

* **HIGH COURT OF DELHI : NEW DELHI**

CM (M) No. 1144/2010 & CM No. 16015/2010

% Judgment reserved on: 6th September, 2010

Judgment delivered on: 14th September, 2010

1. M/s Rainbow Travels
B-106, Surajmal Vihar,
Near Yamuna Sports Complex,
Delhi-110092 Petitioner No.1.

2. Mr. Rajesh Thakur
Proprietor
M/s Rainbow Travels
B-106, Surajmal Vihar,
Near Yamuna Sports Complex
Delhi- 110092. Petitioner No.2
Through: Ms. Pushp Gupta, Advocate

Versus

M/s New High Flying Travels Pvt. Ltd.
E-34, First Floor,
Connaught Place,
New Delhi
(Through Sh. Sunil Talwar, Director) Respondent
Through: None

Coram:

HON'BLE MR. JUSTICE V.B. GUPTA

1. Whether the Reporters of local papers may
be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported

in the Digest?

Yes

V.B.Gupta, J.

By way of this petition filed under Article 227 of Constitution of India, petitioner has challenged order dated 31.7.2010 passed by Senior Civil Judge, vide which, evidence of Petitioner was closed.

2. Brief facts are that in February, 2006 respondent (plaintiff in trial court) filed a suit for recovery of Rs.65,131/- against present petitioners (defendants in trial court). Petitioner No.2 filed cross claim in the suit, in April, 2006. On 31.7.2010, since no witness of petitioner was present, trial court closed the evidence of petitioners.

3. It is contended by learned counsel for petitioners that trial court has closed the petitioner's evidence without any cogent reason and as such prejudice has been caused to them. The order closing petitioner's evidence without giving any reason is also contrary to law and without jurisdiction.

4. It is also contended that when petitioners were not able to bring the witness of its own, then under Order 16 Rule 1A of the Code of Civil Procedure (for short as 'Code') petitioners sought assistance of

the Court under Order 16 Rule 1 (3) of the Code. Trial court also failed to mark the attendance of the petitioner who was present on the date of hearing. In support, learned counsel cited following judgments:-

- a) *Glaverbel S.A. vs. Dave Rose and Ors.*
152 (2008) DLT 577,**
- b) *Mange Ram vs. Brij Mohan & Ors.*
(1983) 4 SCC 36;**
- c) *Link Engineers (P) Ltd. vs. M/s Asea Brown Boveri Ltd. & Ors.*
140 (2007) DLT 533;**
- d) *Jagat Singh & Anr. vs. Hoshiari Devi & Ors.*
157 (2009) DLT 90;**
- e) *Smita Chaudhry vs. Uma Devi,*
2008 (100) DRJ 293;**
- f) *D.R.Puri vs. Kamlesh Sawhney & Ors.*
54 (1994) DLT 493;**
- g) *Dr. (Mrs.) Aruna Batra vs. Dr. Jaidev Batra,*
II (1987) DMC 79and**
- h) *Amar Singh vs. Hans Raj Sachdeva And Others,*
20 (1981) DLT 17.**

5. Present petition has been filed under Article 227 of the Constitution of India. It is well settled that jurisdiction of this Court under this Article is limited.

6. In *Waryam Singh and another vs. Amarnath and another*, AIR 1954, SC 215, the court observed;

This power of superintendence conferred by Article 227 is, as pointed out by Harries, C.J., in – ‘Dalmia Jain Airways Ltd. V. Sukumar Mukherjee’, AIR 1951 Cal 193 (SB) (B), to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors.”

7. In light of principles laid down in the above decision, it is to be seen as to whether present petition under Article 227 of the Constitution of India against impugned order is maintainable or not.

8. Relevant provisions of Order 16 Rule 1 and 1A of the Code read as under:-

“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)]*.

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.”

9. As per list of dates and events and averments made in the petition it is stated that in April, 2006, petitioner No.2 filed the cross claim in the suit. Thereafter, petitioners straightaway jumped to the date of 17.5.2010, stating that petitioner No.2 was cross-examined and the case was adjourned for remaining defendant’s evidence for 31.7.2010. Present petition and list of dates and events is absolute silent as to what happened between April, 2006 till 17.5.2010. Petitioners have nowhere stated as to which was the first date for petitioner’s evidence, since on 17.5.2010, petitioner No.2 was cross-examined.

10. In application under Order 16 Rule 1 sub-rule (3) of the Code, it is stated that on 17.5.2010, defendant No.2 was cross-examined by

counsel for plaintiff. After conclusion of said cross-examination, court inquired from the present counsel for defendant, as to whether there are any other witness/witnesses to be examined from defendant's side. It was informed to the Court that only one witness, that is, Srilankan Airlines needs to be examined. But counsel for plaintiff took objection to the same on the ground that no list of witness to this effect is on record.

11. As per record, no list of witnesses was filed by petitioners before the trial court. This fact has been admitted by the petitioners also in their application under Order 16 Rule 1(3) of the Code, in which it is stated;

“that defendant did not file the list of witnesses as the witness proposed to be produced was to be procured in this Hon'ble Court, on defendant's on own account under Order XVI Rule 1A of the Code”.

