

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

% *Judgment Reserved On : September 15, 2016*
Judgment Delivered On : September 21, 2016

+ **FAO (OS) 66/2016**

TENDRIL FINANCIAL SERVICES PVT.
LTD. & ORS.

.....Appellants

Represented by: Mr.Ashwini Kumar Mata,
Sr.Advocate instructed by
Mr.Rahul Srivastava, Advocate

versus

NAMEDI LEASING & FINANCE
LTD. & ORS.

.....Respondents

Represented by: Mr.Harish Malhotra, Sr.Advocate
instructed by Mr.Simran Mehta,
Mr.Anil Upadhyay and Mr.Tarun
Sengla, Advocates for R-1, R-2, R-
5, R-6 and R-7
Mr.Hemant Malhotra, Advocate
with Mr.Pankaj Malhotra,
Advocate for R-3 and R-4

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

1. The appellants : six in number, instituted CS(OS) No.2281/2006 impleading the nine respondents as defendants Pleading that the decree for declaration and perpetual injunction arose out of malicious acts of defendant No.7 : Morgan Securities and Credits Pvt.Ltd. in selling shares

of defendant No.8 : M/s Blue Coast Hotels & Resorts Ltd. held by the plaintiffs and pledged with defendant No.7 as security for inter-corporate deposits made by defendant No.7 with defendant No.9 : M/s Morepen Laboratories Ltd. Defendants No. 5 and 6 were stated to be the entities to whom the shares were sold initially and defendants No.1 to 4 were the entities to whom defendants No.5 and 6 sold the shares.

2. The suit as also IA No.13721/2006 (under Order 39 Rule 1 & 2 CPC), IA No.14158/2006 (under Order 39 Rule 4 CPC), CCP(O) No.57/2007, IA No.291/2007 (under Order 39 Rule 4 CPC), IA No.1922/2007 (under Order 12 Rule 12 and 14 CPC), IA No.1389/2008 (under Section 47 CPC) and IA No.7312/2013 (under Order 1 Rule 10 CPC) have been dismissed by the learned Single Judge vide impugned order dated July 12, 2016, holding that the suit was liable to be dismissed for non-prosecution and as a result of the suit being dismissed the pending applications were also liable to be dismissed.

3. Irrespective of the suit being dismissed for non-prosecution and interim applications becoming infructuous, CCP(O) No.57/2007 could not have been dismissed as a consequence of the suit being dismissed for non-prosecution and to this extent the impugned order suffers from a patent legal infirmity qua CCP(O) No.57/2007 being dismissed.

4. As regards the suit being dismissed for non-prosecution the learned Single Judge has noted that issues were settled way back on May 02, 2012 and plaintiff were directed to file affidavit by way of evidence of its witnesses within eight weeks and for over four years the plaintiffs had taken no steps to examine any witness. Therefore, the consequences of the suit being dismissed for non-prosecution has ensued.

5. The impugned order simply notes that the plaintiffs gave justification for not leading evidence inasmuch as IA No.7312/2013 under Order 1 Rule 10 of the Code of Civil Procedure to transpose defendants No.8 and 9 as plaintiffs was pending; and has found the justification to be a ruse.

6. The impugned order has not traced the journey of the suit and the interim applications which in our opinion was relevant and the journey ought to have been undertaken and thus we undertake the journey.

7. After settling the issues on May 03, 2012 the learned Single Judge listed the suit before the learned Joint Registrar for August 06, 2012 directing that in the meanwhile within eight weeks the plaintiffs should file affidavit by way of evidence of its witnesses. The then pending applications, being IA No.13721/2006, IA No.14158/2006, IA No.291/2007, IA No.1922/2007, IA No.1389/2008 and CCP(O) No.57/2007 were directed to be listed before Court for hearing on September 20, 2012.

8. Thus, the first thing to be noted and recorded would be two sets of order being passed in the order-sheet. The first set comprising order passed by the learned Joint Registrar and second set comprising the orders passed by the learned Single Judge.

