

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

+ **RFA No. 773/2018**

% **7th December, 2018**

THE PRINTERS HOUSE LTD.

..... Appellant

Through: Mr. Abhinav Tandon, Advocate
(Mobile No. 9810092425).

versus

KARNATAKA STATE FINANCIAL CORPORATION & ORS.

..... Respondents

Through: Ms. Kiran Suri, Sr. Advocate
with Ms. Aishwarya Kumar and
Mr. Purvesh Bhuttan,
Advocates (Mobile No.
8826299042).

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

1. This Regular First Appeal under Section 96 of the Code of Civil Procedure (CPC) is filed by the plaintiff in the suit impugning the Judgment of the trial court dated 13.12.2017 by which the trial court

has dismissed the suit for recovery of Rs. 9,63,977/- filed by the appellant/plaintiff against the respondents/defendants inasmuch as no evidence was led on behalf of the appellant/plaintiff. The suit for recovery is filed on account of the goods supplied by the appellant/plaintiff to the respondent no. 2/defendant no. 2/M/s. Malali Publications. As per the plaint, the respondent no. 1/defendant no. 1/Karnataka State Financial Corporation had agreed to make payment of the goods supplied. The impugned judgment is passed pursuant to the Orders of the trial court dated 18.09.2017 and 27.11.2017, and the effect of these orders are that though the appellant/plaintiff had brought a witness to the Court, the trial court did not examine such witness inasmuch as the name of the witness was not found in the list of witnesses. These two Orders dated 18.09.2017 and 27.11.2017 read as under:-

1. Order dated 18.9.2017:-

CS No. 18668/16

**The Printer House Ltd. Vs. Karnatka State Financial Ltd.
18.09.2017**

Present : Sh. Rahul Madan, Ld. Counsel for the plaintiff.
None for the defendant no. 1.
Other defendants are exparte.
Be awaited.

[Barkha Gupta]
ADJ :06/Central/Delhi
18.09.2017

At 11:05 a.m.

Present : Sh. Rahul Madan, Ld. Counsel for the plaintiff.
Sh. M. Avasthi, Ld. Counsel for defendant no. 1.
None for other defendants who are already exparte.

Ld. Counsel for plaintiff submitted that earlier Sh. Tara Shankar Banerjee was partly examined as PW1 however, he has left the office of plaintiff. Ld. Counsel for the plaintiff has also admitted that no list of witnesses has been filed by the plaintiff and one witness is present today and he proposes to file his affidavit which is strongly opposed by counsel appearing for defendant no. 1 as firstly, the name of said witness is not mentioned in the list of witnesses and secondly, no application even formal is filed seeking permission to examine any such witness whose name was not mentioned in the list of witnesses and plaintiff cannot take defendant no. 1 by surprise by bringing a new witness who is not in knowledge of defendant no.1. As per record neither any list of witness is filed by the plaintiff nor any application is filed by the plaintiff to examine the proposed witness nor any permission is sought nor advance copy of affidavit of said witness is provided to other party.

It also needs to be mentioned that on last date of hearing, it was clearly observed that the present case was more than 10 years old and last & final opportunity was granted to the plaintiff for today to adduce PE with clear directions that no further opportunity would be afforded. Accordingly, the said witness cannot be examined. PE closed and be put up for DE on 17.10.2017.

[Barkha Gupta]
ADJ :06/Central/Delhi
18.09.2017

2. Order dt. 27.11.2017:-

CS No. 18668/16
The Printer House Ltd. Vs.
Karnatka State Financial Corp. Ltd.
27.11.2017

Present: Sh. Rahul Madan, Ld. Counsel for plaintiff.
Sh. M. Avasthi, Ld. Counsel for defendant no. 1.
Other defendants are already ex-parte.

1. Arguments heard on the pending application filed under Order XLVII Rule 1 CPC of the plaintiff for review of order dated

18/09/2017 vide which the opportunity of plaintiff to lead PE was closed. Defendant has already filed reply.

