

(2002) 04 DEL CK 0005
In the Delhi High Court
Case No : C.R. No. 380 of 2001

Unimode Overseas Limited	Vs	APPELLANT
J and K Cargo Movers Pvt. Ltd. and Others		RESPONDENT

Date of Decision : 19-04-2002

Acts Referred:

Citation : (2002) 5 AD 806 : (2002) 97 DLT 946 : (2002) 3 RCR(Civil) 816

Hon'ble Judges : Mahmood Ali Khan, J

Bench : Single Bench

Advocate : Anurag Kumar and Umesh Mishra, for the Appellant; Manbir Singh, for the Respondent

Final Decision : Allowed

Judgement

Mahmood Ali Khan, J.—This civil revision petition u/s 115 of the CPC is filed by the petitioner, who is the plaintiff in the suit, assailing the order of an Additional District Judge dated 26.2.2001 by which he has dismissed the application of the petitioner filed under Order 18 Rule 17A and Order 26 Rule 10A read with Section 151 of the CPC and Section 340 of the Code of Criminal Procedure.

2. Briefly stated the facts are that the petitioner filed a civil suit for recovery of Rs. 4,29,600/- from the respondents 1 & 2 (defendants No. 1 & 2) and one M/s. Zubi Shipping Pvt. Ltd. defendant No. 3 in the suit on the averment that the respondents were acting as clearing and forwarding agent of the petitioner and during the course of the business dealings the petitioner had delivered a consignment of leather garments worth US \$ 24,000 to them for shipment to Humberg in Germany from Nhava Sheva Port at Bombay through M/s. Zubi Shipping Pvt. Ltd. The said consignment was required to be loaded in the vessel V-316, CMBT Concord on 16.5.1996 so as to reach Humberg before 5th June, 1996. Because of the negligence, carelessness and callous acts/omission of the respondents and Zubi Shipping Pvt. Ltd. the said consignment could not reach its destination in time. Consequently, the foreign buyers imposed damages to the tune of US \$ 12,000 for causing delay in the shipment and refused to buy further

goods from the petitioner. The respondents contested the suit. The issues were framed on which the parties adduced evidence. On 18.2.2000 the respondents examined one witness DW.1 Mr. Vinay Kumar Jain. No other witness was examined as a result the remaining evidence of the respondents/defendants was closed on 15.5.2000. The plaintiff filed all the documents which were in its power and possession and on which it intended to rely Along with the plaint and copy thereof was supplied to the defendants but the respondents/defendants did not file any document with the written statement at or before the date of settlement of issues. They filed their documents only on 18.2.2000 on which date their first witness was examined as DW.1 after the evidence of plaintiff was over. They did not take any permission of the court for filing these documents at the belated stage. On 20.1.2001 Mr. Sandeep Gupta, Managing Director of the petitioner company visited the office of the counsel for discussion. During the discussion the counsel asked Mr. Gupta to comment upon the letter dated 2.5.1996 Ex. DW.1/2 alleged to have been written by an authorised signatory of the plaintiff company. Mr. Gupta was shocked to see the letter because it was never issued by the plaintiff company or by any of its so called authorised signatories. The matter had always been dealt with the respondents by Mr. Gupta personally. No mention of this letter was made in the written statement. The letter was a forged and fabricated document. The defendants committed forgery and had committed offences punishable u/s 465, 467, 468, 469 & 471 IPC. The petitioner filed an application before the trial court for recalling of the witness of the defendants for further cross-examination and to lead evidence in rebuttal about the aforesaid letter Ex. DW.1/2 which has been dismissed by the learned Additional District Judge vide his order impugned in this petition. The petitioner is aggrieved and has filed the present petition.

