Supreme Court of India
Mange Ram vs Brij Mohan And Others on 3 August, 1983
Equivalent citations: 1983 AIR 925, 1983 SCR (3) 525
Author: D Desai
Bench: Desai, D.A.

PETITIONER:
MANGE RAM

Vs.

RESPONDENT:
BRIJ MOHAN AND OTHERS

DATE OF JUDGMENT03/08/1983

BENCH:
DESAI, D.A.
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DESAI, D.A.
REDDY, O. CHINNAPPA (J)

CITATION:
1983 AIR 925 1983 SCR (3) 525
1983 SCC (4) 36 1983 SCALE (2)63

ACT:
Code of Civil Procedure, 1908-O. XVl, rs. 1 and 1A-Trial of election petition-Right to bring any witness, without applying for summons, for examination under r. 1A-Scope of-Can court decline to examine witnesses kept present by party on the sole ground that their names have not been set out in the list filed in compliance with r. 1?

HEADNOTE:
Sub-r. (1) of r. 1 of O. XVI, Code of Civil Procedure, 1908 casts an obligation on every party to a proceeding to present a list of witnesses whom it proposes to call and to obtain summonses to such persons for their attendance in court; sub-r. (2) requires that the party seeking such assistance from the court must make an application stating the purpose for which the witness is proposed to be summoned; and sub-r. (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 under sub-r. (1), if such party shows sufficient cause for the omission to mention the name of such witness in the said list. Rule 1A of O. XVI enables a party to bring in any witness without applying for summons under r. 1 but this enabling provision is ' subject to sub-r. (3) of r. 1.

Rule 22 of the "Rules of Procedure and Guidance in the matter of trial of Election Petition under Part Vl of the Representation of the People Act, 1951" of the Punjab and Haryana High Court merely re-enacts sub-rs. (1) and (2) of r. 1 of o, XVI, C.P.C.

Sub-s. (1) of s. 87 of the Representation of the People Act, 1951 makes O. XVI, c.P.c. applicable to the trial of election petitions and the proviso thereto gives the High Court the discretion to refuse to examine any witness if it is of the opinion that the evidence of such witness is not material or that the party tendering such witness is doing so on frivolous grounds or with a view to delay the proceedings.

The appellant, who was the petitioner in an election petition, had filed an application seeking permission to produce and examine witnesses whose names were set out in the application and the court had passed appropriate orders thereon. When the court was recording the evidence of the appellant he submitted another list of witnesses whom/he had kept present in the court for being examined, but the court rejected the same for two reasons. (i) that the appellant had not mentioned their names in the application made by him earlier; and (ii) that there was no mention of the purpose for which they were being offered for examination. The appellant challenged the validity of the Court's order.

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Allowing the appeal,

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HELD: It is obligatory on the party to a proceeding to file the list of witnesses with the gist of evidence and to make an application for issue of summons as provided in sub-rs. (1) and (2) of r. 1, O. XVI only where the party wants the assistance of the court to procure the presence of witnesses; but where the party is in a position to produce its witnesses without the assistance of the court, it can do so under r. 1A irrespective of the fact whether the names of such witnesses are mentioned in the list or not and the court cannot decline to examine them unless it proposes to act under the proviso to sub-s. (1) of s. 87 of the Representation of the People Act, 1951. [531 G-H, 532 A]

(i) The obligation to file a list of witnesses with the gist of evidence of each witness within the time prescribed under sub-r. (1) of r. 1, O. XVI is in respect of those 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. If mere omission to mention the name of a witness in the list envisaged by sub-r. (1) of r. 1 would enable the court lo decline to examine such a witness, r. 1A 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-r. (1) of r. 1 and who can be produced without the assistance of the court. The marginal note of r 1A reads: "Production of witnesses without summons" and the rule proceeds to enable a party to bring any witness to give evidence or produce documents without applying for summons under r. 1. If it was implicit in r. 1A that it enables the party to examine only those witnesses whose names are mentioned in the list filed under sub-r. (1) of r. 1 whom the patty would produce before the court without the assistance of the court, it was not necessary to provide in r. 1A that the party may bring any witness without applying for summons under r. 1. [533 B-H]

(ii) The contention that r 1A is subject to sub-r. (3) of r. 1 and therefore the court must ascertain how far sub-r (3) would carve out an exception to the enabling provision contained in r. 1A cannot be accepted. Sub-r. (3) of r. 1 and r. 1A operate in two different areas and cater to two different situations. Sub-r. (3) of r. 1 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 is unable to produce him on its own under r. 1A and seeks the assistance of the court under sub-r. (3) of r. 1 to procure the presenee of the witness. [534 C-E]

