present case. It is the case of the applicants that when he was confronted with his past conduct on non-appearance, Shri Ajay Gopal stated that he was threatened of dire consequences by the plaintiff no.3. He submits that Shri Ajay Gopal is the only surviving attesting witness of the Will and being a material witness, his appearance before this Court is of immense importance to reach a just and judicious decision. He, therefore, urges the Court that the present application be allowed and the defendants may be permitted to produce Shri Ajay Gopal as witness to testify as regards the Will in question.

7. *Per contra*, the present application is opposed by the learned counsel appearing for the plaintiff/non-applicant. He submits that the defendants have voluntarily not examined Shri Ajay Gopal as witness. In case Shri Ajay Gopal was not coming forward for testifying with regard to the Will in question, the defendants could have sought assistance of the Court for the said purpose. He further submits that since the defendants have taken a conscious decision not to examine the attesting witness, namely Ajay Gopal, therefore, at this stage when the matter is ripe for final arguments, they cannot seek summoning of the said witness.

8. He further submits that the present application is also not maintainable for the reason that by way of present application, only the summoning of the witness is being prayed for whereas no application has been moved by the defendants for re-opening of the evidence which stands



closed *vide* order dated 21.07.2023. He also submits that the defendants never filed any application under Order XVI Rule 10 of CPC whereby the defendants ought to have sought issuance of proclamations/warrants against Ajay Gopal as he was wilfully not appearing before this Court in respect of the summons issued.

9. I have heard the learned counsel for the defendant nos. 1 to 7, as well as, learned counsel for the plaintiffs/non-applicants and have perused the record.

10. It is not in dispute that the attesting witness namely, Shri Ajay Gopal was cited as one of the witnesses by the applicants/defendants in the list of witnesses and some endeavour was also made by them to examine him. In fact, Sh. Ajay Gopal's affidavit was filed by way of examination-in-chief as far back as on 31.08.2015 but, despite issuance of summons he never tendered himself for cross-examination.

11. The case of the applicants is that after having appeared once in the Court, the said witness refused to appear for his cross-examination. The reason put forth by the applicants is that the said witness was won over or threatened by the plaintiffs, therefore, he did not tender himself for cross-examination.

12. It is also a matter of record that after the said witness did not appear for his cross-examination, the applicants chose to examine another witness not mentioned in the list of witnesses namely, Mr. Deepak Sharma, the scribe of the Will, under Section 69 of the Indian Evidence Act, 1872.

13. The said witness was also examined in-chief and partly cross-examined till 21.07.2023 but thereafter, he too did not turn up for his further



cross-examination.

14. In the above backdrop, the learned counsel for the defendant nos. 1 to 7, on instructions, closed the defendants' evidence. The statement of the counsel to that effect was recorded at bar on 21.07.2023.

15. From the above narration, it is absolutely clear that the applicants consciously chose to close their evidence. Incidentally, no efforts were made by the applicants to seek the assistance of the Court to summon the attesting witness i.e. Sh. Ajay Gopal when he refused or chose not to appear for his cross examination.

16. At this stage, reference to Sections 30 and 32 as well as Rules 10 and 12 of Order XVI of the Code of Civil Procedure is apposite, which provides for the manner in which the court can compel the attendance of the witness who is required to give evidence or to produce the documents. The said provisions read thus:

*“30. Power to order discovery and the like.—Subject to such conditions and limitations as may be prescribed, the Court may, at any time, either of its own motion or on the application of any party,—*

*(a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;*

*(b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such other objects as aforesaid;*

*(c) order any fact to be proved by affidavit.*



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**32. Penalty for default.**—*The Court may compel the attendance of any person to whom a summons has been issued under section 30 and for that purpose may—*

*(a) issue a warrant for his arrest;*

*(b) attach and sell his property;*

*(c) impose a fine upon him 1 [not exceeding five thousand rupees];*

*(d) order him to furnish security for his appearance and in default commit him to the civil prison.*

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## ORDER XVI

**10. Procedure where witness fails to comply with summons.**—

*(1) Where a person 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 the affidavit, or if service of the summons has affected 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.*