3. The argument of the learned counsel for the petitioner is that the letter dated 2.5.1996 Ex. DW.1/2 was not filed by the defendants with the written statement on or before the date of settlement of the issues. It was filed during the examination of DW.1 Mr. Vinay Kumar Jain and was marked Exhibit. No application was presented for permission to file this document at a belated stage under Order 13 Rule 1 & 2 CPC nor was any reason recorded by the learned trial court Judge for allowing the documentary evidence Ex. DW.1/2 being produced at that stage. It is submitted that the document is forged and fabricated and the petitioner deserves to get an opportunity to cross-examine the witness of the defendants and produce evidence in rebuttal. It was also prayed that a reference should also be made to the CFSL for scientific examination of the letter for determining the date and its genuineness.

4. Conversely, the argument of the counsel for the respondents is that the document was produced during the statement of the witness DW.1 and in the presence of the counsel for the petitioner. The counsel for the petitioner did not raise any objection to the filing of the document at that stage. He further argued that the document cannot be sent to the CFSL for examination under the provisions of Order 18 or 26 of the Civil Procedure Court. It was further

submitted that the letter Ex. DW.1/2 is in conformity with the terms and conditions written in the bill of lading which support the case of the defendants. He also argued on merit that the respondents were merely agents and that the vessel for shipment of the consignment was chosen by the petitioner, Therefore any delay caused by the respondent No. 3 would not give right to the petitioner to claim damages from the respondents.

5. It is not disputed by the counsel for the respondents that Ex. DW.1/2, letter was not filed by the respondents with the written statement on or before the date of settlement of issues. It is also not disputed that this document was produced by the respondents during the recording of the statement of Mr. Vinay Kumar Jain, DW.1 which was recorded much after the closure of the evidence of the petitioner/plaintiff. The respondents have not alleged that the document Ex. DW.1/2 was not in their power and possession or that they had mentioned it in the list of documents on which they intended to rely. It is also a fact that no application was submitted for late admission of the letter Ex. DW.1/2 at the stage of the recording of the evidence of the defendant; no Explanation had been given for its not filing with the written statement or on or before the settlement of issues and; further no order has been passed by the court giving reason for allowing the respondents to produce the documents after the settlement of the issues or at the time when it was sought to be tendered and proved during the recording of the evidence of DW.1. It is also not stated that the Managing Director or authorised representative of the petitioner company was present when this document was tendered and was marked exhibit during the statement of the defendant's witness. It is clear that the documents including document Ex. DW.1/2 were filed in flagrant violation of Order 13 Rule 2 CPC. They were tendered in evidence by the respondents and were marked exhibits by the court when the statement of DW.1 was in progress without complying with this Rule.

6. There is no doubt that the court has the discretion to allow a party to produce documentary evidence at a belated stage, after the date of settlement of issues, provided the two essential conditions are satisfied which are mandated by Rule 2 of Order 13 CPC. The first condition is that the party which files the documents, which were in its power and possession, on which it intended to rely, after the settlement of the issues should show good reasons for not filing the documents at the appropriate stage i.e. on or before the settlement of the issues. Second condition is that the court should also give reasons for allowing the production of the documents at a stage later than the date of settlement of issues. In this case neither of these two conditions were satisfied.

7. But at the time of tendering of the document Ex. DW.1/2 by the respondents 1 & 2 the counsel for the petitioner/plaintiff did not raise any objection and allowed it to be tendered in evidence and even marked exhibit. Mere marking of exhibit on a document does not mean that the document has also been proved. But it has to be remembered that the trial procedure adopted in a suit is adversarial in nature. If the parties agree to the tendering of certain document or even oral

evidence as part of their evidence to be considered for deciding an issue or a suit the court could have hardly any objection, unless it is in contravention by any of the statutory provision or is otherwise inadmissible in evidence. In the instant case there is no express consent of the petitioner in allowing the defendants to produce the document Ex. DW.1/2 but it did not raise objection to the filing of the document when it was tendered and was marked exhibit. The petitioner/plaintiff impliedly consented to its late production. But the petitioner/plaintiff cannot be said to have accepted its genuineness. May be the petitioner/plaintiff and the court considered it to be relevant, so admitted to evidence. Still marking of exhibit cannot amount to the proof or genuineness of the document.