(ii) Failure to comply with the summons served on a person entails certain consequences in law as provided in r. 10 of O. XVI: the court may issue a proclamation requiring him to attend to give evidence or to produce the document at a time and place named therein, or issue a warrant for his arrest with or without bail, or impose a fine on him, or order his property to be attached and sold. In view of these legal consequences ensuing from the issuance of a summons by the court and failure to comply with the same, the scheme of rs. 1 and 1A of O. XVI and r. 22 of the Rules framed by the High
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Court envisaged the filing of a List only in respect of witnesses whom the parties desire to examine and procure presence with the assistance of the court. The advance filling of list is necessary because summoning of witnesses by court is a time-consuming process. [532 D-H]

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 4379 of 1983.

From the Judgment and order dated the 11th January, 1983 of the Punjab and Haryana High Court at Chandigarh in Election Petition No. 3 of 1982.

S N. Kacker and V Mayakrishan for the Appellant. A. K. Sen and Rathin Das for the Respondent. The Judgment of the Court was delivered by DESAI, J. On May 3, 1983 we made the following order:

"Special leave granted. The appeal is allowed. The order of the High Court refusing the request of the appellant to examine his 54 witnesses who, according to him, were kept present is varied. The election petitioner-appellant herein shall produce all those witnesses and examine all or any of them whomsoever he wants to examine out of them and in respect of whom, the Court did not grant permission to examine. The examination shall be taken up day to day. No Court assistance need be rendered for procuring the presence of all or any of them and the examination shall be completed within a span of 7 days commencing from the date on which the High Court commences examination of witnesses. Subject to the convenience of the learned Judge and the parties recording of evidence shall be taken up on this side of the summer vacation of the High Court. In the circumstances of the case, there shall be no order as to costs. Reasons to follows." Here are the reasons.

Appellant Shri Mange Ram contested the election to Haryana Legislative Assembly from Jind Legislative Assembly constituency. 14 persons offered themselves as candidates for the election. One Shri Brij Mohan, 1st respondent was declared elected. Appellant was defeated. The remaining candidates lost their deposits. Appellant called in question the election of the 1st respondent (the returned candidate) by presenting . an election petition under Sec. 81 of the Representation of People Act 1951 (' 1951 Act' for short). To this petition, the returned candidate as well as all other candidates who lost the election were impleaded as parties. In the election petition, charges of corrupt practice and irregularities and illegalities in the conduct of election were made. The returned candidate contested the petition. After going through the pleadings of the parties, the Court ascertained the points on which parties were at variance and framed appropriate issues. The election petition reached the stage of recording evidence.

It appears an application was filed by the appellant- election petitioner seeking permission to produce and examine witnesses whose names were set out in the application. It was averred in the application that the names of the witnesses whom he desires to produce are already mentioned in the appropriate paragraphs of the election petition and that the petitioner would keep the witnesses present. The learned Judge to whom the election petition was assigned made an order on November 29, 1982 that as and when witnesses are produced, appropriate orders will be passed determining whether the witnesses could or could not be produced. In the meantime, the evidence of election petitioner was being recorded. It appears that again on January 11,1983, petitioner submitted a list of witnesses intimating to the Court that he desires to examine them. This was objected to by the returned candidate. The learned Judge after hearing the parties made an order upholding the objection raised by the returned candidate that the purpose for which the witnesses were offered is not mentioned in the list and therefore, the election petitioner could not be permitted to examine such witnesses. A further observation was made by the Court that the election petitioner could not be allowed to examine more witnesses whose names had not been mentioned in the list of witnesses submitted in accordance with the relevant provisions of the Code of Civil Procedure and the rules framed by the High Court. Accordingly, the learned Judge held that except Bahre son of Sher Singh, no other witness could be examined and that as soon as the evidence of the afore-mentioned witness was recorded, the Court would proceed to record the evidence on behalf of the returned candidate; and thereafter the matter will be set down for hearing oral arguments of the learned counsel of either side. It is this order which was questioned in this appeal by special leave.

