(2006) 07 DEL CK 0198

Delhi High Court

Case No: CM (M) No''s. 3057-59 of 2005 and CM (M) No''s. 2718-20 of 2005

Roshan Lal Mittal and Others		APPELLANT
	Vs	
Hari Singh (since deceased) through his legal representatives		RESPONDENT

Date of Decision: July 6, 2006

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 16 Rule 1, Order 16 Rule 1(1), Order 16 Rule 2, Order 16 Rule 3

Citation: (2006) 131 DLT 27 : (2006) 90 DRJ 696

Hon'ble Judges: Sanjay Kishan Kaul, J

Bench: Single Bench

Advocate: R.M. Bagai, for the Appellant; R.C. Gupta, for Respondents No. 1 to 3, for the Respondent

Final Decision: Dismissed

Judgement

Sanjay Kishan Kaul, J.

The petitioners are tenants in the suit property of the respondents being commercial premises bearing Municipal Nos. 2 and 3, 17, Community Centre, Ashok Vihar, Delhi 110 052. The father of the respondents had filed eviction petition on the ground of subletting against the petitioners in the year 1984 and the matter has been since pending.

2. The grievance of the petitioners arises from the order passed on 23.04.2003 on the application of the petitioners under Order XVI Rule 1, 2 & 3 of the Code of Civil Procedure, 1908 (hereinafter to be referred to as, ''the Code'') for examining four more witnesses in support of their case. It is the case of the petitioners that evidence was material for disposal of the controversy and related to the subsequent developments. The Additional Rent Controller (for short, ''ARC''), however, rejected the application. The petitioners thereafter filed a review application, which has also

been dismissed by the order dated 28.09.2005.

3. The petitioners seek to produce four witnesses, namely, Shri Ashok Kumar, Shri Ram Bhaj, Shri Shanti Swaroop and Shri Sanjay Kumar Mittal. The application of the petitioners was opposed by the respondents on the ground that the matter was no more rest integra since the request of the petitioners to summon the witnesses mentioned in the list of witnesses had already been disallowed.

4. It may be noticed that undisputedly the name of Shri Ram Bhaj was included by the petitioners in the list of witnesses naming 21 witnesses. The request of the petitioners to summon witnesses at Serial Nos. 4 to 13 were disallowed by the order dated 27.09.1995 and the name of Shri Ram Bhaj was at Serial No. 6. This order was never challenged any further.

5. Learned Counsel for the petitioners did not dispute the aforesaid position and, thus, did not press the petition insofar as the question of producing Shri Ram Bhaj as a witness was concerned.

6. Learned Counsel for the petitioners, however, contended that the aforesaid reasoning would not apply to the other three witnesses whose name did not appear in the list of witnesses. Learned Counsel contended that the non-mention of names in the list of witnesses was not material once the petitioners were producing the witnesses at their own responsibility. In this behalf, learned Counsel relied upon the judgment of the Apex Court in Mange Ram Vs. Brij Mohan and Others, The Apex Court considered the effect of the provisions of Order XVI Rule 1 of the Code, which reads as under:

1. List of witnesses and summons to witnesses

(1) On or before such date as the Court may appoint and not later than fifteen days after the date on which the issues are settled, the parties shall present in Court a list of witnesses whom they propose to call either to give evidence or to produce documents and obtain summons to such persons for their attendance in Court.

(2) 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.

(3) The Court may for reasons to be recorded permit a party to call whether by summoning through Court or otherwise any witness, other than those whose names appear in the list referred to in Sub-rule (1), if such party shows sufficient cause for the omission to mention the name of such witness in the said list.

(4) Subject to the provisions of Sub-rule (2), summonses referred to in this rule may be obtained by the parties on an application to the Court or to such officer as may be appointed by the Court in this behalf.

7. The question of law, which arose was, whether a party to a proceeding, which does not wish to have the assistance of court for purposes of procuring the attendance of witness, could be denied privilege of examining witnesses kept present by him on the date fixed for recording of evidence on the sole ground that the name of witness and the gist of evidence have not been set out in the list. The Supreme Court was of the view that Sub-rule (1) of Rule 1 of Order XVI of the Code castes an obligation on a party to the proceeding to present the list of witnesses who it proposes to call either to give evidence or to produce documents and obtain summons to such persons for their attendance in court. Sub-rule (2) required the party seeking assistance to make an application, while Sub-rule (3) confers the discretion on the court to permit a party to summon through court or otherwise the witness. It is in view thereof that the Apex Court was of the view that it is only where a party needs assistance of the court, would the aforesaid provision apply. If on the date fixed for recording evidence, the party keeps his witnesses present even though the name of the witness is not in the list filed under Sub-rule (1) of Rule 1 of Order XVI of the Code, the party would be entitled to examine the witnesses and to produce the documents through the witness. However, if the evidence is frivolous or vexatious or the evidence is led to delay the proceedings, the court can decline to examine the witness.

