

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

%

Date of decision: 9th May, 2016

+

RFA No.835/2015 & CM No.29736/2015 (for condonation of 1066 days delay in filing the appeal).

DARGAH PAANCH PEER

..... Appellant

Through: Mr. M. Mohsin Israili, Adv.

Versus

UNION OF INDIA & ORS

..... Respondents

Through: Mr. Chiranjiv Kumar, Adv. for R-1,2&6.

Mr. Rajiv Bansal with Ms. Niharika Ahluwalia and Ms. Arpita, Adv. for DDA.

Mr. Roshan Lal Goel, Adv. for R-4.

Ms. Jagrati Singh, Adv. for R-5.

Mr. Peeyoosh Kalra, ASC with Ms. Sona Babbar and Ms. Mahua Kalra, Adv. for R-7 to 9.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This first appeal under Section 96 of the Code of Civil Procedure (CPC), 1908 impugns the orders dated 7th August, 2012 and 17th December, 2012 of the Court of Additional District Judge (ADJ), Central-07, Tis Hazari Courts, Delhi of dismissal of Civil Suit No.595/2004 filed by the appellant for non-prosecution and of dismissal of the application under Order IX Rule 9 of the Code of Civil Procedure, 1968 (CPC) filed by the appellant/plaintiff

for restoration of the suit, respectively.

2. The appeal was accompanied with applications for condonation of 1066 days delay in filing and of 50 days delay in re-filing the appeal.

3. Vide order dated 8th December, 2015, the delay of 50 days in re-filing the appeal was condoned and notice of the application for condonation of 1066 days delay in filing the appeal was ordered to be issued to the (i) respondents no.1&2 Union of India (UOI), (ii) respondent no.3 Delhi Development Authority (DDA), (iii) respondent no.4 South Delhi Municipal Corporation (SDMC), (iv) respondent no.5 Civil Services Officer Institute (CSOI), (v) respondent no.6 Central Public Works Department (CPWD), (vi) respondent no.7 Commissioner of Delhi Police, (vii) respondent no.8 Station House Officer (SHO), Police Station (PS) Chanakyapuri, New Delhi and (viii) respondent no.9 Government of National Capital Territory of Delhi (GNCTD).

4. The counsels for all the respondents appear.

5. Trial Court record comprising of four voluminous volumes has also been received.

6. Being of the view that considering the nature of the impugned orders, viz of dismissal of the suit for non prosecution and dismissal of application for restoration of the suit, in the event of appeal being allowed, the suit will have to be remanded, the appeal, with the consent of counsels, is immediately taken up for hearing.

7. The counsels for the appellant and the counsel for the respondent no.5 CSOI have been heard. The contentions of the counsels for all the other respondents are the same as the contentions of the counsel for the respondent no.5 CSOI.

8. The Trial Court record has also been perused to the extent required.

9. I may at this stage record that the appellant, in the prayer paragraph in the memorandum of appeal, has sought setting aside of the orders dated 7th August, 2012 and 17th December, 2012, besides in Suit No.595/2004, also in Suit No.379/2001. On enquiry, the counsel for the respondent no.5 CSOI states that Suit No.379/2001 is the earlier number of Suit No.595/2004 and is not a separate suit. The counsel for the appellant has no idea in this respect.

10. I may further record that the order dated 7th August, 2012 also directs that the copy thereof be placed in Suit No.134/2008. On enquiry as to what is Suit No.134/2008, the counsels state that Suit No.595/2004 and Suit No.134/2008 were being taken up together by the learned ADJ and the copies of the orders in Suit No.595/2004 were placed on the file of Suit No.134/2008. On enquiry as to the fate of the Suit No.134/2008, it is informed that the said suit also stands dismissed in terms of the order dated 7th August, 2012. However on further enquiry whether there is any appeal against the dismissal of Suit No.134/2008, it is informed that there is none.

