



2024:DHC:4781



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

%

Judgment reserved on: 13.03.2024

Judgment pronounced on: 27.06.2024

+ CM(M) 1699/2023, CM APPL. 54015/2023--stay

HERSHEY INDIA PRIVATE LIMITED

..... Petitioner

Through: Mr. Rajiv Tyagi and Mr. Piyush Jha,
Adv.

versus

SHRI RAJENDRA PRASAD

..... Respondent

Through: Mr. Deepak Jain, Adv.

CORAM:

HON'BLE MS. JUSTICE SHALINDER KAUR

J U D G M E N T

1. The present petition has been filed under Article 227 of the Constitution of India, 1950 read with Section 115 of the Code of Civil Procedure, 1908 (hereinafter referred to as "CPC") against the order dated 19.07.2023 in C.S. No. 1019/2017 passed by learned Additional District Judge-09, Central, Tis Hazari Courts, Delhi (hereinafter referred to as "Trial Court") whereby application under Order XVI Rule 1 & 2 CPC filed by the petitioner/defendant praying for recall of the summons of witnesses for 19.07.2023 was dismissed.

2. The facts reveal that the petitioner, M/s Hershey India Private Limited is a subsidiary of M/s Hershey Company, USA, which came into existence as per the joint venture of Godrej group with Hershey Company named as



Godrej Hershey Food and Beverages Limited in the year 2007. The Godrej Hershey Food and Beverages Limited had acquired Nutrine Confectionary Company Pvt. Ltd. in the year 2006 as a part of its business arrangement. The Godrej group completely exited the venture in the year 2012 and the petitioner company's name changed to M/s Hershey India Pvt. Ltd.

3. It is the case of the petitioner that on 27.05.2006, respondent was appointed at the post of Regional Sales Manager by Nutrine Confectionary Company Pvt. Ltd. However, his employment continued with the respondent on executing the contract of appointment dated 17.08.2007 for the post of Area Sales Manager in the petitioner company. The petitioner company terminated the employment of the respondent vide termination letter dated 02.11.2016 alleging misconduct in his dealings with the distributors of the petitioner company. During the course of employment, the petitioner company found that there were various irregularities committed by the respondent, which led to thorough investigation by the petitioner company with respect to alleged misconduct. As per, the investigation report dated 02.11.2016, the committee constituted by the petitioner company concluded that the respondent had committed serious breach of code of ethical business conduct and applicable employees regulation and such misconduct rendered him liable for termination of his employment contract.

4. Subsequent thereto, the respondent issued a legal notice dated 24.11.2016 through his advocate to the petitioner company alleging his termination being illegal and seeking reinstatement with consequential benefits. The notice was replied to by the petitioner company through its



advocate vide reply dated 12.12.2016. In retaliation to his termination, the respondent instituted a suit bearing CS No. 1019/2017 titled as “Rajendra Prasad vs. Hershey Company and Others” on 15.03.2017 before the learned Trial Court for recovery of an amount of Rs. 12,93,910/-. The petitioner company entered appearance in response to the summons sent to it and contested the suit by filing the written statement. On the pleadings of the parties, the learned Trial Court framed issues on 03.11.2018 in the said suit. To lead evidence, the respondent filed the first list of witnesses dated 18.01.2019 before the learned Trial Court.

5. While tendering affidavit of evidence by respondent as witness on 30.01.2020, the petitioner pointed that affidavit annexed with suit was not in compliance with Order XIX CPC and certain paragraphs were not duly verified in the plaint. In response to these averments of the petitioner company, the respondent on 02.09.2021 moved an application under Order VI Rule 17 read with Section 151 CPC seeking amendment in the verification paragraph of the suit. The learned Trial Court by the order dated 01.09.2022 allowed the same and the amended plaint was taken on record subject to payment of cost to the petitioner company by the respondent. Subsequently, the respondent filed the revised list of witnesses along with fresh affidavit of evidence on 03.03.2023. The respondent then moved an application for summoning of the witnesses, being the MIS Officer of the petitioner company producing the documents of the VAM/DSM subsidy paid to the distributor M/s Raj Traders.

6. It is the case of the petitioner that on 02.05.2023 in the absence of the petitioner, the learned Trial Court heard and allowed the application without



issuing notice to the petitioner as to the maintainability, necessity and relevancy of the evidence of the summoned employee of the petitioner company as the witness. The petitioner received the summons issued by the learned Trial Court requiring the attendance of MIS Officer on 19.07.2023 in terms of Order XVI Rule 12 CPC. Expediently, the petitioner moved an application under Order XVI Rule 1 and 2 CPC for recall of summons on 03.07.2023.

7. On 19.07.2023, the learned Trial Court allowed the affidavit of evidence of the respondent to be tendered and after part cross-examination of the witness, the said application was taken up for adjudication. Learned Trial Court vide the impugned order dated 19.07.2023 dismissed the objections raised by the petitioner and placed the burden upon the petitioner to appoint a responsible person or person having custody of summoned documents to appear as a witness before the learned Trial Court and to produce the said record on 07.12.2023.

SUBMISSIONS OF THE PETITIONER

8. Mr. Rajiv Tyagi, learned counsel for the petitioner submitted that the learned Trial Court over-looked the mandate of rule 3-A of Order XVIII CPC and Section 99 to 102 of the Indian Evidence Act, 1872 that cast the burden upon the respondent/plaintiff to first produce the evidence in support of its case. Petitioner/defendant can be called upon to produce its evidence only when the respondent/plaintiff's evidence is fully recorded. The respondent cannot be permitted to drag the petitioner/defendant into the witness box until respondent/plaintiff has produced his entire evidence. Learned counsel for the petitioner submitted that the petitioner is being



compelled to stand in the witness box and prove its case in defense, and to assist the respondent in proving its supposed case against the petitioner, thus, amounting to self-incrimination.

