

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

+ **CM (MAIN) No.420/2008**

Date of Decision: July 09, 2010

HANSALAYA PROPERTIES & ORS. Petitioners

Through: Mr. H.L.Tiku, Senior Advocate with
Ms. Yashmeet Kaur, Advocate.

VERSUS

DALMIA CEMENT (BHARAT) LIMITED Respondent

Through: Mr. Ashwini Mata, Senior Advocate
with Mr.Jaideep Sarna and
Mr.Hemant Budakoti, Advocates.

% **CORAM:**
HON'BLE MS. JUSTICE ARUNA SURESH

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not? Yes
- (3) Whether the judgment should be reported in the Digest? Yes

J U D G M E N T

ARUNA SURESH, J.

CM (MAIN) No.420/2008

1. Impugned in this petition is the order of the Trial Court dated 29th March 2008, whereby application of the Petitioners

(defendants) filed under Order 16 of the Code of Civil Procedure (hereinafter referred to as 'CPC') was dismissed.

2. Respondent (Plaintiff) had purchased complete 11th and 12th floor having an approximate carpet area of 9850 square feet each from Petitioner No.1. Dispute *inter se* the parties arose when Petitioner No. 1 demanded the balance sale consideration on the complete floor area while Respondent alleged that sale consideration was agreed to be paid on the carpet area, which according to the Respondent was 9547 square feet. This resulted into filing of various suits by the Respondent against the Petitioners, one of them being Suit No.1205/1979 for damages for delay in delivering the possession as also refund of transfer charges paid by it to the Petitioners. This suit was initially filed in this Court but, subsequently it was transferred to the District Court on account of pecuniary jurisdiction of the District Court having been exercised and it was renumbered as Suit No.664/2006. Impugned order has been passed by the Trial Court in this suit.

3. After the pleadings were complete and issues were framed, matter was listed for evidence of the Respondent.

4. On 24th April 1997, Court recorded that Respondent had to adduce evidence of Shri S.N. Mittal, Shri V.K.Mathur, Shri V.P.Gupta and Shri Bhirmiwala in support of his case in affirmative. Court also recorded presence of S.N.Mittal in the Court on that day and an adjournment was sought by Mr.Tiwari, counsel for the Respondent for filing affidavit evidence of the said four witnesses within six weeks from that date with advance copy to counsel for the Petitioners and agreed that Petitioners would be at liberty to call all or any of the said persons for purposes of cross-examination, which suggestion was accepted by counsel for the Petitioners. Accordingly, the matter was listed for 25th September, 1997 with a direction to Respondent to file affidavit evidence within six weeks with advance copy to counsel for the Petitioners and they were directed to indicate on the next date of hearing, the name of the persons whom they wanted to be called for cross-examination to enable to call them for that purpose on subsequent date. Matter again came up before the Court on 25th September, 1997.

5. On 25th September 1997, Trial Court passed the following order:-

“Affidavit by way of evidence in pursuance of order dated 24th April, 1997 has been filed on behalf of the plaintiff. Copy has been received by the learned counsel for the defendants who may file his affidavit by way of evidence within six weeks. List on 19.2.1998 before joint registrar.”

6. It seems that affidavit evidence of only one of the witnesses S.N.Mittal was filed on record. Order is silent if Respondent had sought time to file affidavit evidence of the remaining three witnesses. Order is also silent if Petitioners exercised their option to cross-examine S.N.Mittal, whose affidavit evidence had already been placed on record. It is also not clear if the Respondent had actually closed its evidence after filing affidavit evidence of S.N.Mittal.

7. Respondent had filed two applications, one under Order 13 Rule 2 CPC for filing of additional documents and another under Order 14 Rule 5 CPC for framing of additional issues. Both the applications were dismissed vide order dated 6th September, 1999 by the Trial Court. In appeal, application under Order 13 Rule 2 CPC was dismissed but, the other application under Order 14 Rule 5 CPC was allowed and additional issues were framed. In the order dated 6th

September 1999, Court noticing conduct of the Petitioners in not filing affidavit evidence, as a last and final opportunity granted them four weeks time to file affidavit evidence observing that in case it was not so filed, Petitioners' evidence would be deemed to be closed. Similar right was given to the Respondent to cross-examine the witnesses of the Petitioners, if affidavit evidence was filed.

8. Petitioners did file affidavit evidence as directed but, also moved an application under order 18 Rule 17 (a) CPC including permission to recall S.N. Mittal for cross-examination. Trial Court dismissed the said application on 8th December 1999, observing that as per the order dated 25th September 1997 since Petitioners did not opt to cross-examine the witnesses of the Respondent, evidence of the Respondent stood closed as no opportunity was sought by it to produce any other affidavit evidence.