11. The statement of the counsel for the respondent no.5 CSOI that Suit No.379/2001 is the earlier number of Suit No.595/2004 does not appear to be correct as the Trial Court record requisitioned shows the Suit No.595/2004 to have been instituted in the year 2004 only.

12. At this stage the counsel for the appellant/applicant states that Suit No.379/2001 is the earlier number of Suit No.134/2008.

13. The appellant, if desirous of impugning the order in Suit No.134/2008 (old no.379/2001) ought to have preferred a separate appeal with respect thereto. The valuation of this appeal also, is in terms of the valuation of Suit

No.595/2004 only and not as per the valuation of Suit No.379/2001 later numbered as Suit No.134/2008 also.

14. Thus, this appeal is treated as arising out of Suit No.595/2004 only.

15. I have next enquired from the counsel for the appellant as to how this appeal under Section 96 of the CPC and which is filed as a Regular First Appeal (RFA), is maintainable against an order of dismissal of an application under Order IX Rule 9 of the CPC, in as much as under Order 43 Rule 1 (c), an appeal against order filed as a First Appeal against Order (FAO) lies.

16. The counsel for the appellant states that the appellant had in fact earlier filed FAO No.381/2013 and has invited attention to the order dated 17th February, 2014 therein. By the said order, upon the Hon'ble Judge enquiring from the counsel for the appellant as to how an application under Order IX Rule 9 of the CPC which lies only against an order of dismissal of a suit in default of appearance was maintainable against an order of dismissal of suit for non-prosecution, the counsel for the appellant withdrew FAO No.381/2013 with liberty to file a RFA under Section 96 of the CPC.

17. Against the impugned order dated 17th December, 2012 of dismissal of an application under Order IX Rule 9 CPC, only an FAO will lie and not a

RFA, which lies only against a decree. It was for the appellant, to while arguing FAO No.381/2013, convince this Court in that respect and the appellant having withdrawn FAO No.381/2013, the challenge in this RFA is to be confined only to the order dated 7th August, 2012.

18. The order dated 7th August, 2012 dismisses the suit for non-prosecution recording (i) that the appellant/plaintiff had not filed affidavit by way of evidence despite having been given endless opportunities; (ii) that the appellant/plaintiff had also not paid the cost of Rs.10,000/- imposed by this Court vide order dated 21st March, 2012 in the Transfer Petition arising from the suit and also the cost of Rs.10,000/- imposed by the Trial Court on 22nd March, 2012; (iii) that the appellant/plaintiff had instead moved an application for waiver of costs along with order dated 23rd July, 2012 of the Supreme Court in SLP (C) No.20071/2012; (iv) vide order dated 23rd July, 2012 Supreme Court had granted liberty to the appellant/plaintiff to move an appropriate application for waiver of the costs before the High Court as well as the Trial Court; (v) that the only ground for waiver of the costs was that the appellant/plaintiff was a poor person and a religious institution – however the said plea was not taken in writing in the application and was only orally urged; (vi) that the suit was instituted in the year 2004; (vii) that

on 9th October, 2007, issues were framed in the suit and despite endless opportunities thereafter till 7th August, 2012, the appellant/plaintiff had not left any stone unturned including change of counsels to avoid filing affidavit by way of evidence and to delay the matter; (viii) that the counsel who was appearing on 7th August, 2012 had been appearing since 13th October, 2011 but still had not taken steps to lead evidence or to pay the costs; (ix) that the High Court also in the Transfer Petition (C) No.24/2012 had commented on the abuse of process of the Court and wastage of precious time of the Court by the appellant/plaintiff; (x) that though the counsel for the appellant/plaintiff on 22nd March, 2012 had undertaken to the Court to co-operate in expediting the suit proceedings and in the light whereof a last opportunity was given to the appellant/plaintiff to lead evidence subject to costs but neither had affidavit been filed nor was cost paid; (xi) that the appellant/plaintiff had thus not made out any case for waiver of the costs; and, (xii) that if the intention of the appellant/plaintiff was *bona fide*, the appellant/plaintiff at least on 7th August, 2012 would have brought the affidavit by way of evidence but which was also not done.

