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

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Date of decision: 8.11.2016

+ C.R.P. 55/2016

M/S OIL AND NATURAL GAS
CORPORATION LTD

..... Petitioner

Through

Mr.P.S.Narsimha, ASG with Mr.Sashi
Prabhu, Adv.

versus

VIJAY MAHAJAN

..... Respondent

Through

Mr. Sanjeev Agarwal and Mr.Ekansh
Agarwal, Advocates.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. By the present petition filed under section 115 of the Civil Procedure Code the petitioner seeks to impugn the judgment of the trial court dated 25.2.2016 by which an application under Order 16 Rule 1 CPC filed by the respondent for summoning of witnesses was allowed.

2. Some relevant facts are that the respondent claims to be an 'Agent' of foreign firms/companies providing various services as an intermediary to help in easy and convenient mode of communication and also to do all such acts necessary for the tendering process for various Indian public sector companies. The respondent was banned by the petitioner vide order dated 14.11.2006. The respondent filed a writ petition challenging the said ban. On 3.2.2012 in the said writ petition being W.P.6943/2011, without filing a counter affidavit a submission was made by the petitioner that the ban order

would stand withdrawn for the respondent. The writ petition was disposed of in view of the said submission of the petitioner.

3. Subsequently, the respondent filed the present suit seeking a decree declaring the information/communication ban dated 14.11.2006 as illegal and malafide. Other connected reliefs were also sought including Rs.30 lacs for damages and Rs.10 lacs being loss of business and commission etc. Issues were framed and the respondent filed a list of witnesses. Thefreafter the respondent filed an application under Order 16 Rule 1 CPC for summoning of the witnesses. The witnesses which were sought to be summoned by the respondent are as follows:-

- “1.Mr.C.R.Mohanty, Executive Director,-Chief (MM), ONGC Ltd., 9th floor, Scope Minar, Laxmi Nagar-Delhi-110092
- 2.Mr.Sunil Johare, Chief Manager [MM] ONGC Ltd, Tripura Asset, Badarghat Base Complex, Agartala-799014, Tripura
3. Mr.M.D.Joshi [Ex.Director-[retired] ONGC Mobile no.098207-77615, (the current address is with the defendant)
4. Mr.Ashwini Nagia, [GGM-Incharge-MM] drilling services, ONGC, II high building, Sion Bandra Link Road, Sion [West], Mumbai-400017
5. Mr.Ziauddin, DCLA-Corporate legal department, ONGC ltd., scope Minar, Laxmi Nagar, Delhi-110092.
6. Mr.Pratyush Sinha, Independent External Monitor-C/o Vigilance Department, ONGC Ltd., Jeevan Baharati building, Rajiv Chowk, Connaught Place, New Delhi-110001
7. Mr.Sandeep Gupta-DGM [MM]- Head- PMC, ONGC ltd., Jeevan Bahrati Building, Rajiv Chowk, Connaught Place-New Delhi-110001.”

4. By the impugned order the said application was allowed. The trial court concluded that the purpose for which the witnesses are being summoned has been explained and hence allowed the application.

5. The learned ASG appearing for the petitioner has vehemently argued that the attempt of the respondent is to only harass senior functionaries of the petitioner. He submits that some of the functionaries have also retired. He further submits that witness No.6 is not even an employee of the petitioner and was a senior retired civil servant who was a member of the Independent External Monitor i.e. an independent advisory forum created by the petitioner. He submits that these witnesses are not necessary. He further submits that in violation of the mandatory provisions of Order 16 Rule 1 CPC respondent have failed to give any reason as to why these witnesses are required to be summoned. He relies upon judgments of the Supreme Court in ***Mange Ram vs. Brij Mohan and Others, (1983) 4 SCC 36, Kokkanda B.Poondacha & Ors., vs. K.D.Ganapathi & Anr.,AIR 2011 SC 1353*** and judgment of the Jammu and Kashmir High Court in ***Yashpal Sawhney vs. M/s.Gandotra Traders and others, AIR 1995 J&K 32*** to submit that in the absence of any proper and cogent reasons being given by the respondent to summon the said witness the trial court has wrongly allowed the said application by the impugned order.

6. Learned counsel appearing for the respondent has raised a preliminary objection and has submitted that the present petition under section 115 CPC is not maintainable. He relies upon the judgment of the Supreme Court in ***Shiv Shakti Coop. Housing Society, Nagpur vs Swaraj Developers and Ors, AIR 2003 SC 2434*** to support his said contentions. On the merits of his application he points out to some of the documents on record including the opinion of Independent External Monitor dated 16.8.2011 to justify that the said document need to be proved and the said witness at serial No.6 is required to be summoned to give evidence on the said opinion and to further

elaborate the said opinion. He further justifies his list stating that he needs to prove several such documents.