8. The document Ex. DW.1/2 has been taken on record and has been tendered in evidence in contravention of the provision of Order 13 Rule 2 CPC but the petitioner has not challenged that order in this revision petition. The petitioner is aggrieved by an order of the learned trial court on its application filed under Order 18 Rule 17A CPC. Therefore, it is necessary to consider this provision. Rule 17A of Order 18 provides as under:-

"Where a party satisfies the court that, after the exercise of due diligence, any evidence was not within his knowledge or could not be produced by him at the time when that party was leading his evidence, the court may permit that party to produce that evidence at a later stage on such terms as may appear to it to be just:.

This provision gives a discretion to the court on such terms as may appear to it to be just to allow a party to produce evidence, on being satisfied, that the party despite exercise of due diligence could not produce an evidence which was not within its knowledge or could not be produced by it when the evidence of such party was being recorded. The petitioner had filed the application for permission to recall DW.1 for further cross-examination in respect of the document Ex. DW.1/2 and also to produce his own evidence in rebuttal, beside obtaining the report of the CFSL about the genuineness of the document. In my view the learned trial Judge, in the peculiar facts and circumstances of the case, in exercise of its discretion should have allowed the petitioner to produce additional evidence which it wanted to produce in rebuttal to the documentary evidence which was produced and tendered by the respondents after the petitioner's evidence was closed and on which the respondent had not placed any reliance. The object of Order 13 Rule 2 CPC is to prevent fabrication and forgery of a document. That is the precise reason why the provision of Order 13 Rule 2 CPC is stringent and debars a court from receiving an evidence at a later stage unless the two conditions as mentioned above were satisfied. The discretion vested in the courts by Rule 2 is to be exercised judiciously and not liberally. The petitioner could not have produced evidence to rebut the evidence of the respondents Ex. DW.1/2 since it was neither filed on or before the date of settlement of the issues nor was it relied upon. One more reason why the restriction in acceptance of the documents produced at later stage is stringent is to ensure that the opponent is

not taken by surprise. In this case if the document was allowed to be tendered and was admitted in evidence by the Court it will be travesty of justice if the petitioner was not given an opportunity to produce evidence in rebuttal of that document at least when a request for it was made. For availing of this opportunity, not granted earlier by the court, the petitioner/plaintiff had submitted the application. Still the court did not consider the application in the light of the provisions of Rule 17A of Order 18 CPC. Such an application could have been allowed easily in the peculiar facts of the case.

9. The petitioner had alleged that it could not effectively cross examine DW.1 during the statement of whom the letter Ex. DW.1/2 was tendered and was marked exhibit, Therefore, recalling of the DW.1 for further cross-examination by the petitioner in respect of the letter seems justified. As regards the question whether the letter should be sent to CFSL for determining its genuineness or making complaint to the court of a Magistrate for prosecution of the respondents for commission of certain offences in respect of alleged forgery and fabrication of letter Ex. DW.1/2, it is the trial court which after considering the evidence and material on record was required to take a decision in accordance with law on the application of the petitioner or on its own.

10. But the fact remains that the learned trial Judge committed clear error of jurisdiction, illegality and material irregularity in exercise of its jurisdiction when he dismissed the application of the petitioner. No prejudice is going to be caused to the respondents because it was they who had produced the evidence at such a late stage and it could not have been in the knowledge of the petitioner to enable him to produce evidence or to effectively cross examine DW.1 when all of a sudden the document was tendered and was marked exhibit.

11. For the reason stated above the petition succeeds. The impugned order of the learned Additional District Judge is set aside. The petitioner is permitted to further cross-examination DW.1 Mr. Vinay Kumar Jain in respect of the letter Ex. DW.1/2 and further that the petitioner/plaintiff is allowed to produce its evidence in rebuttal to the document Ex. DW.1/2. But it is clarified that the petitioner/plaintiff will be given only one opportunity to cross-examination DW.1 and one opportunity for producing his evidence in rebuttal as aforesaid. The parties shall appear before the trial court on 15.5.2002. Trial court record be sent back.