

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

% *Date of Decision : February 23, 2016*

+ **FAO(OS) 543/2015**

SHAHNAZ ALI & ANR Appellants
Represented by: Mr.K.B.Upadhyay, Advocate

versus

SURESH KUMAR GERA & ANR Respondents
Represented by: Mr.Ravi Gupta, Sr.Advocate
instructed by Mr.Vinay Gupta and
Ms.Bhoomija Verma, Advocate for
R-1

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J. (Oral)

CM No.21042/2015

For the reasons stated in the application the delay of 18 days in filing the appeal is condoned.

The application is disposed of.

FAO (OS) No.543/2015

1. The record of CS(OS) 2457/2009 has left us sad and filled with pain. One could not have imagined that the learned counsel who appeared for the defendants could have fallen so low in the understanding of the procedures of the law, more so when defendant No.2 himself is a lawyer of standing and was defending not only himself but also his daughter-in-law, impleaded as defendant No.3. We would only say that when representation by a counsel

falls to such abyss of depth, that the trial ceases to be adversarial, the Court would have to come to the rescue of the client, but the task is difficult for the reason : Why should the opposite party suffer for the delay. Who recompenses? With regret we note that today, in the very preceding matter, we had to deal with a supine negligence by a learned member of the Bar which caused grave injury to the client and to undo the harm caused to the client we had to recompense the opposite party with cost which was borne from the pocket of the unfortunate client. The only difference in the instant case is that the negligent lawyer was a party himself and so was his daughter-in-law. As regards the two, they were just not bothered about their fate. But unfortunately the appellants are the sufferers because the lawyer concerned engaged to defend their late father went along with his senior colleague and remained equally negligent.

2. Time has come to make learned counsel personally liable for cost if it is found that the negligence by the lawyer is of a kind where, as a figure of speech, one can say that the lawyer has murdered the brief.

3. Impugned order dated August 03, 2015, has dismissed IA No.15435/2015 filed under Order 37 Rule 4(5) of the Code of Civil Procedure, 1908 by the legal heirs of deceased defendant No.1, who died on June 20, 2013 and whose legal heirs were brought on record on September 10, 2014. The application sought leave to defend the suit filed by respondent No.1. The reason for dismissal is that during his lifetime defendant No.1 had withdrawn IA 2091/2010 praying for leave to defend being granted.

4. The reason for our pain and anguish is that the record of the suit and the orders passed therein, some of which are laughable. The orders warrant a cry of anguish to be made for being heard by those who are a part of the

adjudicatory system. The system is collapsing.

5. The first respondent : Suresh Kumar Gera, instituted a suit under Order 37 of the Code of Civil Procedure, 1908, pleading that Syed Faiz Murtaza Ali (defendant No.1) was the owner of property bearing municipal No.A-4, Chirag Enclave New Delhi. S.C. Maheshwari (defendant No.2), was a designated Senior Advocate. Archana Maheshwari (defendant No.3), was the daughter-in-law of defendant No.2, and was a lawyer herself. Amar Chand Goel (defendant No.4) was a family friend of the plaintiff. The plaintiff pleaded that defendants No.2 and No.3 were representing defendant No.1 in litigations concerning his properties. It was pleaded that the plaintiff was interested in purchasing the property at Chirag Enclave and was told that possession thereof was with a tenant. After negotiations, defendant No.1 agreed to sell the property to him for ₹3.25 crores. Plaintiff agreed to purchase the same along with defendant No.4. Terms and conditions of the same were reduced into writing on January 28, 2005, on which date ₹30 lakhs were paid in cash to defendant No.1. Time passed, and defendant No.1 did not sell the property to him and defendant No.4. On October 06, 2005 another agreement to sell was executed recording that the sale price stood enhanced to ₹9 crores, with an undertaking that defendant No.1 would get the property vacated and deliver possession to the plaintiff at the time of sale. A fresh written agreement was executed on October 06, 2005, recording ₹50 lakhs (including ₹30 lakhs paid earlier) being received in cash and ₹2 crores paid by cheque. The amount of ₹2 crores was paid by defendant No.4 because he and the plaintiff were to jointly purchase the property. It was pleaded that defendant No.1 did not settle with the tenant and did not come forward to execute the sale-deed. It was at that stage that

