

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR**

Writ Petition (WP) No. 5235 of 2022

Sikharchand Milapchand Sipani
Versus
Rajesh Laxmandas Hariyani and others

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Shri A.S.Dhore, Advocate for the petitioner.
Shri S.N.Bhattad, Advocate for the respondent.

**CORAM : ANIL S. KILOR, J.
DATED : 8th MARCH, 2023.**

Heard.

2. An application moved by the petitioner by discarding the evidence of Dipak Laxmandas Hariyani came to be rejected by the 2nd Joint Civil Judge (Junior Division), Warora vide impugned order dated 16th April, 2022, passed below exhibit 207 in Regular Civil Suit No. 36 of 2000, is under challenge.

3. The only ground of which the challenge is raised is that without submitting the list of witnesses and without seeking leave of the Court, an affidavit in chief of the witnesses namely Dipak Laxmandas

Hariyani was filed and therefore the same shall be discarded.

4. The learned trial Court after considering the provisions namely Rule 1A of Order XVI of Code of Civil Procedure, 1908 and the judgment of the Hon'ble Supreme Court of India in the case of Mange Ram Vs. Brij Mohan and others¹, rejected the application.

5. The Hon'ble Supreme Court of India in the case of *Mange Ram Vs. Brij Mohan and others*(supra) has held thus:

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 Order 16. 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

1 AIR 1983 SC 925

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 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 16 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- sec. (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 Order 16 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 Order 16 would enable the Court to decline to examine such witness, Rule 1A Order 16 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 Order 16 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 Order 16 irrespective of the fact whether the name of such witness is mentioned in the list or not.

10. It was, however, contended that Rule 1A is subject to sub-rule (3) of Rule 1 and therefore, the Court must ascertain how far sub-rule (3) would carve out an exception to the enabling provision contained in Rule 1A. There is no inner contradiction between sub-rule (1) of Rule 1 and Rule 1A Order 16. Sub-rule (3) of Rule 1 Order 16 confers a wider jurisdiction on the Court to cater to a situation where the party has failed to name the witness in the list and yet the party is unable to produce him or her on his own under Rule 1A and in such a situation the party of necessity has to seek the assistance of the Court under sub-rule (3) to procure the presence of the witness and the Court may if it is satisfied that the party has sufficient cause for the omission to mention the name of such witness in the list filed under sub-rule (1) of Rule 1, the Court may still extend its assistance for procuring

the presence of such a witness by issuing a summons through the Court or otherwise which ordinarily the court would not extend for procuring the attendance of a witness whose name is not shown in the list. Therefore, sub-rule (3) of Rule 1 and Rule 1A operate in two different areas and cater to two different situations.”

6. After going through the observations made by the Hon’ble Supreme Court of India and considering the reasons recorded by the learned trial Court while rejecting the application for petitioner Exhibit 207, I do not find any error committed by the learned trial Court in rejecting the application. Accordingly, the writ petition is dismissed.

[ANIL S. KILOR, J.]

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