12. Application further states;

“That the list of witness was not filed at the appropriate stage, as only the deposition of the defendant No.2 was felt sufficient to bring forward true facts of the case along with documents already on record of the case file.”

13. Petitioners have deliberately chosen not to file all the relevant order sheets of the trial court along with this petition. They have only

filed copy of the impugned order and have mentioned the dates in the list of dates and events which are convenient to them. Under these circumstances, inference has to be drawn against them for not placing correct and true record before this Court. Nevertheless, no illegality or infirmity is there in the impugned order, which read as under:-

“31.07.2010

Present: Counsel for the plaintiff.
Clerk for counsel for the defendant

No DW nor the counsel is present today. An application U/o 16 Rule 1 (3) r/w Section 151 CPC for production of additional witness/documents. Alongwith the application, the defendant has filed a letter written by the Counsel to the Chief Manager of Sri Lankan Air Lines seeking some information. The letter has been written on 29.06.10 whereas last date of hearing was 17.6.10. Even otherwise, this letter is nothing but a request by the Counsel for the defendant to send the authorized representative with relevant records to the court today. No witness is present today. DE stands closed.”

14. As per impugned order, neither petitioners nor their counsel were present. Even no witness of petitioners was present. On the other hand, it was the clerk for counsel for petitioners who was present. It is really surprising as to how trial court marked the attendance of the clerk for counsel for defendant, who had no authority to represent

petitioners. It is impressed upon the trial court that it should not mark presence of any clerk for the counsel.

15. As per Order 16 Rule 1(1) of the Code;

“Parties shall present in Court a list of witnesses whom they propose to call either to give evidence or to produce documents and obtain summons to such persons for their attendance in Court.”

16. While, Order 16 Rule 1(3) of the Code states that;

“the court may for reasons to be recorded, permit a party to call, whether by summoning through court or otherwise, any witness, other than whose name appear in the list to in sub-rule (1), if such party shows sufficient cause for omission to mention the name of such witness in the said list”.

17. Admittedly, no list of witnesses was filed by petitioners which is mandatory under Order 16 Rule 1(1) of the Code, nor the name of witnesses proposed to be examined were mentioned before the trial court.

18. In *Nandita Chaudhry vs. Surat Singh Rao, 2010 V AD(Delhi) 739*, the Court while dealing with Order 16 rule 1 Sub rule (1) and (2) held;

“It is apparent from this Order of CPC that list of witnesses is to be filed within 15 days of framing of issues and thereafter the Court has to be informed as to out of the list which of the witnesses the party was desiring of summoning through Court process and the party was given liberty to obtain summons on making an appropriate application within 05 days of presenting the list of witness under Sub-Rule (1). The intention of the legislature is clear that an application has to be made well in advance from the date fixed for evidence and the application cannot be made just on the date when the evidence is to be recorded.”

19. In *Roshan Lal Mittal & Ors. vs. Hari Singh (Since deceased) through his Legal Representatives, 2006 VII AD (Delhi) 295*, this Court observed:-

“There can be no legal dispute insofar as the question of law is concerned in view of the judgment of the Supreme Court in **Mange Ram’s case** (supra). Thus, if the name of a witness does not appear in the list of witnesses filed under sub-rule (1) of Rule 1 of Order XVI of the Code, the same does not preclude the party from producing the witnesses as its own responsibility. This is so since the object of filing the list of witnesses is that where the assistance of court is required, the court has an opportunity to examine on the application of the party whether such an assistance is required to be given to the party and whether the witness is liable to be summoned. The point, however, remains that if the party seeks to lead the evidence of further witnesses, those witnesses should be present and the court should not find that they are irrelevant or the production of those witnesses is only for dilatory purposes.

The proceedings recorded show that no such witnesses were present and only their affidavits were sought to be produced. Thus, the contention of the petitioner based on the presumption that the witnesses were present and, thus, the provisions of Order XVI of the Code would not apply, has no factual basis. A reading of the Order also shows that the court really did not find any relevance of production of the said witnesses at the belated stage.”

20. Since, no witness was present on 31.7.2010, averments made in application under Order 16 Rule 1(3) of the Code thus falls to the ground. None of the judgments cited by learned counsel are applicable to the facts of the present case.

21. The only purpose of filing of present petition is just to delay the proceedings pending before the trial court. It is well settled that bogus and frivolous application filed deliberately by the litigants in order to delay the trial should be dealt with heavy hands. A strong message is also required to be sent to those litigants, who are in the habit of challenging each and every order of the trial court, even if the same is based on sound reasoning and also to those litigants who chose to file meritless application/petition.

22. Since, there is no infirmity or illegality in the impugned order, present petition under Article 227 of the Constitution of India is not

maintainable. Accordingly, it is hereby dismissed with costs of Rs.20,000/- (Twenty thousand only).

23. Petitioners are directed to deposit the costs, with Registrar General of this Court, by way of cross cheque within four weeks from today.

+ CM No. 16015/2010 (stay)

24. Dismissed.

25. List for compliance on 21st October, 2010.

14th September, 2010
mw

V.B.GUPTA, J.