

\$~36

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 31st October, 2019
+ **CM (M) 1585/2018 & CM APPL. 53660/2018**

URMILA TANWAR & ORS. Petitioners
Through: Mr. S. C. Singhal, Advocate.
(M:9810061558)
versus

D K GUPTA Respondent
Through: Mr. Sumit Bansal and Mr. Prateek
Kohli, Advocates. (M:9990589195)

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petition has been filed by the Petitioners/Defendants (*hereinafter 'Defendants'*) challenging the order dated 10th December, 2018 by which the application filed by the Petitioner under Order XVI Rule 1 CPC for placing on record the list of witnesses was dismissed by the Trial Court, on the ground that the same was not filed in time and was belated.
2. The suit is one for specific performance in which the Respondent/Plaintiff (*hereinafter 'Plaintiff'*) has already concluded his evidence. The Plaintiff has led the evidence of one handwriting expert. In an earlier round of litigation, the dispute had reached this Court wherein the Plaintiff had sought reference of the documents to the Forensic Science Laboratory (FSL/CFSL) for examination. While dismissing the said petition, the Court had observed that the Plaintiff could make an appropriate application before the Id. Trial Court for leading the evidence of the handwriting expert. Since then, the Plaintiff has led the evidence of handwriting expert. The evidence of the Plaintiff was closed on 16th May,

2018.

3. In the Defendants' turn, before commencing the evidence, the Defendant sought to place on record list of witnesses by way of an application in which the following witnesses were sought to be deposed by the Defendants.

"1. Tarun Tanwar son of late Shri Charan Singh, R/o village Asola, New Delhi (defendant no.2).

2. Shri Mam Chand, father of late Charan Singh, R/o Village Asola, New Delhi.

3. Handwriting expert and document expert.

4. Clerk Sub Registrar, Mehrauli, New Delhi.

5. Record clerk of Sir Ganga Ram Hospital and Sir Ganga Ram City Hospital.

6. Any other relevant witness with the permission of this Hon'ble court."

4. This application was rejected by the Id. Trial Court on the ground that since the issues were framed in 2009, the Defendants having not filed the list of witnesses, they cannot be allowed to file the list of witnesses at a belated stage.

5. Mr. S. C. Singhal, Id. Counsel for the Defendants vehemently contends that the observation of the Id. Trial Court, that the Defendants were choosing to surreptitiously include a handwriting expert in their list of witnesses, is completely incorrect, inasmuch as there was nothing surreptitious about the said fact. The High Court in its order dated 1st September, 2017 passed in CM (M) 947/2017 had also observed that once the Plaintiff led the evidence of his handwriting expert, the Defendants would also be doing the same. Thus, there was nothing surreptitious in the inclusion of a handwriting expert as a witness and the ground, on which the Id. Trial Court has refused to take the list of witnesses, is not tenable.

6. On the other hand, Mr. Sumit Bansal, Id. Counsel for the Plaintiff submits that the list of witnesses is absolutely compulsory to be filed and if the same is not filed, only the parties themselves can be examined and nothing more. He relies on the judgement of this Court in ***Dinesh Jain v Krishan Kumar Gupta, [in CM(M) No. 885/2008 decided on 23.09.2008]***.

7. The Court has heard the Id. counsels for the parties and has perused the application under Order XVI Rule 1 CPC. The sufficient cause, which has been given by the Defendants, is that there was an inadvertent error by the previous counsel and the list of witnesses was, accordingly, not filed.

Paragraphs 3 & 4 of the application read as under:

“3. That the plaintiff has concluded the evidence only on last date of hearing i.e. 16.5.2018 and now suit has been adjourned for evidence of the defendant on 12.7.2018.

4. That the plaintiff noticed that the list of witness was not filed in the present case on behalf of the defendants within 15 days as allowed, inadvertently by the previous counsel which the defendant want to place on the record. The list of witness is very brief and no way it would cause any prejudice to the plaintiff as plaintiff himself took nine years to complete the evidence.”

8. The submission of Mr. Bansal, Id. counsel for the Plaintiff is valid and justified that these two paragraphs do not show sufficient cause for non-filing of the list of witnesses. These are the very reasons, which have been considered by the Ld. Single Court of this Court in ***Dinesh Jain (supra)*** to not constitute sufficient cause. In ***Dinesh Jain (supra)***, the Court has observed as under:

“3. A perusal of the above Order 16 Rule 1 shows that the parties are supposed to file list of witnesses within 15

days of framing of issues and they have to obtain summons of such witnesses whose presence is sought in the Court for evidence. Sub-Rule 3 provides that the Court may permit a party to call a witness either by summoning or otherwise whose name does not appear in the list of witnesses, if party shows sufficient cause for omission to mention its name in the list. It is clear that both plaintiff and defendant are supposed to file list of witnesses whom they intend to examine, whether assistance of the Court is needed to summon them or not. There is no escape from filing list of witnesses. Rule 1(A) provides that party may, without applying for summons under Rule 1, bring any witness to give evidence or to produce documents in the Court. This Rule is also subject to Rule 1 sub-Rule 3 which clearly means that the name of witness should be either in the list or the party must show sufficient cause for omission its name in the list.

4. In *Lalitha J. Rai vs. Aithappa Rai* AIR 1995 SC 1984 Supreme Court held that where list of witnesses was not filed within prescribed time and plaintiff subsequently files a list stating that he was under bonafide impression that he had already filed the list along with documents and mistake was discovered when they were got ready for trial, the Trial Court committed illegality in refusing to receive the list for summoning the witnesses.