7. I will first deal with the preliminary objection raised by the respondent. In *Shiv Shakti Coop. Housing Society vs. Swaraj Developers and Ors. (supra)* the Supreme Court held as follows:-

“32. A plain reading of Section 115, C.P.C., as it stands makes it clear that the stress is on the question whether the order in favour of the party applying for revision would have given finality to suit or other proceeding. If the answer is “yes” then the revision is maintainable. But on the contrary, if the answer is ‘no’, then the revision is not maintainable. Therefore, if the impugned order is of interim nature or does not finally decide the *lis*, the revision will not be maintainable. The legislative intent is crystal clear. Those orders, which are interim in nature, cannot be the subject matter of revision under Section 115. There is marked distinction in language of Section 97 (3) of the Old Amendment Act and Section 32 (2) (i) of the 1999 Amendment Act. While in the former, there was clear legislative intent to save applications admitted or pending before the amendment came into force. Such an intent is significantly absent in Section 32 (2) (i). The amendment relates to procedures. No person has a vested right in a course of procedure. He has only the right of proceeding in the manner prescribed. If by a statutory change, the mode of procedure is altered, the parties are to proceed according to the altered mode, without exception unless there is a different stipulation.”

8. In my opinion, there is merit in the contention of learned counsel for the respondent that the present impugned order dismissing an application under Order 16 Rule 1 CPC would not qualify to be an order which finally decides the *lis* between the parties. A revision under section 115 CPC would not be maintainable.

9. However, instead of returning the petition and giving an opportunity to the petitioner to file a fresh petition under Article 227 of the Constitution of India it would be in the interest of justice that the Registry be directed to renumber the present petition as CM(M) treating it as a petition under Article 227 of the Constitution of India. As per Roster of this court, such petitions are also being heard by this court.

10. I shall now come to the merits of the matter. A perusal of the application filed by the respondent would show that the only basis on which the said witnesses who are senior employees of the petitioner/present or retired is stated in paragraph 3 of the application as follows:-

“3. That the witnesses named at serial no.3 to 9 in the list of witnesses dated 04.11.2015 as filed by the plaintiff in the present suit, are relevant and necessary witnesses. The said witnesses have information and knowledge with regard to the subject matter of the present suit and the documents plaed on record need to be proved through them.”

11. It is clear that the basis for summoning these witnesses as given in the application is vague. No proper information is given as to why these witnesses are required.

12. The Supreme Court in *Mange Ram v. Brij Mohan & Ors., (supra)* held as follows:-

“11. The analysis of the relevant provisions would clearly bring out the underlying scheme under Order XVI Rules 1 and 1A, and Rule 22 of the High Court Rules would not derogate from such scheme. The scheme is that after the Court framed issues which gives notice to the parties what facts they have to prove for succeeding in the matter which notice would enable the parties to determine what evidence oral and documentary it would like to lead, the party should file a list of witnesses with the gist of evidence of each witness in the Court

within the time prescribed by Sub-rule (1). This advance filing of list is necessary because summoning the witnesses by the Court is a time consuming process and to avoid the avoidable delay an obligation is cast on the party to file a list of witnesses whose presence the party desires to procure with the assistance of the Court. But if on the date fixed for recording the evidence, the party is able to keep his witnesses present despite the fact that the names of the witnesses are not shown in the list filed under Sub-rule (1) of Rule 1, the party would be entitled to examine these witnesses and to produce documents through the witnesses who are called to produce documents under Rule 1A. The only jurisdiction the Court has to decline to examine the witness is the one set out in proviso to Section 87(1) of '1951 Act', the discretion being confined to refusing to examine witnesses on the ground that the evidence is either frivolous or vexatious or the evidence is led to delay the proceedings. Save this the Court has no jurisdiction to decline to examine the witness produced by the party and kept present when the evidence of the party is being recorded and is not closed, and the Court has no jurisdiction to refuse to examine the witness who is present in the Court on the short ground that the name of the witness was not mentioned in the list filed under Sub-rule (1) of Rule 1 of Order XVI. This scheme clearly emerges from the various provisions herein discussed.”

13. Similarly, in ***Kokkanda B.Poondacha & Ors., vs. K.D.Ganapathi & Anr. (supra)*** the Supreme Court held as follows:-

“16. We may add that if the parties to the litigation are allowed to file list of witnesses without indicating the purpose for summoning the particular person(s) as witness(es), the unscrupulous litigants may create a situation where the cases may be prolonged for years together. Such litigants may include the name of the advocate representing the other side as a witness and if the Court casually accepts the list of witnesses, the other side will be deprived of the services of the advocate. Therefore, it would be a prudent exercise of discretion by the Court to insists

that the party filing the list of witnesses should briefly indicate the purpose of summoning the particular person as a witness.”

14. It is the requirement of the CPC that the party filing the list of witness must briefly give the purpose for summoning the witness. The respondent has here failed to give cogent reason for the need to summon the senior officers/advisors of the petitioner. On this ground itself the application of the respondent is liable to be dismissed.