2. As per application, the court refused to allow the plaintiff to file affidavit of evidence of proposed witness Nitin Sharma on the sole ground that his name was not mentioned in the list of witness of the plaintiff and the plaintiff could not be allowed to take defendant no. 1 by surprise by bringing a new witness who is not in the knowledge of defendant no. 1. As per application, the plaintiff sought to examine Nitin Sharma as its witness in place of earlier witness Tara Shankar Banarajee who had left the services of plaintiff company before his examination could be completed.

3. Plaintiff relies upon the judgment of Hon'ble Supreme Court in Mange Ram Vs. Brij Mohan AIR 1983 SC 1925 in which it was held that where a party is in a position to produce its own witness without assistance of the court, it can do so under Rule 1A of Order XVI CPC irrespective of the fact that the name of such witness is not mentioned in the list of witness. As per applicant, there was error apparent on the face of the record in order dated 18/09/2017 and needs to be reviewed.

4. Defendant has strongly opposed the application through its reply. As per reply, the plaintiff has always been negligent in pursuing the present case. Initially the suit was dismissed in default on 27/09/2008. Thereafter, the suit was restored on 28/05/2009 upon application of plaintiff. The issues in this case were framed on 13/09/2011 and the matter was fixed for PE on 01/02/2012. Thereafter, plaintiff failed to lead evidence on three consecutive dates due to which the Court closed PE on 19/11/2012. Again, upon application of plaintiff, plaintiff was allowed last opportunity to lead evidence subject to cost.

5. Thereafter, plaintiff filed affidavit of evidence of one Manoj Khanna, AR of plaintiff but did not examine him on the purported ground that the said witness had left the services of plaintiff company. Thereafter, plaintiff filed affidavit of evidence of Mr. Tara Shankar Banarajee as substitute of earlier witness Manoj Khanna. Thereafter, plaintiff failed to conclude the evidence on four successive dates upto 17/08/2017. PW1 Tara Shankar Banarajee last appeared on 22/05/2017 and was examined in chief. Thereafter, on 17/08/2017 PW1 did not appear for cross examination.

6. Thereafter, on 18/09/2017 without seeking leave of the Court, the plaintiff sought to file another affidavit of evidence of witness Nitin Sharma in substitution of PW1 Tara Shankar Banarajee. The plaintiff took the sole ground for substitution that Tara Shankar Banarajee had also left the services of plaintiff company. The said ground was not accepted by the Court and the Court, by order dated 18/09/2017 closed the opportunity of plaintiff to lead PE.

7. Ld. Counsel for defendant submits that the Court rightly closed the opportunity of plaintiff to lead PE and there is no ground to review the same.

8. I have perused the order dated 18/09/2017 as per which my Ld. Predecessor had observed that the plaintiff had neither mentioned the name of proposed witness Nitin Sharma in its list of witness, nor sought leave of the Court to examine him as a witness in substitution of earlier witness Tara Shankar Banarajee. Moreover, no advance information or affidavit of evidence of proposed witness was supplied by plaintiff to defendant. The Court had observed that the case was already more than 10 years old and the plaintiff had already availed of too many opportunities to lead PE, far in excess of last and final opportunity to lead PE, granted vide order dated 25/04/2016.

9. I find that the order dated 18/09/2017 is comprehensive, based cumulatively upon the several observations of the Court regarding conduct of the plaintiff. The order was not based solely on the ground that the name of proposed witness was not mentioned in the list of witness of the plaintiff. The present application is highly misconceived and untenable. There is no ground for review of the order dated 18/09/2017. Hence, the application is dismissed with cost of Rs.5,000/- upon the plaintiff.

10. The case is at the stage of DE. At this stage, Ld. defence counsel has given the statement that he wants to close the evidence in affirmative, since the plaintiff failed to lead evidence. His statement is taken separately. Upon the statement of Ld. Counsel for defendant, DE is closed. Put up for final arguments on 05/12/2017.