defendants No.2 and No.3 entered the scene and another agreement was drawn up in which defendant No.3 was shown to be the purchaser of 80% share in the property with 20% share that of the plaintiff, by which date the plaintiff had paid ₹1 crore to defendant No.1. Another ₹1 crore was paid by the plaintiff to defendant No.1. Pleading that even this agreement fell foul, suit was filed to recover ₹2 crores paid to defendant No.1 with pre-suit interest calculated @ 18%. The amount claimed was thus ₹3.08 crores. Pendente lite and future interest was claimed.

6. Prima-facie, a meaningful reading of the plaint would reveal, and especially keeping in view the relief prayed for that the suit would lie only against defendant No.1; and defendants No.2, No.3 and No.4 were unnecessarily impleaded as a party. After all, it has to be kept in mind that the suit was filed under Order 37 of the Code of Civil Procedure, 1908 and its foundation was a written document executed by defendants No.1, No.3 and No.4; with acknowledgement of money received by the defendant No.1 from the plaintiff. But we do not expand on this subject because it would be irrelevant to do so qua defendants No.2 to No.4 because in the appeal the combatants are the legal heirs of deceased defendant No.1 and the plaintiff.

7. Who can harm, if God saves you. The saying is proved in the instant case and would be apparent as we note the further facts of the case.

8. The plaint was filed in the filing counter in the Registry of this Court on October 29, 2009, and this is apparent from the endorsement made by the Registry at the rear of the memo of parties. It was returned with objections six times, and with the defects cured piecemeal it was finally filed on December 17, 2009 without any defects. To cure the objections raised by the Registry, the plaintiff changed the plaint and what ultimately reached the

Court was different than the one which was originally filed. The result of the change was the date December 14, 2009 being put on the plaint as the date when the plaint was signed and the pleadings were verified, giving legitimate rise to a belief that the suit was instituted on or after December 14, 2009. The plaintiff filed IA No.675/2010 under Order 37 Rule 3(4) of the Code of Civil Procedure, 1908 for summons for judgment. The same was served.

9. Summons being served upon the defendants in the prescribed form under Order 37 of the Code of Civil Procedure, 1908, defendant No.2 filed IA No.2092/2010, an application under Order 7 Rule 11 of the Code of Civil Procedure, 1908 stating therein that merely because he happened to be the father-in-law of defendant No.3, the suit against him was not maintainable on the existing pleadings. He prayed that the plaint be rejected. He also pleaded that the suit was barred by limitation.

10. Defendant No.2 filed IA No.1830/2010 under Order 37 Rule 3(5) of the Code of Civil Procedure, 1908 (wrongly stating that it was filed under Order 37 Rule 4). The said application was dismissed in default on February 16, 2010.

11. IA No.2091/2010 was filed by defendant No.1 praying for leave to defend to be granted and the caption of the application was that it was filed under Order 37 Rule 5 and not under Order 37 Rule 3(5). Notice of IA No.2091/2010 and IA No.2092/2010 was issued to the plaintiff.

12. The basis of the two applications No.2091/2010 and 2092/2010 was an order passed in FAO (OS) No.110/2010, in which appeal, defendant No.1 had challenged the order dated December 21, 2009, when taking cognizance of the suit summons were directed to be served upon the defendants in terms

of Order 37 Rule 2(2) of the Code of Civil Procedure, 1908. In the appeal it was stated that the plaint was barred by limitation and for which plea the Division Bench noted the facts which we have noted in paragraph 8 above. The Division Bench held that what should be the date of institution of the suit would be decided by the learned Single Judge and the plea of bar of limitation would be considered when applications filed seeking leave to defend would be argued.

