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

Date of Decision: 17th January, 2020

+ **CM (M) 1220/2018 & CM APPL. 41809/2018**

DELHI DEVELOPMENT AUTHORITY Petitioner

Through: Mr. Rajiv Bansal, Senior Advocate
with Ms. Prabhsahay Kaur, Standing
Counsel, Ms. Parul Panthi & Ms.
Shruti Gala, Advocates.
(M:9810158581)

versus

M/S TIRUPATI CEMENTS & ORS Respondents

Through: Ms. Kamlakshi Singh, Mr. Parijat
Kumar and Ms. Saundanya Singh,
Advocates. (M:9873408273)

WITH

+ **CM(M) 1221/2018 & CM APPL. 41817/2018**

DELHI DEVELOPMENT AUTHORITY & ANR..... Petitioners

Through: Mr. Rajiv Bansal, Senior Advocate
with Ms. Prabhsahay Kaur, Standing
Counsel, Ms. Parul Panthi & Ms.
Shruti Gala, Advocates.

versus

M/S TIRUPATI CEMENTS Respondent

Through: Ms. Kamlakshi Singh, Mr. Parijat
Kumar and Ms. Saundanya Singh,
Advocates.

CORAM:

JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. The present petitions challenge the impugned order dated 31st July, 2018 by which the applications under Order XVI Rule 1(3) CPC filed by the

DDA have been rejected. The DDA had produced a retired Superintendent - Mr. A.K. Malik to prove one of the show cause notices which was issued to the Respondent – M/s Tirupati Cements. The Trial Court has refused the permission for examination of Mr. A.K. Malik as a witness. The operative portion of the order reads as under:

*“12. In my considered opinion in the present facts and circumstances of the case, the judgment in the case of **Mange Ram (supra)** relied upon by Ld. Counsel for the DDA is distinguishable. The present cases are Civil Suits and not Election Petition. In the present case, the DDA examined present Executive Engineer Sh. Bimal Kumar Gupta, who has been thoroughly cross-examined by Tirupati Cements Products. Now, after four months, DDA wish to call Retired Superintendent Sh. A.K. Malik, who was in-charge of the project. However, it is not explained as to what restrained DDA to produce Sh. A.K. Malik as witness. Secondly, I agree with the Counsel for the Tirupati Cements Products that now in order to fill up lacuna or deficiency in the testimony of Sh. Bimal Kumar Gupta, Retired Superintendent Sh. A.K. Malik is to be examined by the DDA. For the sake of arguments if it is allowed then in my considered opinion there would be prejudice to the rights of Tirupati Cement Products. The DDA must have made efforts to call Sh. A.K. Malik, Retired Superintendent, who according to DDA is now more relevant to the earlier witness. The provisions of law although handmade but cannot permit DDA to improve the deficiency of earlier witness and at the same time, it would cause prejudice to the rights of Tirupati Cement Products.”*

2. The ground on which the Trial Court has refused permission is that the official was being produced to improve the deficiencies in the earlier testimony of Mr. Bimal Kumar Gupta.

3. Mr. Rajiv Bansal, Id. Senior Counsel appearing for the DDA submits that the judgment in ***Mange Ram v. Brij Mohan & Ors. (1983) 4 SSC 36*** is very clear that if the witness is present, at the instance of a particular party, the fact that his name is not in the list of witnesses would not entail the rejection of his evidence. In fact the witness ought to have been permitted to depose in the matter. On the other hand, Id. counsel for the Respondent submits that the purpose is to delay the proceeding and also to plug the loopholes in the earlier testimony, hence, the Trial Court had rightly rejected the examination of Mr. A.K. Malik. She further submits that no list of witnesses was filed by the DDA.

4. This Court has considered the position under Order XVI in ***Zile Singh v Santosh @ Santra & Ors CM (M) 1296/2018 (Decided on 6th November, 2019)***, and in ***Ganga Ram v Shekhar Kumar CM (M) 1656/2019 (Decided on 22nd November, 2019)***. As per the said judgement, there is no doubt that witnesses ought to be mentioned in the list of witnesses before they are produced before the Court so that parties are not taken by surprise. However, as per the judgment in ***Mange Ram (supra)***, if a person is produced as a witness at the instance of a party without summons being required, the Court cannot turn back a witness who is present before the Court. The relevant portion of ***Mange Ram (supra)*** reads as under:

“9. If the requirements of these provisions are conjointly read and properly analysed, it clearly transpires that the obligation to supply the list as well as the gist of the evidence of each witness whose name is entered in the list has to be carried out in respect of those witnesses for procuring whose attendance the party needs the assistance of the Court. When a summons is issued by the Court for procuring the

presence of a witness, it has certain consequences in law. If the summons is served and the person served fails to comply with the same, certain consequences in law ensue as provided in Rule 10 of Order XVI. The consequence is that where the witness summoned either to give evidence or to produce documents fails to attend or to produce the documents in compliance with such summons, the Court on being satisfied of the service as provided therein and is further satisfied that the person has without lawful excuse failed to honour the summons, the Court may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place to be named therein; and a copy of Such proclamation shall be affixed in the manner therein provided. Simultaneously, the Court may, in its discretion, issue a warrant, either with or without bail, for the arrest of such person, and may make an order for the attachment of his property for such amount as it thinks fit. even if thereafter the witness fails to appear, the Court may impose upon him such fine not exceeding five hundred rupees as it thinks fit, having regard to his condition in life and all the circumstances of the case, and may order his property, or any part, thereof, to be attached and sold as provided in Rule 12 of Order XVI. In view of this legal consequence ensuing from the issuance of a summons by the Court and failure to comply with the same, the scheme of Rules 1, 1A of Order XVI and Rule 22 of the Rules framed by the High Court clearly envisaged filing of a list only in respect of witnesses whom the parties desire to examine and procure presence with the assistance of the Court. There, however, remains an area where if the party to a proceeding does not desire the assistance of the Court for procuring the presence of a witness, obviously the party can produce such witness on the date of hearing and the Court cannot decline to examine the witness unless the Court proposes to act under the proviso to

Sub-section (1) of Section 87 of the '1951 Act' which enables the Court for reasons to be recorded in writing, to refuse to examine any witness or witnesses if it is of the opinion that the evidence of such witness or witnesses is not material for the decision of the petition or that the party tendering such witness or witnesses is doing so on frivolous grounds or with a view to delay the proceedings. It, therefore, unquestionably transpires that the obligation to supply the list of witnesses within the time prescribed under Sub-rule (1) of Rule 1 of Order XVI is in respect of witnesses to procure whose presence the assistance of the Court is necessary. And this ought to be so because the Court wants to be satisfied about the necessity and relevance of the evidence of such witness whose presence will be procured with the assistance of the Court. This not only explains the necessity of setting out the names of witnesses in the list but also the gist of evidence of each witness. If mere omission to mention the name of a witness in the list envisaged by Sub-rule (1) of Rule 1 of Order XVI would enable the Court to decline to examine such witness, Rule 1A of Order XVI would not have omitted to mention that only those witnesses kept present could be examined whose names are mentioned in the list envisaged by Sub-rule (1) and who can be produced without the assistance of the Court. Viewed from this angle, Rule 1A becomes wholly redundant. If it is obligatory upon the party to mention the names of all witnesses irrespective of the fact whether some or all of them are to be summoned and even the names of those whom the party desires to produce without the assistance of the Court are also required to be mentioned in the list on the pain that they may not be permitted to be examined, Rule 1A would have given a clear legislative exposition in that behalf and the marginal note of Rule 1A clearly negatives this suggestion. Marginal note of Rule 1A reads as 'Production of witnesses without summons'

and the rule proceeds to enable a party to bring any witness to give evidence or to produce documents without applying for summons under Rule 1. If it was implicit in Rule 1A that it only enables the party to examine only those witnesses whose names are mentioned in the list filed under Sub-rule (1) of Rule 1 whom the party would produce before the Court without the assistance of the Court, it was not necessary to provide in Rule 1A that the party may bring any witness to give evidence or to produce documents without applying for summons under Rule 1. Rule 1A of Order XVI clearly brings to surface the two situations in which the two rules operate. Where the party wants the assistance of the Court to procure presence of a witness on being summoned through the Court, it is obligatory on the party to file the list with the gist of evidence of witness in the Court as directed by Sub-rule (1) of Rule 1 and make an application as provided by Sub-rule (2) of Rule 1. But where the party would be in a position to produce its witnesses without the assistance of the Court, it can do so under Rule 1A of Order XVI irrespective of the fact whether the name of such witness is mentioned in the list or not.

...

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."

5. Mr. Rajiv Bansal, ld. senior counsel submits that DDA would not seek any adjournment, and though Mr. A.K. Malik is a retired official of the DDA he would be produced before the Court on the date fixed by the Trial Court.

6. In view of the legal position as enunciated in ***Mange Ram (supra)*** the witness who was produced by DDA without requiring any summons from the court, cannot be turned back. Under these circumstances it is directed that the evidence of Mr. A.K. Malik, Retired Superintendent of the DDA be recorded before the Trial Court on the date fixed. DDA shall not take any

adjournment in the matter. Costs of Rs.5,000/- in each of the petitions shall be payable to the Respondent by the DDA.

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

**PRATHIBA M. SINGH
JUDGE**

JANUARY 17, 2020

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corrected & released on 23rd January, 2020