9. On August 06, 2012 the learned Joint Registrar noted that whereas a list of witnesses had been filed by the plaintiffs the affidavit of the witnesses was not filed. Requiring the affidavit by way of evidence of the witnesses to be filed the suit was adjourned to February 08, 2012.

10. Before said date, IA No.13721/2006, IA No.14158/2006, IA No.291/2007, IA No.1922/2007, IA No.1389/2008 and CCP(O) No.57/2007 which were directed to be listed on September 20, 2012 as per order dated May 03, 2012 came to be listed before the learned Single Judge who simply adjourned the same to March 26, 2013 and as a result before said date was reached the suit came to be listed before the learned Joint Registrar on February 08, 2012, on which date IA No.2076/2013 filed by the plaintiffs praying for further time to lead evidence was disposed of directing suit to be listed on May 03, 2013.

11. The applications which were directed to be listed on March 26, 2013 were actually listed before the learned Single Judge on April 26, 2013 who, overlooking that only the applications were listed before the Court and not the suit passed a composite order listing the suit and the applications on April 26, 2013, on which date the learned Single Judge noted that the suit was listed before the learned Joint Registrar May 03, 2013 and only the pending applications were listed before the Court; directed that the applications would be listed for consideration on August 22, 2013.

12. Thereafter, IA No.7312/2013 was filed by the plaintiffs under Order 1 Rule 10 CPC praying that defendants No.8 and 9 be transposed as plaintiffs. As per the Original Side Rules power has been delegated to the Joint Registrars attached to the Hon'ble Judges on the Original Side of this Court to decide, amongst others, applications filed under Order 1 Rule 10 CPC and thus said application along with the suit was listed before the learned Joint Registrar on May 03, 2013 and because the Presiding Officer was on leave the Reader adjourned the same to May

17, 2013 and therefrom to August 01, 2013 because even on May 17, 2013 the Presiding Officer was on leave.

13. IA No.10135/2013 was filed in between praying that IA No.291/2007 be heard early. Said application was dismissed on July 02, 2013.

14. On August 01, 2013 the learned Joint Registrar noted that the suit record had not been received and thus the suit was adjourned for August 08, 2013, overlooking that the learned Joint Registrar was seized of IA No.7312/2013 as well and on May 03, 2013 was listed before the learned Joint Registrar and on account of he being on leave the Reader of the Court of the learned Joint Registrar had adjourned it for May 17, 2013. No order was passed as regards IA No.7312/2013.

15. On August 08, 2013 the learned Joint Registrar recorded that he had heard arguments in IA No.7312/2013. Directing plaintiffs to file affidavit by way of evidence, learned Joint Registrar directed that for remaining arguments the matter be posted for September 04, 2013. The order reads as under:-

“Learned counsel for the defendant Nos. 1 to 4 and learned counsel for the defendant No.7 submit that they have objection to the notice being issued. Parties have already have been heard in part. On the request of learned counsel for the plaintiff the matter is adjourned for remaining consideration on the aspect of notice/transposition.

Plaintiff is directed to file the affidavit in evidence. No further opportunity shall be granted.

Matter to come up on 4th September, 2013 for remaining arguments.”

16. Now, the order, though directs the plaintiffs to file the affidavits by way of evidence, did not list the suit for witnesses to be present for cross-examination. The order simply records that for further arguments IA No.7312/2013 would be listed on September 04, 2013.

17. The pending application other than IA No.7312/2013 which were directed to be listed before the Court on August 22, 2013 were listed before the Court and we find that the order passed re-notifies the suit and IA No.7312/2013 for September 09, 2013. Regretfully, the Court Master attached to the Court of the learned Single Judge who passed the order dated August 22, 2013 did not bring to the notice of the learned Single Judge that neither the suit nor IA No.7312/2013 were listed in Court and that IA No.13721/2006, IA No.14158/2006, IA No.291/2007, IA No.1922/2007, IA No.1389/2008 and CCP(O) No.57/2007 which were directed to be listed before the Court as per order dated April 26, 2013 were to be heard.