13. Rather than argue IA No.2091/2010 and IA No.2092/2010, the learned counsel for the defendants started showing a very curious behaviour. Strange applications were filed and strange oral pleas were made. It all commenced when a counsel engaged at the instance of Sh.S.C.Maheshwari, Senior Advocate, to defend defendant No.1, filed IA No.6535/2010 in which the prayer made was that the previous counsel engaged by defendant No.1 should be discharged. The said application was dismissed as withdrawn on May 17, 2010. On the said date, IA No.6534/2010 filed by defendant No.1 claiming a restraint order against defendants No.2 and 3 was listed before the Court in which notice was issued and accepted by counsel for defendant No.2.

14. A fair amount of confusion was created in the Court as recorded in the order dated July 26, 2010. Whereas Ms.Sandhya Goswami Advocate for defendant No.1 stated that she would like to argue IA No.2091/2010 filed by her on behalf of defendant No.1, Mr.K.B.Upadhyay, an associate counsel in the chamber of defendant No.2 stated that he was instructed by defendant No.1 to withdraw IA No.2091/2010, an act of sheer stupidity, if at all defendant No.1 had instructed Sh.K.B.Upadhyay to withdraw the application filed by him seeking leave to defend, because if the application

was withdrawn, the sequitur would be the suit against defendant No.1 being decreed. Providence saved defendant No.1 because the learned Single Judge noted representation on behalf of defendant No.1 by two counsel, each pulling in the opposite direction, and simply adjourned hearing of IA No.2091/2010 to October 26, 2010, on which date the suit was simply re-notified for January 03, 2010. Ms.Sandhya Goswami filed IA No.17755/2010 praying that vakalatnama issued in her favour by defendant No.1 be discharged. The application was allowed. Sh.K.B.Upadhyay moved IA No.9642/2010 on behalf of defendant No.1 praying that defendant No.1 be permitted to withdraw IA No.2091/2010. IA No.9642/2010 was allowed and IA No.2091/2010 filed by defendant No.1 praying for leave to defend the suit to be granted was dismissed as withdrawn. And we simply wonder at the legal knowledge shown by Sh.K.B.Upadhyay, who survives as the counsel for legal heirs of defendant No.1 and has filed the above captioned appeal.

15. Defendant No.3 filed IA No.14264/2010 as also IA No.14259/2010, the former under Section 5 of the Limitation Act, 1963 and the latter under Order 9 Rule 4 of the Code of Civil Procedure, 1908. The prayer in the latter application was to restore IA No.1830/2010, dismissed in default on February 16, 2010. In said application he pleaded that as a matter of fact IA No.1830/2010 was filed by defendant No.3 and not defendant No.2 and in the caption of the application it was wrongly stated that said application was filed on behalf of defendant No.2. Notice of said applications was issued and accepted by learned counsel for the plaintiff on January 03, 2010.

16. Various applications were filed by the parties, and being not relevant to highlight the same, we simply observe that applications after applications

were filed causing utter confusion. Impleadment of a company was prayed for on the plea that defendants No.2 and No.3 had further entered into some kind of an agreement with said company.

17. Relevant would it be to highlight that the plaintiff filed IA No.9720/2010 to amend the plaint and implead M/s.Tera Real Estates Pvt. Ltd. as defendant No.5, with some consequential amendments prayed for in the plaint; as if the suit was one for specific performance concerning an immovable property. The said application was dismissed as withdrawn on May 18, 2011. But the suit was unnecessarily protracted on account of said application being filed.

