

**THE HIGH COURT OF SIKKIM : GANGTOK**  
(Civil Revisional Jurisdiction)

**DATED : 27-02-2014**

**CORAM**

**HON'BLE MR. JUSTICE S. P. WANGDI, JUDGE**

**CRP No.06 of 2013**

Shri Kenneth Brian Cashmore,  
R/o Below TNSS School,  
Upper Sichey,  
Gangtok, Sikkim. **... Petitioner**

**versus**

Tashi Namgyal Academy,  
Gangtok,  
East Sikkim. **... Respondent**

For Petitioner : Mr. Tashi Norbu Basi, Legal Aid  
Counsel.

For Respondent : Mr. Karma Thinlay Namgyal,  
Senior Advocate with Mr.  
Thinlay Dorjee Bhutia,  
Advocate.

**O R D E R (ORAL)**

**Wangdi, J.**

This Application has been preferred by the  
Petitioner against the Order dated 10-12-2013 in Title  
Suit No.5 of 2008 passed by the Learned District Judge,  
East and North Sikkim at Gangtok whereby an application  
under Order XVI Rule 14 of the Code of Civil Procedure,  
1908 (in short "CPC"), had been rejected.

2. Mr. Tashi Norbu Basi, Learned Legal Aid Counsel, appearing on behalf of the Petitioner, submits that the Order is erroneous and unjustified in as much as the witness sought to be summoned by him is a person who has been named by the Respondent in his evidence as the source from whom certain facts have been verified. He has specifically drawn the attention of the Court to the following portion: -

“..... My evidence-on-affidavit was prepared on the basis of documents on record and after understanding the contents after I verified the facts with the Co-Ordinator I , Shri Phuchung Lepcha. It is true that I did not ask the Sr. Teachers of TNA about the employment of the Plaintiff although I understood the facts of the case from the Officiating Principal , Ms. Kalyani Banerjee who was there before me. ....”

3. It is submitted that the Learned Trial Court has refused to exercise jurisdiction conferred upon it under the law and has caused serious prejudice to the Petitioner.

4. Mr. Karma Thinlay Namgyal, Learned Senior Counsel, appearing on behalf of the Respondent, seriously opposes the application and submits that examination of the witness, namely, Mrs. Kalyani Banerjee, named by the Principal of the Respondent-School in his evidence will be of no use and redundant in as much as the entire evidence on behalf of the

Respondent is based upon the records. It is also submitted that the application is frivolous and is a dilatory tactic as this is the third time the Petitioner has moved such an application.

**5.** I have considered the submissions made on behalf of the Learned Counsel and am of the view that the application deserves to be allowed for the following reasons: -

- (a) The very evidence of the Principal as P.W.1, reproduced above, clearly reflects that the source of some of the information given by him is Mrs. Kalyani Banerjee as it has been stated by him that he had verified the facts of the case from her as the Officiating Principal. Clearly, therefore, her evidence would be necessary and relevant for an effective adjudication of the matter.
- (b) Order XVI Rule 14 CPC vests in the Court a discretion to examine any person including a party to the suit if the Court thinks it necessary. The provision, no doubt, is a power vested in the Court and can be exercised *suo motu* but it is a settled position of law that it can also be exercised even at the instance of a party to the suit.
- (c) Clause (2) of Rule 1 of Order XVI is an additional provision which also permits a party to a suit to seek invocation of the Court's power to call a witness for examination.

6. We may in this regard refer to a decision of this Court in ***CRP No.7 of 2011*** in the matter of ***Shri Kenneth Brian Cashmore vs. Principal, Tashi Namgyal Academy*** wherein while deciding a similar application the following have been held:

"7. The application that stood rejected on 10.02.2010 is neither is to be considered as an application filed under Order XVI Rule 1 (1) nor under Order XVI Rule 14. It is rather quite obvious that it was one under Order XVI Rule 1 (2) CPC. For better appreciation of these provisions, we may reproduce them as under: -

**"Order XVI**

- [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 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), 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 {Court in this behalf within five days of presenting the list of witnesses under sub-rule (1)}.]

.....

**14. Court may of its own accord summon as witnesses strangers to suit** – Subject to the provisions of this Code as to attendance and appearance and to any law for the time being in force, where the Court at any time thinks it necessary [to examine any person, including a party to the suit], and not called as a witness by a party to the suit, the Court may, if its own motion, cause such person to be summoned as a witness to give evidence, or to produce any document in his possession on a day to be appointed, and may examine him as a witness or require him to produce such document.”

This would set at rest the confusion as far as the scope and ambit of the provisions of Order XVI Rule 1 and Order XVI Rule 14 are concerned and also as to the provision under which the earlier application was filed.

8. It is an admitted position of the parties and which, also appears to be apparent from the order dated 10.02.2010, that the application which was rejected by that order did not contain the grounds set out in the application which was rejected by the impugned order dated 07.05.2011. By that petition, the petitioner rather appears to have been endeavouring to impress upon the Court the necessity of issuing summonses upon the witnesses named in the application, which is a situation contemplated under Order XVI Rule 1(2) CPC.

9. There can be no manner of doubt that powers under Order XVI Rule 14 CPC can be exercised by the Court at any time if it thinks necessary to examine a person as a witness. The only question for determination by this Court is that whether it would be permissible for a party in a suit to invoke such powers and as to whether it would be permissible for the Court to act at the behest of any party to a suit. The legal position in this regard appears to be well settled in the decisions cited at the bar by Mr. Tashi Norbu Basi, learned Advocate for the petitioner, which have been dealt with above and I am persuaded to accept the ratio propounded in the case of **G. Baliah vs. G. Ramchander & Ors.** (supra) by the Andhra Pradesh High Court.”

**7.** Considering the above position of law and the facts alluded to above, in my view, the application should be allowed and is allowed. However, in the interest of expeditious disposal of the matter, it is directed that the examination of the witness be completed and the entire case be disposed of within two months and not later than that. It is also directed that the matter be heard without any interruption day to day. Mr. Tashi Basi, Learned Counsel, assures this Court that there are no further witnesses to be examined.

**8.** In view of this the Learned Trial Court shall ensure that the case is disposed of within the time stipulated.

**9.** In the result, the CRP is allowed.

**10.** No order as to costs.

**11.** A copy of this Order and the original case records be transmitted forthwith to the Learned Court below for compliance.

Sd/-  
**( S. P. Wangdi )**  
**Judge**  
27-02-2014