18. Before September 09, 2013, as directed by the learned Joint Registrar, on August 08, 2013, IA No.7312/2013 was listed before the learned Joint Registrar on September 04, 2013, who passed the order as under:-

“Order dated 8.8.2013 perused.

None is present from the side of the plaintiff side nor any affidavit filed despite last opportunity.

Since there is no steps taken for plaintiff's evidence, the opportunity of plaintiff to lead evidence is closed.

List the matter before the Hon'ble Court on 9.9.2013.”

19. On September 09, 2013 the learned Single Judge re-notified all pending applications recording that counsel for the plaintiff had filed an application seeking recall of the order dated September 04, 2013 passed by the learned Joint Registrar closing plaintiffs' right to lead evidence. The plaintiffs had filed IA No.14677/2013 under Section 151 CPC which was listed before the learned Joint Registrar on September 13, 2013 who adjourned the same to October 11, 2013 and on said date after hearing arguments the learned Joint Registrar passed an order that he would be passing the necessary order in IA No.14677/2013 on October 22, 2013, on which date the learned Joint Registrar did not hold the Court and thus the Reader adjourned the matter to October 24, 2013, on which date once again the learned Joint Registrar did not hold Court and thus the Reader simply re-notified to November 15, 2013.

20. The order-sheets of the suit file shows that the suit came to be listed in Court on October 25, 2013 and was simply re-notified for December 19, 2013. On November 15, 2013 the learned Joint Registrar adjourned the suit to December 12, 2013 overlooking that it was not the suit but IA No.14677/2013 which had to be decided and in respect of which as recorded in the order dated October 11, 2013 the learned Joint Registrar had heard arguments and had listed for decision i.e. order to be pronounced in said IA on October 22, 2013.

21. On December 12, 2013 rather than pronounce decision only in IA No.14677/2013 the learned Joint Registrar passed an order dismissing IA No.7312/2013 in which part arguments were heard by the learned Joint Registrar on August 04, 2013 and thereafter no further arguments were heard. Additionally, the learned Joint Registrar passed an order in IA

No.14677/2013 recalling his order dated September 04, 2013 and granting another opportunity to the plaintiffs to lead evidence; listing the suit for recording evidence from 8th to 11th July, 2014.

22. In the interregnum the pending applications which had to be heard by the learned Single Judge came to be listed before the learned Single Judge on December 19, 2013 who adjourned the same, but recording only as if the suit was being adjourned to February 06, 2014, on which date the learned Single Judge recorded an order in the suit to the effect that the plaintiffs had preferred a Chamber Appeal against the order dated December 12, 2013 dismissing IA No.7312/2013 and thus the proceedings were held over to March 24, 2014, on which date proceedings were held over to August 20, 2014.

23. In between, the date July 08, 2014 came into being. Once again plaintiffs did not file affidavit by way of evidence and the justification was that the Chamber Appeal filed against the order passed by the learned Joint Registrar on December 12, 2013 dismissing applications seeking transposition of defendants No.8 and 9 as plaintiffs had to be heard and depending upon its fate, for if defendants No.8 and 9 were transposed as plaintiffs the evidence to be led accordingly. Thus, cancelling the dates 9th and 10th July, 2014 the learned Joint Registrar directed the suit to be listed before the Court on August 20, 2014; the date given by the learned Single Judge on March 24, 2014.