19. The star argument of the counsel for the appellant/plaintiff is that the affidavit by way of evidence stood filed on 13th December, 2007 and which

is on record and thus the dismissal for non-prosecution is bad.

20. A perusal of the Trial Court order sheet shows that after framing the issues on 9th October, 2007, the suit was listed for the appellant/plaintiff's evidence on 14th December, 2007 with direction for filing of affidavit by way of examination-in-chief within 15 days of 9th October, 2007 with advance copy to the counsel for the respondents. On 14th December, 2007, the learned ADJ was on leave and the order sheet of that date records the presence of the mother of Shri Abdul Malik who is pursuing the present proceedings on behalf of appellant/plaintiff and the presence of the counsels for the respondents/defendants and adjourned the suit for appropriate orders to 2nd January, 2008. The said order does not record any affidavit by way of evidence having been filed. The order of 2nd January, 2008 records that the affidavit of evidence had not been filed and gave last and final opportunity to the appellant/plaintiff to file affidavit within 30 days with advance copy to the counsel for the respondents/defendants and adjourned the suit to 13th March, 2008 for appellant/plaintiff's evidence.

21. No affidavit was filed and on 13th March, 2008 the suit was dismissed in default but upon application for restoration being filed on the same date, notice thereof was ordered to be issued.

22. On the next date i.e. 3rd April, 2008 the suit was restored to its original position.

23. The following orders concerned applications for interim order and for amendment of the plaint and which was allowed.

24. Vide order dated 14th January, 2009 the suit was again listed for evidence of the appellant/plaintiff for 8th April, 2009 and affidavit by way of evidence was ordered to be filed within 60 days with advance copy to the counsel for the respondents/defendants. Admittedly no affidavits were filed. The said direction was reiterated in order dated 9th April, 2009 and which also remained uncomplied.

25. The following orders are again with respect to applications filed in the suit.

26. Vide order dated 8th July, 2010, again directions were issued for filing of affidavit by way of evidence by the appellant/plaintiff and the matter posted for appellant/plaintiff's evidence to 9th September, 2010. On 9th September, 2010 neither any witness of the appellant/plaintiff was present nor any affidavits had been filed and adjournment was sought.

27. Again, applications for interim orders were filed and further orders are on the said applications.

28. The order dated 14th December, 2011 records that the appellant/plaintiff had not filed affidavits by way of evidence inspite of repeated opportunities and had instead been making applications one after another; in these circumstances, the appellant/plaintiff was directed to file the affidavits of evidence within eight weeks with advance copy to the counsel for the respondents/defendants and the suit was posted to 22nd March, 2012 for entire evidence of the appellant/plaintiff and it was made clear that no further adjournment shall be granted.

29. On the next date i.e. 22nd March, 2012, the counsel for the respondents/defendants complained that no advance copies of the affidavits by way of evidence had been supplied. Before the Court also, the affidavits were not filed. No witness of the appellant/plaintiff was also present. Still, yet another opportunity was granted to the appellant/plaintiff subject to payment of costs.

30. On the next dates i.e. 12th July, 2012 and 6th August, 2012, though the position was the same but adverse orders were not passed owing to the

Advocates abstaining from work.

31. It was in these circumstances that the impugned order dated 7th August, 2012 dismissing the suit for non-prosecution was passed.

32. Though the Court Master, on the trial court record has not been able to find the affidavit stated to have been filed by the appellant/plaintiff on 13th December, 2007 but the counsel for the appellant/plaintiff draws attention to an affidavit of Shri Abdul Malik of the appellant/plaintiff at pages 89 to 100 of the appeal paper book. The said affidavit is verified on 13th December, 2007 and attested on 14th December, 2007.