9. On 30th November 2000, while allowing the appeal, following order was passed by the Appellate Court:-

“ We have heard the learned counsel for the parties. In the interest of justice, one opportunity is allowed to appellant to cross examine the witness who has filed affidavit

by way of evidence on behalf of plaintiff. Plaintiff/respondent is directed to produce Shri S.N.Mittal who has filed an affidavit by way of evidence on behalf of Plaintiff for cross-examination in court on a date to be fixed by the Court. The court will also fix dates for production of part (B), (C) and (D) witnesses by the appellant as per list of witnesses filed by it. The witnesses who will be produced in court will naturally be available for cross examination by the Plaintiff. The appellant has filed one affidavit of Shri Bharat Bhushan by way of evidence. Counsel appearing for the appellant undertakes to produce the said deponent for cross examination in court by the counsel for the plaintiff on a date to be fixed by the Court.

With these directions, this matter is posted back before the learned Single Judge for further proceedings. Parties to appear before the Single Judge on 11th December, 2000. The impugned order dated 8th December, 1999 is set aside.”

10. On 15th December 2003, counsel for the Respondent made a statement before the Court that he would file affidavit evidence of other witnesses with advance copy to counsel for the Petitioners. It seems that on that day, one bank official was summoned by the Respondent, who could not be examined because summoned record was not available with the Bank as the same had been destroyed. Against

this order, Petitioners filed an application under Order 47 Rule 1 CPC seeking review. Said application was allowed on 3rd March, 2004. While doing so, the Court observed that Respondent had no further right to file affidavit evidence and the matter was adjourned only for cross-examination of Respondent's witnesses whose affidavit evidence had already been placed on record. Cross-examination of S.N.Mittal was completed on 22nd August, 2007. Vide order dated 3rd March 2004, while noting that vide order dated 3.3.2004 Respondent was debarred from filing affidavit evidence of any other witness, on submission of counsel for the Respondent allowed it to examine two more witnesses by way of summoning them i.e. officials from Voltas Ltd. and Raori Associates Ltd. as they were not under his control, it listed the matter for 30th October, 2007 with directions for taking steps within ten days. Though there is no clear order if the request was accepted, but the fact that Court asked the Respondent to produce its remaining evidence and take necessary steps, clearly indicate that the Court permitted it to examine officials from Voltas Ltd. and Raori Associates to be summoned with the assistance of the Court. This was so done in the presence of counsel for the Petitioners.

11. Respondent subsequently filed an application before the Trial Court for summoning V.P. Raori from Raori Associates Limited and official from Voltas Ltd. This application was allowed by the Trial Court on 5th October, 2007. After coming to know that name of Raori Associates did not appear in the list of witnesses filed by the Respondent, Petitioners filed an application under Order XVI CPC praying for an order or directions that Respondent had no right to examine any official from M/s Raori Associates, as its name did not find mention in the list of witnesses. This application was dismissed by the Trial Court vide impugned order dated 29th March, 2008.

12. Mr. H.L. Tiku, Senior Advocate appearing for the Petitioners has submitted that once the evidence of the Respondent was closed and the Petitioners had filed affidavit evidence as per the directions of the Court, the Trial Court could not have permitted the Respondent to summon two witnesses, namely, officials from Voltas Ltd. and Raori Associates Ltd. He has further submitted that official of Raori Associates is not mentioned in the list of witnesses to be examined by the Respondent and after closing its evidence, under no circumstances, the Court could have allowed the examination of Mr.

V.P. Raori who was not under the control of the Respondent to be summoned and examined as a witness for the Respondent. He has urged that ignoring the provisions of Order XVI CPC, the Trial Court dismissed the application of the Petitioners oblivious of the previous proceedings in the case recorded in various orders and also the fact that the evidence of the Respondent stood closed vide order dated 8.12.1999. He has assailed the impugned order dated 29.03.2008, being infirm, illegal and against provisions of law contained in order XVI CPC.

13. Order XVI (1) and (1A) CPC reads as under:-

“ORDER XVI

**SUMMONING AND ATTENDANCE OF
WITNESSES**

**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 summonses to such person 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 within five days of presenting the list of witnesses under sub-rule (1).]

1A. Production of witnesses without summons.-

Subject to the provisions of sub-rule (3) of rule 1, and party to the suit may, without applying for summons under rule 1, bring any witness to give evidence or to produce documents.”

14. From bare reading of the provisions of this Order it is clear that a party is required to present a list of witnesses in the Court whom it propose to call either to give evidence or to produce documents through the assistance of the Courts for their attendance in the Court. For that purpose the party is required to move an application stating the purpose for which the witnesses are proposed to be summoned. Any party to the suit is entitled to bring any witness to give evidence or produce documents without applying for summons under Order XVI Rule 1 CPC.

15. By virtue of Rule 1 sub-rule (3) CPC, the court can permit a party to call, whether by summoning through Court or otherwise, any witness, other than those whose names appear in the list filed by the party, if the party shows sufficient cause for the omission to mention the name of such witness in the said list. Provisions of Rule 1A are subject to the provisions of sub-rule (3) of Rule 1 CPC. In other words, before proceeding to examine any witness who might have been brought by a party for that purpose, leave of the Court is necessary, but this by itself does not mean that Rule 1A is in derogation of sub-rule (3) of Rule 1.

Sub-rule (3) of Rule 1 and Rule 1A operate in two different areas and cater to two different situations.