18. By August 19, 2011, seven applications remained pending, three of which were IA No.149/2010 filed by defendant No.2 pleading that there were no actionable pleadings against him and thus the suit should be dismissed. IA No.14259/2010 and IA No.14264/2010 filed by defendant No.3. Another application which we need to highlight was IA No.6534/2010 filed by defendant No.1 claiming a restraint order against defendant No.2 and No.3. The hearing of said applications was adjourned. IA No.3091/2011, which had been filed by defendant No.2 to place on record some additional documents was also taken cognizance of and even said application was adjourned for hearing. So utter was the confusion, the order sheet reveals that the learned Joint Registrar, and regrettably even the learned Single Judges before whom the file was placed, remained clueless. Applications which were filed and registered were not being placed before the Court and applications filed subsequently were being disposed of and the ones prior earlier, with an earlier number assigned to the application, were being listed later.

19. Two applications registered as IA No.9659/2010 under Order 1 Rule 10 and the other IA No.9720/2010 filed under Order 6 Rule 17 by the plaintiff were dismissed as withdrawn on May 18, 2011.

20. On August 19, 2011 it transpired that an application registered as IA No.149/2010 which was filed by defendant No.2 was lying in the file, in which application he had stated that except for he being stated to be the father-in-law of defendant No.3, there were no actionable pleadings against him.

21. On July 06, 2012, for reasons which have baffled us, defendant No.2 withdrew IA No.149/2010. IA No.6534/2010 filed by defendant No.1 claiming directions against defendants No.2 and 3 was dismissed as withdrawn. IA No.14259/2010 and IA No.14264/2010 praying for restoration of IA No.1830/2010 were dismissed on merits.

22. IA No.2092/2010 filed by defendant No.2 remained to be considered. Order sheet shows that parties made a request to be referred to mediation. The mediation failed.

23. On March 04, 2013 a very curious order was passed. Noting that IA No.2092/2010 filed by defendant No.2 for rejection of the plaint qua him on two counts : (i) No cause of action being disclosed against him, and (ii) The plaint being barred by limitation, the learned Single Judge wrote that the suit is ripe for framing of issues. Hearing was deferred to April 11, 2013.

24. On said date, IA No.5826/2013 filed by the plaintiff, to amend the plaint and confined relief only against defendants No.1 and No.3 and give up defendants No.2 and No.4 was listed before the Court with permission sought by the plaintiff to delete defendants No.2 and No.4 from the array of parties. Surprisingly, counsel for defendant No.2 : Sh.S.C.Maheshwari,

Senior Advocate, got it recorded in the order dated April 11, 2013 that let the plaint be amended but defendant No.2 be granted liberty to move an application for deletion of his name from the array of parties in the suit, a prayer which once again baffles us, because the instruction given was by a Senior Advocate, who was a party in the suit; and it is evident that either learned senior counsel wanted to put a spanner in the wheel or just did not understand what was happened. Counsel for Sh.S.C.Maheshwari, Senior Advocate pointed out that IA No.2092/2010 filed by him was pending and should be put up for consideration on the next date. So utter was the confusion created in the Court that the learned Single Judge obviously got confused. In the same breath, the order dated April 11, 2013 records that claim against defendant No.2 was given up and plaint would be amended to delete not only defendant No.2 but defendant No.4 as well from the array of parties, but simultaneously records that IA No.2092/2010 filed by defendant No.2 would be taken up for hearing on the next date. The simple thing to have been written was that in view of the plaint being amended, giving up relief against defendants No.2 and No.4 they should be deleted from the array of parties and thus IA No.2092/2010 was infructuous. On said date the suit could have been decreed against defendants No.1 and No.3 because applications seeking leave to defend filed by them were dismissed as withdrawn or for default. Order dated April 11, 2013 reads as under:-

“I.A.No.5826/2013 (by the plaintiff u/O VI Rule -17 r/w Section 151 CPC)

1. The present application has been filed by the plaintiff praying inter alia for permission to amend the prayer clause of the plaint by confining the relief in the present suit against the defendants No.1 and 3 alone.

2. Counsel for the plaintiff submits that the plaintiff has arrayed the defendants No.2 and 4 as parties in the present suit as they are necessary and proper parties in the present proceedings. He however states that no particular relief is directed against the said defendants and therefore, the plaintiff may be granted permission to amend the prayer clause, as prayed for in para 4 of the application.