33. However, as aforesaid, in none of the subsequent orders, there is any reference thereto.

34. Without the appellant/plaintiff having sought to use the affidavit, stated to have been filed on 13th December, 2007, as an affidavit in evidence by way of examination-in-chief and having sought to examine Shri Abdul Malik as a witness thereon and having offered him for cross examination even on the said affidavit, and which admittedly was not done, the filing even if any of the said affidavit, on 13th December, 2007, would not at this stage come to the rescue of the appellant/plaintiff to contend that its suit was

wrongly dismissed for non-prosecution for not leading evidence when the affidavit by way of examination-in-chief was on record. It was for the appellant/plaintiff to have tendered the said affidavit in evidence and which was never done.

35. Moreover, the affidavit if any filed on 13th December, 2007 is of no avail inasmuch as thereafter, as aforesaid, the appellant/plaintiff applied for amendment of the plaint and the trial Court record contains an amended plaint verified on 15th May, 2008.

36. I am satisfied on perusal of the trial Court record that impugned order dated 7th August, 2012 dismissing the suit for non-prosecution does not suffer from any infirmity and does not require any interference. The appellant/plaintiff is found to have been given sufficient number of opportunities to lead its evidence. The suit was dismissed for non-prosecution only when appellant/plaintiff utterly failed to avail thereof. Without the appellant/plaintiff making out a case of its suit having been dismissed for non-prosecution, hastily or without giving it reasonable opportunity to prosecute the same and without the appellant/plaintiff satisfying the court that it had reasonable explanation for being not able to prosecute the suit, this court would not, as a largesse, grant another

opportunity. I may in this regard notice the grievance often heard of the Judges of District Judiciary that the High Court and the Supreme Court though caution them against granting repeated adjournments but when approached against their orders refusing adjournments and passing appropriate orders, without even recording that sufficient opportunity had not been given, grant another opportunity and remand the case.

37. However, to satisfy my conscience I have perused the plaint on the Trial Court record. The suit has been filed by the appellant/plaintiff Dargah Paanch Peer through Shri Abdul Malik, a *Khadim* and *Mujawar*, for recovery of possession of land measuring 3 *bigha* 16 *biswas* of the Revenue Estate of Village Pijanji near Vinay Marg, Petrol Pump, Chanakya Puri, New Delhi and on which the respondent no.5 CSOI has constructed its building upon allotment of land made by the Government of India.

38. I have enquired from the counsel for the appellant/plaintiff whether Shri Abdul Malik who is pursuing the said suit is authorised by the Delhi Waqf Board with respect to Dargah Paanch Peer on whose behalf this litigation is being pursued. The counsel for the appellant/plaintiff states that the Delhi Waqf Board has got nothing to do with the said Dargah. However, on enquiry whether not the property of Dargah is vested in *Allah* and

whether not it constitutes a Waqf, the counsel for the appellant/plaintiff agrees that it is so and it is the Waqf to the said extent. If the said Dargah is a Waqf, then the same would be governed by the Waqf Act, 1995 and Shri Abdul Malik cannot, without any authorisation, appropriate to himself the rights to act on behalf of Dargah. Delhi Waqf Board is informed to have not made any claim with respect to the land possession whereof is sought to be recovered by Shri Abdul Malik in the name of Dargah Paanch Peer.

39. I am therefore satisfied that even on merits, no injustice has been caused to the appellant/plaintiff. Rather, the Trial Court record has copies of orders including of this Court in proceedings arising out of the suit, of the appellant/plaintiff being only interested in keeping the suit alive and not pursuing the same. Such a suit has been rightly dismissed for non prosecution after eight years of its institution and after five years of framing of issues and during which time the appellant/plaintiff failed to lead evidence.

40. In the aforesaid scenario, need is not felt to go into the aspect of long delay of 1066 days in filing this appeal also and which is yet another indication of the casual manner in which this proceeding is being pursued.

41. There is thus no merit in the appeal.

Dismissed.

I refrain from imposing costs on the appellant/plaintiff.

RAJIV SAHAI ENDLAW, J

MAY 09, 2016

‘pp’ ..

(corrected and released on 23rd May, 2016)