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*12. **Procedure if witness fails to appear.**— (1) The Court may, where such person does not appear, or appears but fails so to satisfy the Court, impose upon him such fine not exceeding five hundred rupees as it thinks fit, having regard to his condition in life and all the circumstances of the case, and may order his property, or any part thereof, to be attached and sold or, if already attached under rule 10, to be sold for the purpose of satisfying all costs of such attachment, together with the amount of the said fine, if any:*

*Provided that, if the person whose attendance is required pays into Court the costs and fine aforesaid, the Court shall order the property to be released from attachment.*

*(2) Notwithstanding that the Court has not issued a proclamation under sub-rule (2) of rule 10, nor issued a warrant nor ordered attachment under sub-rule (3) of that rule, the Court may impose fine under sub-rule (1) of this rule after giving notice to such person to show cause why the fine should not be imposed.”*



17. A perusal of the aforesaid provisions clearly shows that in case the witness whom a party to the suit wishes to examine does not appear on the request of the party or despite having been served with the summons to appear as witness, assistance of the Court can be sought to ensure presence of such witness by making resort to coercive measures including proclamation, issuance of bailable/non-bailable warrants, imposition of fine and/or attachment.

18. Furthermore, in the context of proving a Will under the Indian Evidence Act, 1872, Sections 68, 69 and 71 assume relevance which are reproduced as under:

***“68. Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:***

*Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.*

***69. Proof where no attesting witness found.—If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the hand writing of that person.***

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**71. Proof when attesting witness denies the execution.**—*If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.*”

19. From a conjoint reading of the aforesaid provisions, it appears that a Will primarily must be proved as per Section 68 if at least one of the attesting witnesses is alive and capable of giving evidence. However, section 69 and section 71 provide for contingencies where the attesting witness is not available or when he denies or does not recollect execution of the Will in question.

20. The renewed concern of the applicants regarding the importance of the Ajay Gopal as a material witness, after having voluntarily closed the evidence, does not seem *bona fide*. It is not the case of the applicants that the attesting witness Ajay Gopal could not be found or that he was incapable of giving his evidence when he was first summoned. Rather, it is their case that he had refused to appear before this Court.

21. As noted above, the applicants, at no stage made any endeavour to seek assistance of the Court for ensuring the presence of Sh. Ajay Gopal. Instead, the applicants decided to proceed with the trial by producing Deepak Sharma as alternative witness, though the contingencies as contemplated in Sections 69 and 71 had not arisen warranting proving of Will by other evidence.

22. The applicants ought to have sought the assistance of this Court to call upon the attesting witness of the Will dated 24.05.2002 namely, Ajay Gopal to tender himself for his cross-examination, as he was available. It is only in the event of attesting witness Ajay Gopal denying or not recollecting the



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execution of the Will that the applicants/defendants should have proceeded to prove the Will by other evidence e.g. by examining Deepak Sharma, the scribe of the Will.

23. The attesting witness of the Will namely, Ajay Gopal was available but despite that the applicants/defendants voluntarily produced an alternative witness to prove the said Will dated 24.05.2002 and then closed their evidence. Accordingly, the suit progressed to the stage of final arguments and the matter was listed for final hearing twice on 19.02.2024 as well as 28.10.2024. Before that the matter was also listed on 08.02.2024 when the Court directed the parties to file their written submissions.

24. From the above narration, it is evident that the present is not a case where a meaningful opportunity has been denied to the defendants/applicants to summon the attesting witness, rather it is a case of non-availing of recourse which was always available to the applicants/defendants under the provisions of the Code, as noted above, but they took a conscious decision to close the evidence. Further, the reason put forth for not examining the attesting witness Ajay Gopal is that he was threatened or won over by the plaintiffs. Incidentally, no complaint was filed by the applicants/defendants in that behalf nor it was brought to the notice of the Court when the applicants decided to examine another witness, the scribe Deepak Sharma, or closed their evidence. The said ground at this belated stage when the matter is fixed for final arguments, cannot be sustained. It is also not to be forgotten that the suit is of 2009 vintage and any indulgence at this stage would further delay adjudication.



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25. In view of the above, this Court finds no merit in the application. Accordingly, the same is dismissed.
26. List for final hearing on 22.02.2025 before the Roster Bench.

**JANUARY 08, 2025**  
**'rs'/dss**

**VIKAS MAHAJAN, J**