8. Learned Counsel for the petitioners contended that the need to examine the witnesses arose when the court had observed that the bills issued by them could not be proved by RW-1. A reading of the order dated 23.04.2003 shows that the request has been declined on the ground that it is a settled principle of law that a document can be proved by its author and if the respondent failed to produce the relevant witness and the court consequently refused to exhibit the document, the petitioners could not take advantage of that fact. This was in respect of the testimony of Shri Ram Bhaj and Shri Ashok Kumar and, as noticed above, the production of Shri Ram Bhaj has already been given up by learned Counsel for the petitioners.

9. The affidavit of Shri Shanti Swaroop is stated to not contain any material relating to subsequent event, while Shri Sanjay Kumar was a minor at the time of institution of the petition and, thus, cannot be said to be aware of the facts existing at that time.

10. The order passed on review dated 28.09.2005 shows that the petitioners contended that the witnesses had been brought in court along with their affidavits and since the counsel for the petitioners was busy in another Court, the presence of the witnesses was not taken on record and their affidavits were returned. The judgment of the Supreme Court in Mange Ram''s case (supra) was sought to be taken advantage of to advance the proposition that the witnesses ought not to have been turned away.

11. The trial court noted that in the entire application filed under Order 16 of the Code, there was no plea by the petitioners that the witnesses were present and the

court was bound to examine them without insisting to the inclusion of their names in the list of witnesses. Thus, it was concluded that the error apparent on record could have only occurred if the witnesses were present while the records show that there was no such presence of the witnesses.

12. Learned Counsel for the respondent has pointed out that the order dated 26.09.2002 shows that the case was fixed for cross-examination of RW-2 when the affidavits of four additional witnesses was sought to be filed. However, the order further records, No other RW except RW-2 is present. The counsel also did not turn up till 12.30 P.M. when the counsel arrived and stated that he wanted an adjournment. It is, thus, submitted that a false plea is sought to be made out that the witnesses were present. Learned Counsel for the respondent also pointed out by reference to the order dated 24.10.2005 and 07.11.2005 that no other witness was subsequently present when the respondent''s evidence was closed.

13. I have considered the submissions advanced by learned Counsel for the parties.

14. In my considered view, there can be no legal dispute insofar as the question of law is concerned in view of the judgment of the Supreme Court in Mange Ram''s case (supra). Thus, if the name of a witness does not appear in the list of witnesses filed under Sub-rule (1) of Rule 1 of Order XVI of the Code, the same does not preclude the party from producing the witnesses at its own responsibility. This is so since the object of filing the list of witnesses is that where the assistance of court is required, the court has an opportunity to examine on the application of the party whether such an assistance is required to be given to the party and whether the witness is liable to be summoned. The point, however, remains that if the party seeks to lead the evidence of further witnesses, those witnesses should be present and the court should not find that they are irrelevant or the production of those witnesses is only for dilatory purposes.

15. The proceedings recorded show that no such witnesses were present and only their affidavits were sought to be produced. Thus, the contention of the petitioner based on the presumption that the witnesses were present and, thus, the provisions of Order XVI of the Code would not apply, has no factual basis. A reading of the Order also shows that the court really did not find any relevance of production of the said witnesses at the belated stage. The petitioners have produced the copy of birth certificate of Shri Sanjay Kumar Mittal to state that he was born on 15.01.1966 and was, thus, a ''major''. The reason for rejection of his testimony is not that he was a ''minor'' when he was sought to be produced, but he was a ''minor'' for the period the matter related to. There could, thus, be no relevance of his testimony since the evidence which was sought to be produced was in respect of rent receipts, etc., which could not be proved by the petitioners in the testimony of RW-1. The trial court was right in its conclusion that the petitioners cannot now attempt to fill up the lacunae in the evidence as they had failed to produce the author of the document and could not expect to exhibit the document through production of their

witnesses.

16. The eviction petition has been pending for almost 22 years and the evidence of the respondents in defense has been going on for a number of years. In my considered view, the attempt of the petitioners is clearly dilatory to somehow prolong the matter.

17. I do not find any perversity or error of law apparent on the face of the record in the orders passed by the trial court.

18. The petitions are accordingly dismissed with costs of Rs. 5,000/-.