16. Applicability of Rule 1, sub-rule (3) and Rule 1A under different situations has been explained in '*Mange Ram vs. Brij Mohan & Ors., AIR 1983 SC 925*', it was held:-

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.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.

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.

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 in an election petition, 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.”

17. *Mange Ram's case (supra)* has been referred to in ‘*Vidhyadhar vs. Mankikrao & Anr.*’, *JT 1999 (2) SC 183*.

18. Thus, it is clear that Order XVI Rule 1 and 1A neither gives absolute permission nor puts a total prohibition on the party to

produce the witnesses or the production of documents for proof of their respective case. However, when they seek assistance of the Court, they are enjoined to give reasons as to why they have not filed the application within the time prescribed under Rule 1 of Order XVI.

19. In this case an oral request was made by the counsel for the Respondent to the court that he wanted to examine two witnesses one from Voltas Ltd. and another from Raori Associates Ltd. Petitioner is not in issue as regards examination of an official witness from Voltas Ltd. as its name appears in the list of witnesses filed by the Respondent. It is noted that counsel for the Respondent had made an unambiguous statement before the Trial Court that he would not examine any other witness except the said two witnesses. Grievance of the Petitioner is that Mr. V.P. Raori has been wrongly allowed by the Court to be examined as a witness by the Respondent especially when its evidence was closed and the name of this witness did not find mention in the list of witnesses and also over a long period Respondent nowhere made a request to the Court to permit it to examine Mr. V.P. Raori, till after the cross examination of S.N. Mittal was closed.

20. It is not in dispute that name of V.P.Raori does not find mention in the list of witnesses. It is also a common case of the parties that since after 24.4.1997, when the Court permitted the Respondent to file an affidavit of four witnesses in evidence within a period of six months till 22.8.2007 Respondent did not make any request nor sought permission from the Court to examine V.P. Raori as its witness.

21. As discussed above, it is open to a party to produce a witness to give evidence or produce documents even if the witness is not listed in the list of witnesses. Mr. V.P. Raori was present in the Court on 30.10.2007, the date fixed by the Court for examination of witnesses from Voltas Ltd. and Raori Associate Ltd. Mr. V.P.Raori was produced by the Petitioner himself and it did not take any assistance of the Court to summon this witness. No doubt that Respondent did not formally apply for extension of the date for filing affidavit by way of evidence, but then, court is not without power to extend such date. Respondent never made any statement to the Court closing its evidence after filing of the affidavit of Mr. S.N. Mittal in evidence.

22. The Trial Court did observe that name of Mr. V.P. Raori did not appear in the list of witnesses till date but noted that the witness

was produced by the Respondent of its own without assistance of the Court and therefore Respondent was entitled to examine the witness even though his name was not mentioned in the list of witnesses. True that, application filed by the Respondent for summoning concerned official of Raori Associates with the assistance of the Court was allowed, the fact remains Respondent had produced the witness of its own without the assistance of the Court on 30.10.2007, the date fixed for remaining PE. He could not be examined because of the objections raised by the Petitioner. While dismissing the application, the Trial Court did direct Respondent to produce V.P. Raori without the assistance of the Court to examine him as its witness and only permitted it to summon official witness from Voltas Ltd. with the assistance of the Court and that too on its own responsibility.

23. The impugned order of the Trial Court therefore is within the purview of provisions contained in Order XVI CPC. Hence, I find no illegality or infirmity in the same. Hence, the petition is dismissed.

24. Before parting with the petition, I would like to express my anguish and concern to the manner in which the parties to the suit are proceeding with the case. This case is pending since 1979.

S.N.Mittal was cross examined after about ten years of his filing affidavit in evidence. Petitioner took few dates to complete the cross examination. Both the parties for one reason or the other have been prolonging the proceedings in this case after it was fixed for recording of evidence of the parties. The Trial Court conscious of the delay in disposal of the case directed the parties to co-operate with the court in disposing of the matter in a scheduled time and also took it open itself that with the co-operation of the counsel for parties it would endeavour to dispose of the case by the end of April, 2008. Even challenge to this order has taken two years to reach to a final conclusion.

25. Parties under the circumstances are directed to fully cooperate with the Trial Court in getting the matter finally concluded and judgment pronounced on merits without any unnecessary delay or adjournments. The Trial Court shall also make every endeavour to ensure that the case is finally decided within six months from the date of the order. Parties shall appear before the Trial Court on 9th August, 2010. The Trial Court shall grant only one last and final opportunity to the Respondent to produce V.P. Raori and official witnesses from Voltas Ltd on its own responsibility to examine them as its witnesses,

failing which the Trial Court shall be at liberty to close the evidence of the Respondent without giving any further opportunity to it.

CM No.4938/2008 (for stay)

26. Since petition has been dismissed, this application has become infructuous. Hence, the same is accordingly disposed of.

27. An attested copy of this order be sent to the Trial Court through special messenger for compliance.

**ARUNA SURESH
(JUDGE)**

JULY 09, 2010
sb/vk