5. Filing of list of witnesses is not a mere formality and is not a superfluous act. List of witnesses if filed by the parties to apprise the Court as well as the opposite party as to what evidence will be produced by the party to prove its case. If there is a bonafide mistake and sufficient reasons are given by the party, the Court should allow the filing of such a list. However, if no bonafide reasons are given and the party keeps sleeping, there is no reason for allowing a party to file a list of witnesses later on.

6. In the present case, the defendant had not filed list of

witnesses. However, defendant was allowed to examine the witnesses without a list. After examining his three witnesses defendant filed a list of witnesses alongwith an application for summoning Mr. P.K. Jain, Advocate stating therein that list of witnesses could not be filed due to oversight and non-advice by counsel for the defendant. Thus, the total approach of the petitioner was casual, thinking that filing of list of witnesses was a mere superfluous act and can be done at any point of time. I consider this approach has to be curbed. Filing of list of witnesses must take place as per order 16 Rule 1 and delay in filing list of witnesses can be condoned by the Trial Court only for sufficient reasons. Non-advice by the counsel or oversight is not a sufficient ground.”

9. In fact, subsequently in ***Rainbow Travels v. New High Flying Travels Pvt. Ltd.*** [CM (M) 1144/2010, decided on 14th September, 2010], the same issue as to whether the filing of list of witnesses is mandatory, was considered by the Court and the Id. Single Judge, after taking into consideration the judgment of the Supreme Court in ***Mange Ram v. Brij Mohan & Ors.***, (1983) 4 SCC 36 as also ***Roshan Lal Mittal & Ors. v. Hari Singh (Since deceased) through his Legal Representatives***, 2006 VII AD (Delhi) 295 and ***Nandita Chaudhary v. Surat Singh Rao***, 2010 V AD (Delhi) 739. The court concluded therein as under:

“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.

.....
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.”

10. Mr. Singhal, ld. counsel for the Defendants, on the other hand, has relied upon the judgment in ***Lalitha J. Rai v. Aithappa Rai, AIR 1995 SC 1984*** to submit that the Supreme Court had permitted the list of witnesses to be received by the Court and thus, in the present case also the list of witnesses ought to be entertained by the Court. In ***Lalitha J. Rai (supra)***, the trial was yet to begin and hence the said judgement would have no applicability in the present case.

11. This Court has considered the judgements of ***Dinesh Jain (supra)*** as also ***Rainbow Travel (supra)*** and holds that the Defendants, who are before this Court, had an obligation to file the list of witnesses with due diligence.

12. A perusal of the list of witnesses filed by the Defendants shows that the Defendants intended to produce five witnesses. Admittedly, Mr. Tarun Tanwar and Mr. Mam Chand, who are witness nos. 1 and 2, have already been examined and cross-examined by the Court. The only other witness whom the Defendants intend to examine is the hand writing expert. In the earlier round of litigation before this Court in CM (M) 947/2017 when the question as to whether the documents need to be sent to the FSL or CFSL, the ld. Single Judge has recorded as under:

“9. Direction for examination of the disputed and admitted signatures by handwriting experts of FSL and Central Forensic Science Laboratory (CFSL) which are already strained for time for submitting reports in criminal prosecutions, cannot be issued in a routine manner. In the present case, when the petitioner/plaintiff since 2009 has intent to examine a private handwriting

expert, there is no reason for the petitioner/plaintiff to after seven years change his mind. It is also not as if both the petitioner/plaintiff and respondents/defendants are agreeable to bind themselves to the report of the handwriting expert of the FSL / CFSL, in which case it can perhaps be said that a reference thereto under Section 20 of the Indian Evidence Act, 1872 can be made. Even if the petitioner/plaintiff were to agree to be bound by the said report, the respondents / defendants would be entitled to controvert the same and to produce their own handwriting expert; it is not deemed appropriate to trouble the FSL / CFSL in such circumstances."

13. From the above it is clear that the Defendants all along had liberty to produce the hand writing expert but their mistake was not to file the list of witnesses in time. The Plaintiff has had notice of the fact that the Defendants would be producing a hand writing expert from the above order itself. The due diligence having not been exercised by the Defendants in filing the list of witnesses and the delay having occurred because of the same, the Plaintiff can be appropriately compensated with costs. The only witness, which the Defendants wish to examine, is being permitted, subject to payment of Rs.25,000/- as costs to be paid to the Plaintiff. The handwriting expert would be required, inasmuch as there is serious dispute between the parties as to the signatures on the documents relied upon. This being a suit for specific performance, which is based on the agreement to sell and other documents, the signatures of the parties would be crucial in the adjudication of the matter. Accordingly, this Court is of the opinion that the Defendants ought to be given one final opportunity to produce the hand writing expert. The Defendants are, however, liable to be put to terms and the hand writing expert shall be produced by the Defendants of their own

without any assistance from the Court. The evidence of the hand writing expert shall be recorded in the following manner.

- 1) The documents from the Sub-Registrar's office shall be summoned for a particular date and on the said date, the hand writing expert shall be produced by the Defendants of their own, who will be permitted to take photographs of the signatures.
- 2) The said hand writing expert shall, within a period of two weeks after taking the photographs, submit a report. The hand writing expert shall then be cross-examined on the said two dates for a period of not exceeding two hours each.
- 3) No further opportunity shall be granted to the Defendants to lead any other evidence in the matter.

14. The costs as imposed above shall be paid on or before the next date before the Trial Court i.e. 7th November, 2019. On the said date, the summons shall be issued to the Sub-Registrar's office and the Defendants shall ensure that the records from the Sub-Registrar's office are produced for the purpose of taking photographs by the hand writing expert. The Trial Court shall ensure that no unnecessary adjournments are sought for by any of the parties or granted in this matter.

15. With these observations, the petition and all pending applications are disposed of.

PRATHIBA M. SINGH
JUDGE

OCTOBER 31, 2019/dk