9. It is further submitted that the learned Trial Court erred in law and denied the very basic principle of natural justice to the petitioner by *ex-parte* allowing the application filed by the respondent to summon the petitioner's employee as a witness in his case, without serving a copy of that application on petitioner to respond, rather learned Trial Court straightway issued the summons to the petitioner's employee and rejected the objections raised by the petitioner on the denial of fair opportunity of hearing and fair right to object to the said application.

10. Learned counsel for the petitioner submitted that the application under Order XVI Rule 1 & 2 CPC was moved by the petitioner at the first available opportunity i.e. even before the examination-in-chief was recorded. The respondent had merely furnished evidence affidavit in examination-in-chief and the cross examination was allowed to commence without first deciding the objections by way of the application under Order XVI CPC filed by the petitioner. However, the learned Trial Court found fault with the petitioner for moving the application and even without notice to the respondent, the application was dismissed.

11. It is further submitted, the impugned order was passed on factual conjectures and surmises, which are not borne out from the records and thus the order under revision deserves to be quashed. The learned Trial Court has taken away the valuable right of the petitioner to submit its objections to the



admissibility and relevancy of the documents sought to be summoned by the respondent.

12. It is finally submitted that the evidence of MIS officer of the petitioner is not relevant as no issue for determination has been raised with regard to record of VAN/DSN subsidies given by the petitioner to M/s Raj Traders for the years from 2012 to 2016 for Delhi and Haryana state.

SUBMISSIONS OF THE RESPONDENT

13. Mr. Deepak Jain, learned counsel for the respondent supported the impugned order passed by the learned Trial Court and submitted that the law is well settled that in certain circumstances, plaintiff can also summon defendant during its evidence to prove the material facts, however, in the present case, the respondent only seeks to summon the records of distributorship of M/s Raj Traders to rebut the averments against the respondent with respect to misconduct in dealings with M/s Raj Traders. It was submitted that the entire record is with the petitioner company, which is relevant, therefore, it is necessary to summon the said record in order to prove the true facts. It is also submitted that the summoning of the record as well as the witness are important to adjudicate upon the real controversy between the parties.

ANALYSIS AND CONCLUSION

14. Order XVI CPC is a procedural requirement contemplated for full fledged trial in a suit. The provision provides for furnishing a list of witnesses and enables the party to obtain summons for attendance of any person and discretion is conferred upon the Court to permit a party to



summon through Court or otherwise any witness other than those whose names appear in the list submitted under sub-rule 1 of Order XVI.

15. Order XVI Rule 1(2) CPC is an enabling provision for issuing summons to the witnesses after the issues are settled, which reads as under:

“A party desirous of obtaining any summons for the attendance of any person shall file in Court an application stating therein the purpose for which the witness is proposed to be summoned.”

16. In the case of **Mange Ram vs. Brij Mohan and Others**: (1983) 4 SCC 36, the Hon’ble Supreme Court examined the provision of Order XVI CPC and held as under:

“8. Sub-rule (1) of Rule 1 of order XVI casts an obligation on every party to a proceeding to present a list of witnesses whom it proposes to call either to give evidence or to produce documents and obtain summonses to such persons for their attendance in Court. Sub-rule (2) requires that the parties seeking the assistance of the Court for procuring the attendance of a witness must make an application stating therein the purpose for which the witness is proposed to be summoned. Sub-rule (3) confers a discretion on the Court to permit a party to summon through Court or otherwise any witness other than those whose names appear in the list submitted in sub-rule (1), if such party shows sufficient cause for the omission to mention the name of such witness in the said list. Rule 1A in its amended form in force since 1977 enables a party to bring any witness to give evidence or to produce documents but this enabling provision is subject to the provision contained in sub-rule (3) of Rule 1 of order XVI. If a reference to Rule 22 of the High Court Rules is recalled at this stage, it merely reenacts sub-rule (2) of Rule 1 of order XVI.

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 of Order XVI. Sub-rule (3) of Rule 1 of Order XVI 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."

17. Falling back to present case, the respondent had already filed a list of witnesses, which is undisputed. The respondent had sought permission of the learned Trial Court to bring on record the documents, which are in possession of the petitioner, which in no manner indicates that the petitioner is being asked to lead defendant's evidence first. The respondent merely seeks to summon the record, which is not in his possession but is in the possession of the petitioner, which right cannot be denied to him. The petitioner has averred that the respondent had been pressurising the distributors of the petitioner company to pay him kick backs or commission or monetary benefits out of the VAN subsidy. It is further the case of the petitioner company that it had received complaints from its distributors with respect to misconduct of the respondent and petitioner company apprehended that the respondent was dishonest with dealings with M/s Raj Traders and there were certain financial irregularities also.

18. The reading of the pleadings make it amply clear that the misconduct with respect to dealings of the respondent with M/s Raj Traders was one of the prime reason of dispute between the parties to the *lis*, which ultimately led to dismissal of the respondent from service with the petitioner company. Thus, the records to be summoned from the company of the petitioner would reveal the basis of the dispute between the parties.



2024:DHC:4781



19. Having considered the above, there is no infirmity in the impugned order passed by the learned Trial Court and it has rightly allowed the application. Consequently, the petition along with pending application is dismissed.

SHALINDER KAUR, J.

JUNE 27, 2024/ss