



2024:DHC:2135



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

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Judgment reserved on: January 22, 2024
Judgment pronounced on: March 18, 2024

+ CM(M) 127/2024, CM APPL. 4008/2024 (stay)
RADIUS IMPEX PRIVATE LIMITED Petitioner
Through: Mr. Rahul Ajatshatru and Ms.
Smiti Verma, Advs.
versus

SPOTLIGHT EVENTS AND ENTERTAINMENT & ANR.
..... Respondents
Through: Mr. Ram Kumar, Adv.

CORAM:
HON'BLE MS. JUSTICE SHALINDER KAUR

J U D G M E N T

1. The present petition under Article 227 of the Constitution of India arises out of the orders dated 09.01.2024 and 26.09.2023 passed by the learned Additional District Judge-02, South-East District, Saket Court Complex, New Delhi (hereinafter referred to as "ADJ") in CS DJ 8806/2016 titled as "*Radius Impex Private Limited vs Spotlight Events and Entertainment & Another*". The petitioner herein is the plaintiff and the respondent no.1 is herein is the respondent company and respondent no.2 is the director of the respondent company and both the respondents are the defendants before the learned Trial Court.

2. A narration of facts relevant to the present case are that the petitioner herein had filed a Suit for recovery for a sum of Rs. 10,89,000/- , along with

CM(M) 127/2024

Page 1 of 8

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interest, which was the consideration amount paid against invoices raised by the respondents for getting advertisements printed in the newspaper. The petitioner herein has collaborated with the New York Film Academy, New York, USA for setting up their branch in India. The respondents herein promised the petitioner that they would advertise the said academy in the Education Time (supplement) of the Times of India. The respondents assured the petitioner that the said advertisement would be printed in the newspaper on 24.09.2012, however they failed to do so. The respondents then reassured the petitioner by stating that the advertisement would be published in the newspaper on 16.10.2012, but again failed to publish the same.

3. Aggrieved by the actions of the respondents, the petitioner vide emails dated 02.11.2012 and 05.11.2012 sought a refund for the amount paid by them i.e. Rs. 10,89,000/- , along with interest. The respondents while replying to the same stated that they would refund the amount paid by the petitioner within 30-45 days. Upon non-receival of payments by the petitioner, the petitioner issued legal notices dated 27.11.2012 and 21.02.2016 demanding payment of the aforementioned amount.

4. Vide orders dated 24.01.2020 and 18.02.2021, the respondents right to defence was closed and the petitioner was directed to file its evidence. Thereafter the learned Trial Court appointed a Court Commissioner vide its order dated 23.02.2023, for the purpose of recording of the cross-examination of the petitioner's witness.



2024:DHC:2135



5. During the cross-examination of the petitioner, the respondents confronted the petitioner with certain electronic communications and a letter allegedly written by one of the directors of the petitioner company wherein it was stated that the claim was partially settled. In order to seek clarification regarding the above-mentioned letter, the petitioner sought to examine respondent no.2 and moved an application under Order XVI Rule 1(2) on 08.09.2023.

6. On hearing the application on 26.09.2023, the learned Trial Court expressed that it was not inclined to allow the same while stating that once the right to defence of the respondent has been struck off, permitting the respondent no.2 to be examined would reopen the defence and that cannot be permitted. The counsel for the petitioner then proceeded to withdraw the application, which was permitted.

7. Subsequently, petitioner moved an application under section 151 of the Code of Civil Procedure (“CPC”) seeking recall of the order dated 26.09.2023 to the extent of the order recording the withdrawal of the application by submitting that withdrawal of the application was made by the counsel in absence of any instructions from the petitioner himself. Vide the impugned order, the application under section 151 of the CPC was disposed of as well as the application under Order XVI Rule 1(2) for the reasons already stated in the order dated 26.09.2023.



Contentions of the petitioner:

8. The petitioner contends that the position of law is clear and settled that there is no express prohibition in examining the witness of the adversary in certain circumstances, therefore, the learned Trial Court erred in observing that by permitting the petitioner to summon respondent no. 2 as his witness, it would reopen the respondent's right to defend as their defence has been struck off. It is further stated that the learned Trial Court failed to recognize that it was pertinent to examine respondent no.2 as he could provide clarity to the court regarding the documents with which the petitioner was confronted with. The petitioner contends that it was no fault of his, but the fault of the counsel, who withdrew the application under Order XVI Rule 1(2) CPC without seeking any instructions. In this context, the learned counsel referred to the case of **Mohanlal Shamjisoni v. Union of India and Another** 1991 Supp (1) SCC 271. The learned counsel submitted that the impugned order in aforesaid circumstances be set aside and petitioner be afforded with an opportunity to summon respondent no. 2 as his witness.