[Vishal Singh]
ADJ :06/Central/Delhi
27.11.2017”

2. Ld. counsel for the appellant/plaintiff rightly argues that the trial court has clearly erred in not applying the ratio of the judgment of the Hon'ble Supreme Court in the case of *Mange Ram v. Brij Mohan and Ors., (1983) 4 SCC 36; AIR 1983 SC 952*. The above judgment was cited before the trial court as it is reflected in the

Order dated 27.11.2017. The above-mentioned judgment holds that a court cannot refuse to examine a witness brought by a party even though the name of such witness is not found in the list of witnesses. It is stated that once a witness was present, the trial court in view of the ratio of the judgment in the case of *Mange Ram (supra)* could not have held that the name of the witness was not in the list of witnesses, and therefore such witness could not have been examined by the trial court.

3. Ld. counsel for the respondent no. 1/defendant no. 1 has argued that though the trial court is bound to examine the witness produced in accordance with the case of *Mange Ram (supra)*, but further in accordance with the ratios of subsequent judgments of the Hon'ble Supreme Court, leave of the Court had to be obtained. Reliance is further placed on the judgments in the case of *Vidhyadhar v. Manikrao, (1999) 3 SCC 573* and *Ashok Sharma v. Ram Adhar Sharma, (2009) 11 SCC 47*.

4. In my opinion, this appeal has to be allowed because the ratio of the judgment in the case of *Mange Ram (supra)* is very clear that the trial court cannot refuse to examine a witness, if the witness is brought

by a party at its own expense on the date fixed for hearing, even if the name of witness is not shown in the list of witnesses. The leave of the court can also be obtained by means of an oral prayer/application made to the court when the witness is brought, and the purpose of this leave is only to examine as to whether the witness is going to lead relevant evidence or if the witness is otherwise competent to depose. The trial court has not examined these facts but has incorrectly refused to examine the witness Sh. Nitin Sharma who was brought by the appellant/plaintiff on the date fixed for appellant's/plaintiff's witness being 27.11.2017.

5. The Ld. senior counsel for the respondent no. 1/defendant no. 1 is, however, completely justified in arguing that for around ten years, evidence could not be completed by the appellant/plaintiff for one reason or the other, and such type of negligence of the appellant/plaintiff cannot be allowed to continue. In my opinion, therefore, costs would have to be awarded to the respondent no. 1/defendant no. 1.

6. Accordingly, though this appeal is allowed, and it is further directed that the trial court will examine one witness Sh. Nitin

Sharma on behalf of the appellant/plaintiff, and no other, but this opportunity to lead evidence of Sh. Nitin Sharma will be subject to payment of costs of Rs. 30,000/- by the appellant/plaintiff to the respondent no. 1/defendant no. 1. It is made clear that if the witness, Sh. Nitin Sharma, does not appear even on one occasion for the appellant/plaintiff, then in view of the fact that the evidence has gone on for ten years of the appellant/plaintiff, no further opportunity will be granted to the appellant/plaintiff and appellant/plaintiff should ensure that the witness is brought to court on every date of hearing as required in the suit.

7. After the appellant/plaintiff completes its evidence of one witness, Sh. Nitin Sharma, the contesting defendants in the suit will thereafter be allowed to lead evidence.

8. This appeal is accordingly allowed by setting aside the impugned Judgment dated 13.12.2017 and the Orders dated 18.9.2017 and 27.11.2017. The suit will now be decided after the parties lead evidence as observed above.

9. The parties to appear before the Ld. District and Sessions Judge, Central, Tis Hazari Courts, Delhi on 16th January, 2019 and the Ld. District and Sessions Judge will now mark the suit for disposal to a competent court in accordance with law and the observations made in the present judgment.

DECEMBER 07, 2018

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VALMIKI J. MEHTA, J