An election petition presented under Sec. 81 of the '1951 Act' must satisfy the requirements of Secs. 83 and 84. Chapter III in Part IV of the '1951 Act' lays down the procedure for trial of election petitions. Sec. 87 which is material for the present purpose reads as under:

> 87. Procedure before the High Court-(1) Subject to the provisions of this Act and of any rules made thereunder every election petition shall be tried by the High Court, as nearly as may be in accordance with the procedure applicable under the Code of Civil Procedure, 1908 (5 of 1908) to the trial of suits:
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> Provided that the High Court shall have the discretion to refuse, for reasons to be recorded in writing, 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.
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> (2) The provisions of the Indian Evidence Act, 1872 (1 of 1872), shall, subject to the provisions of this Act be deemed to apply in all respects to the trial of any election petition."

Order XVI Rule 1 which is relied-upon on behalf of the returned candidate 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 summonses to such persons for their attendance in Court.
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> (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.
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> 1A, Production of witnesses without summons- Subject to the provisions of sub-rule (3) of Rule 1, any party to the suit may, without applying for summons under rule 1, bring any witness to give evidence or to produce documents."

Rule 1A was inserted by the Code of Civil Procedure (Amendment) Act, 1956. Both Rule 1 and 1A have been drastically amended by the Amending Act, 1976 which came into force on February 1, 1977. Rules 1 and 1A extracted hereinabove are the amended rules in force from February 1, 1977.

At the hearing of the appeal, a statement was made that the Punjab and Haryana High Court has introduced a proviso to subrule (4) of Rule 1 of order XVI. It reads as under:

> "Provided that no party who has begun to call his witnesses shall be entitled to obtain process to enforce the attendance of any witness against whom process has not previously issued, or to produce any witness not named in a list, which must be filed in Court on or before the date on which the hearing of evidence on his behalf commences and before the actual commencement of the hearing of such evidence without any order of the Court made in writing and stating the reasons therefor."

In exercise of the powers conferred by clauses 27 and 35 of the Letters Patent and Sec. 129 of the Code of Civil Procedure, 1908, the High Court of Punjab and Haryana has framed rules styled as 'Rules of Procedure and Guidance in the matter of trial of Election Petitions under Part VI of the Representation of the People Act, 1951' (High Court Rules for short). Rule 22 of the aforementioned rules is relevant. It reads as under:

> "22(1) A party desirous of requiring the attendance of his witnesses at the trial of the petition through the process of the High Court shall, within fifteen days of the settlement of the issues, make an application for the purpose to the Registrar. The said application shall contain the names of the said witnesses and a gist of the facts to be proved by each one of them. A copy of the said application shall, also, be delivered by the party or his Advocate to the Advocate for the opposite party or if the same is not represented by an Advocate, to the said party, at the same time it is made to the Registrar. .. ,"

The neat question of law is: where a party to a proceeding does not wish to have the assistance of the Court for the purpose of procuring the attendance of a witness or witnesses, could he be denied the privilege of examining witnesses kept present by him on the date fixed for recording his evidence, on the sole ground that the names of the witnesses and the gist of evidence have not been set out in the list which may or ought to have been filed in compliance with order XVI Rule 1 of the Code of Civil Procedure ?

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 t 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 attendence of a witness must make an application stating therein the purpose for which the witness is pro posed 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.

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. 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 is a proclamation requiring him to attend to give evidence or to produce the 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 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 t 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 Sec. 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 t 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 1 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 R 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.

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 otherwice 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.

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, 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. The only jurisdiction the Court has to decline to examine the witness is the one set out in proviso to Sec. 87 (1) of '1951 Act', the discretion being confined to refusing to examine witnesses on the ground that the evidence is either frivolous or vexatious or the

evidence is led to delay the proceedings. Save this the Court has no jurisdiction to decline to examine the witness produced by the party and kept present when the evidence of the party is being recorded and is not closed, and the Court has no jurisdiction to refuse to examine the witness who is present in the Court on the short ground that the name of the witness was not mentioned in the list filed under sub-rule (1) of Rule 1 of order XVI. This scheme clearly emerges from the various provisions herein discussed.

If the scheme of the various provisions is as herein discussed, obviously, the order of the learned Judge is wholly unsustainable. He declined to examine the witness by accepting the submission of the returned candidate that the names of the witnesses whom the appellant kept present in the Court were not mentioned in the list. This is the only ground on which the learned Judge declined to permit the appellant to examine his witnesses who were kept present in the Court and this ground is utterly unsustainable. Therefore, the order of the learned Judge had to be quashed and was accordingly quashed and the appeal was allowed.

H.L.C. Appeal allowed.