15. The next question that arises is can the plaintiff summon the defendant or officers of the defendant company to prove his own case. The Karnataka High Court in *M.C.Ananda and another vs. M.C.Chikkanna and another*, **AIR 2001 Kar 139** held as follows:-

“8. So, no doubt, this rule indicates that a party to the suit may be required and a party may be entitled to require any other party to the suit to give evidence, or to produce the documents and the Court below appears to have proceeded on mistaken notion that a party to the suit is not entitled subject to the power and permission of the Court to summon or to examine the opposite party. The expression 'any other party thereto' is indicative of the party to the suit or to say party other than summoning the party which may include the opposite party. In other words, the plaintiff may summon the defendant as a witness and require him, to produce the documents. Similarly, the defendant may summon the plaintiff, as held by this Court in Syed Yasin's case, supra, but it is open to the Court, if in its opinion, summoning of the other party or opponent is likely to result in the abuse of the process of the Court, it may refuse as well. It is also no doubt true that ordinarily the practice of calling the opposite party has been held and considered to be unhealthy practice, as held by their Lordships of the Privy Council in Mahant Shatrugan Das, case, supra and by the Division Bench of this Court in Mallangowda's case, supra. The Division Bench in paragraph 7 of the said report observed as under:

"We have in unmistakable terms stated in this Court previously that this practice of calling the opposite party as a witness on his side should not be countenanced as it is not in the interests of justice".

16. Similarly, the Madras High Court in *Kaliaperumal vs. Pankajavalli and Others*, (1999) 1 MLJ 97 held as follows:- Paras 5,6,7,8 and 9

5. I do not think that the submission made by the learned Counsel for the petitioner could be accepted. In *Pirgonda v. Viswanath*: AIR 1956 Bom 251, His Lordship followed the decision of Privy Council reported in *Kishori Lal v. Chunni Lal*, 31 All. 116, wherein it was held thus,

“Mr. Datar has also relied upon Circular No. 161 of the Circulars issued by this Court in the Civil Manual. This circular has invited the attention of the subordinate Judges to the observations of the Privy Council in *Kishori Lal v. Chunni Lal* I.L.R. 31 All. 116 (A), their Lordships of the Privy Council have referred to the practice which sometimes seemed to obtain in some of the Courts in India of calling the party's opponent as a witness and they have observed that this practice is highly objectionable. 'Such a practice', said their Lordships, ought never to be permitted in the result to embarrass judicial investigation as it is sometimes allowed to be done.”

6. In *Mallangowda v. Gavisiddangowda*: AIR 1959 Kant 194, it is held thus:

“Practice of calling the opposite party as a witness should not be countenanced as it is not in the interests of justice.”

7. In *Narayana Pillai v. Kalyani Ammal* 1963 K.L.T. 537, it is held that the practice of party causing his opponent to be summoned as witness was disapproved in rather strong terms by the Lordships of Privy Council and that as a matter of right, the party cannot have the opposite party as witness.

8.The above decision was follows by Kerala High Court in a case between Muhammed Kunji v. Shahabudeen 1969 K.L.T. 170, wherein it is held thus:

“The practice of a party causing his opponent to be summoned as a witness has to be disapproved. As a matter of right a party cannot have the opposite party examined as a witness.”

9. In view of the settled legal position, I do not think that the petitioner can compel the second defendant to be examined as a witness for him.”

17. I may notice the issues which have been framed in the present case, The issues read as follows:-

- “i) Whether the plaintiff is entitled to the damages and claims as prayed for in the suit? OPP
- ii) Whether the plaintiff sustained loss of reputation, business opportunity and financial loss on account of the ban order dated 14.11.2006 passed by defendant? OPP
- iii) Whether the ban order dated 14.11.2006 was passed legally and for any valid reason by the defendant? OPD”

18. Factually what follows is the respondent have failed to give any cogent reasons as to why these senior officers of the petitioner are being summoned, other than stating that they are necessary to prove the case of the respondent. That apart, normally the Courts as noted above have frowned upon a party summoning the opposite party or its officers for the purpose of recording of evidence. It is clear in the present case that the only object appears to be to harass or embarrass the officers of the petitioner.

19. The above view is supported by one look at the issues framed. The onus to prove damages and loss of reputation suffered has been placed on the respondent. It is not the case of the respondent that the officers of the petitioner who are sought to be summoned are going to prove the damages suffered by the respondent or the loss of reputation. In fact no such submission could possibly even have been made. As far as legality of the ban dated 14.11.2006 is concerned the onus is on the petitioner to prove the same. Keeping in view the issues, it is further clear that the witness sought to be summoned by the respondent have no relevance.

20. I may also point out that there is no merit in the contention of learned counsel for the respondent that he needs to prove the opinion of Independent External Monitors. As pointed out by the learned ASG these are documents supplied by the petitioner to the respondent in response to a query under the RTI Act. The petitioner do not deny these documents. Hence, they can be tendered by the respondent in their evidence being documents admitted and supplied by the petitioner. To summon either of the said officer to prove the contents of the opinion which has already been accepted and admitted by the petitioner appears to be a misplaced exercise.

21. In the light of the above position there is a manifest illegality in the order passed by the trial court allowing the application of the respondent under Order 16 Rule 1 CPC. Grave prejudice would be caused to the petitioners by allowing of the said application. The impugned order is set aside. Petition stands disposed of. All pending applications also stand disposed of accordingly.

JAYANT NATH, J.

NOVEMBER, 08, 2016/n