Contentions of the respondents

9. The entire range of submissions were refuted on behalf of the respondents by submitting that the application moved by the petitioner under Order XVI Rule 1(2) CPC was malafide and an abuse of process of law as by way of general rule, it would not be open to a party to summon



the witnesses of his opponent or the opponent himself to the witness box. However, if such prayer is made by such a party, then party praying for the same has to reveal to the Court the purpose for which the opponent is to be summoned. The Court after being satisfied about the necessity of examination of such a witness may permit the party to do so.

10. It was submitted that petitioner has already lost his right to summon respondent no. 2 as he withdrew his application moved under Order XVI Rule 1. Further, he has not given any cogent reason to show special circumstances to summon him. Thus, there is no ambiguity, illegality or perversity in the impugned order, and it does not require any interference by this Court.

Reasons & Conclusions

11. The legal position with regard to the examination of a witness is abundantly clear, normally a party to the suit is expected to step into the witness box and to summon its own witnesses in support of his case and in case, such a party does not appear in the witness box, it is open to the Court to draw an adverse inference against him.

12. It is also true that each and every witness mentioned in the list of witnesses may not be permitted to be summoned by the Court, and in its discretion, the Court may decline the request to summon a particular witness, which is subject to the rule that witness is necessary to prove the facts of the party summoning him and that the summoning of such a witness



should not be belated or frivolous. It is equally true that in rare circumstances, a party may be allowed by the Court to summon a witness of his opponent or his opponent as his own witness, however, in such a case, the party has to show his bonafide reason for doing so and said summoning should not be an abuse of the process of law.

13. The question before this Court is, can the petitioner / plaintiff summon the respondents / defendants to prove his own case. The Kerala High Court in case of “**Muhammed Kunji vs. Shahabudeen**” 1969 KLT 170 held:

“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.”

14. The learned coordinate Bench of this Court in the case of **M/s Oil and Natural Gas Corp Ltd. vs. Vijay Mahajan 2016** [SCC Online Del 6371] considered the issue and after relying upon various judgments held:

“18. 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.”

15. In this context, reverting to the present case, the petitioner herein had moved an application under Order XVI Rule 1(2) CPC for summoning respondent no. 2 / defendant no. 2 Mr. Gagan Myne as his witness. It is not disputed that the defence of the respondents has been struck off vide order dated 24.01.2020 passed by the learned Trial Court. The learned Trial Court opined that once the defence of the defendants was struck off and the witness sought to be summoned is defendant no. 2 himself, no such



2024:DHC:2135



application can be allowed, which tantamounts to open the defence of the defendant. At that stage, the petitioner / plaintiff withdrew his application under Order XVI Rule 1(2) CPC by not pressing the same and the case was listed for final arguments for 09.01.2024. Subsequent thereto, the petitioner moved an application under Section 151 CPC for modification of the order dated 26.09.2023 and prayed that the said application be decided on merit. The learned Trial Court observed that even on merit, the application was not maintainable as the outcome of the application remained the same as observed by the learned Trial Court vide order dated 26.09.2023, thus, the application under Section 151 CPC was also disposed of.

16. Pertinently, the petitioner wants to summon the respondent no. 2 as during the cross-examination of petitioner, the respondents had confronted the petitioner with a settlement Mark A. The petitioner sought to examine respondent no. 2 to seek clarification in respect of Mark A and the circumstances in which same was created.

17. From the cross examination of petitioner, it appears that the settlement Mark A probably is between one Mr. Manish Singhal and respondent no. 2. Evidently, the petitioner has shown ignorances about Mark X. Apparently, the original of Mark X is neither produced nor proved in the Court. Thus, no purpose will be served to seek any further clarification of Mark A.



2024:DHC:2135



18. Factually, petitioner has failed to give any cogent reason to examine the respondent no. 2 as the petitioner himself has testified that he has no knowledge about the document and that the defence of the respondents has been struck off. Thus, in such circumstances to summon respondent no. 2 to enquire about the circumstances in which Mark A was created is a misplaced exercise.

19. In the light of above, there is no reason to interfere with the order of learned Trial Court. There is thus, no merit in the petition. The petition is dismissed accordingly.

SHALINDER KAUR, J.

March 18, 2024/ss/f