24. On August 20, 2014, OA No.142/2014 along with two applications seeking delay to be condoned in filing the Chamber Appeal and re-filing the same against the order dated December 12, 2013 passed by the learned Joint Registrar were listed before the learned Single Judge who issued

notice in the Chamber Appeal and the accompanying applications returnable for December 15, 2014, on which date delay in filing and re-filing the Chamber Appeal was condoned. The Chamber Appeal was allowed noting that IA No.7312/2013 was decided without hearing arguments and thus IA No.7312/2013 was restored for adjudication afresh. The said application was directed to be listed before the learned Joint Registrar for hearing on February 27, 2015 and pending applications were directed to be listed before the Court on May 14, 2015. No order was passed regarding listing of the suit for purposes of recording evidence.

25. Thereafter, sometimes the pending applications were listed before Court and sometimes IA No.7312/2013 was listed before the learned Joint Registrar and suffice it to highlight that the dates intertwined themselves if somebody did not pen the order correctly for that IA No.7312/2013 was listed on May 01, 2015 and then on July 23, 2015 and further on to September 10, 2015 and then onward to December 17, 2015; further on to April 18, 2016 and then on to July 07, 2016 – further on to August 29, 2016 and in between the pending applications before the Court from May 14, 2015 to May 22, 2015 to November 02, 2015, February 15, 2016, July 12, 2016, when as noted hereinabove, the learned Single Judge set the fuse aflame.

26. It is apparent that an overloaded system has generated enough heat and the slightest friction has set the fuse aflame.

27. The journey of the suit and the interim applications filed would evince that with docket explosion on the Original Side of this Court, the overworked court staff did not bring to the notice of the learned Single Judge that different dates, some before the learned Joint Registrar and

some before the Court with clear demarcation of what would be listed before the Court and what before the learned Joint Registrar had taken place on April 26, 2013 and the result was orders being recorded as if in the suit when the suit was not listed before the Court and no order being recorded in the interim applications which were to be listed before the Court. The order simply records re-notified for a particular date and thus apparently no harm was caused, but lurking within the manner in which the listing of the interim applications and the suit was being recorded was the fear of a procedural error being committed.

28. Now, there is merit in the submissions of the plaintiffs that as per the belief of the plaintiffs depending upon the decision in IA No.7312/2013 would be the course to be chartered concerning the sweep of the affirmative evidence to be led. Since said interim application was pending and had to be decided by the learned Joint Registrar on August 29, 2016, the learned Single Judge ought not to have dismissed the suit for non-prosecution on July 12, 2016.

29. If only the journey which we have undertaken with reference to the order-sheets was chartered, it would have dawned that though there was a delay in leading affirmative evidence by the plaintiffs there was a delay in deciding IA No.7312/2013, which on an earlier occasion was dismissed without hearing the plaintiffs and on being restored was pending consideration, and thus there was a justification for the plaintiffs not to lead affirmative evidence.

30. We therefore dispose of the appeal setting aside the impugned order dated July 12, 2016. The suit and all pending applications are restored with a direction that IA No.7312/2013 shall be placed before the learned Joint

Registrar on September 27, 2016 who would hear arguments in the application on said date and complete the arguments if unconcluded on the next date and decide the application latest by October 04, 2016. Other applications which were pending and as per the Original Side Rules of this Court have to be heard by the learned Single Judge, being IA No.13721/2006 (under Order 39 Rule 1 & 2 CPC), IA No.14158/2006 (Under Order 39 Rule 4 CPC), CCP(O) No.57/2007, IA No.291/2007 (under Order 39 Rule 4 CPC), IA No.1922/2007 (under Order 11 Rule 12 and 14 CPC), IA No.1389/2008 (under Section 47 CPC) shall be listed before the learned Single Judge for directions on October 17, 2016. The suit would be listed for directions before the learned Joint Registrar on October 04, 2016 who, would notify a date for plaintiffs to lead evidence and if IA No.7312/2013 is allowed by transposing defendants No.8 and 9 as plaintiffs, if dismissed, said defendants would remain as defendants. Meaning thereby, the existing plaintiffs would know by October 04, 2016 the sweep and the span of the affirmative evidence which would require to be led.

31. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

SEPTEMBER 21, 2016

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