3. Notice. Counsels for the non-applicants accept notice and state that they have no objection to the prayer made in the present application being allowed. However, counsel for the defendant No.2 states that the defendant No.2 may be permitted to reserve his right to file an application for deletion of his name from the array of defendants.

4. For the reasons stated in the application, the same is allowed and the plaintiff is permitted to amend the prayer clause of the plaint, as prayed for in para 4 of the application. Amended plaint be filed within one week, with an advance copy to the other side.

5. Counsels for the defendants state that as only the prayer clause of the plaint has been permitted to be amended by the plaintiff, they do not wish to file any amended written statements.

6. The application is disposed of.

CS(OS) 2457/2009

1. On the last date of hearing, the parties were directed to remain present. While, the plaintiff and the defendants No.1 and 2 are present, the defendants No.3 and 4 are not present.

2. *Counsel for the defendant No.3 states that his client is confined to bed and unable to attend the Court today. He assures the Court that she shall be present on the next date of hearing.*

3. *List on 11th September, 2013, on which date the plaintiff and the defendants No.1 and 3 shall remain present.*

I.A.No.2092/2010 (by D-2 u/O XXXVII R-4 r/w Section 151 CPC)

1. *Counsel for the plaintiff states that in view of the fact that the relief in the present suit is directed against the defendants No.1 and 3, the present application has been rendered infructuous.*

2. *Counsel for the defendant No.2 states that orders on this application may be deferred till his client files an application under Order I Rule 10 CPC.*

3. *At his request, list on the date fixed.*

4. *In the meantime, an application under Order I Rule 10 CPC may be filed by the defendant No.2, with an advance copy to the other side, who may file a reply thereto, if any, before the next date of hearing."*

25. The onward march took a turn, when defendant No.1 died, and IA No.7595/2014 was filed under Order 22 Rule 9 of the Code of Civil Procedure, 1908 praying that the abatement of the suit against defendant No.1 be set aside. IA No.7929/2014 was filed under Order 22 Rule 4 of the Code of Civil Procedure, 1908 to bring on record legal heirs of deceased defendant No.1. It was accompanied by IA No.7930/2014 praying that delay in filing IA No.7929/2014 be condoned.

26. On September 10, 2014 IA No.7595/2014, IA No.7929/2014 and IA No.7930/2014 were allowed. The mother, widow and daughter of deceased defendant No.1 were impleaded as legal heirs.

27. Counsel for defendant No.2 started pressing IA No.2092/2010, as recorded in the order dated October 19, 2015. On April 27, 2015 the application was disposed of noting that keeping in view the order dated April 11, 2013 defendant No.2 stood deleted from the array of parties. Once again, very curiously the learned Single Judge, after recording that claim against defendants No.2 and No.4 was withdrawn and they were deleted from the array of parties and as regards defendants No.1 and No.3 the applications seeking leave to defend stood either withdrawn or dismissed in default and as a result the suit remained uncontested, yet again listed the suit for arguments on August 03, 2015. Order dated April 27, 2015 reads as under:-

“IA No.2092/2010(by the defendant No.2 u/O XXXVII R 4 CPC)

1. *The present application has been filed by the defendant No.2 for seeking leave to defend the summary suit instituted by the plaintiff.*

2. *On 11.4.2013, an application filed by the plaintiff, under Order VI Rule 17 CPC(IA No.5836/2013) was allowed and he was permitted to amend the prayer clause of the plaint, as prayed for in the said application. On the said date, counsel for the defendant No. 2 had stated that he may be permitted to reserve his right to file an application for seeking deletion of his name from the array of defendants.*

3. *It may be noted that the plaintiff had sought to*

replace the words, “defendants” in the prayer clause (A), by confining the relief therein against the defendants No.1 & 3. Subsequently, an amended plaint was filed by the plaintiff along with an amended Memo of Parties which reveals that the defendant No.2’s name has been deleted from the array of defendants. Though liberty was granted to the defendant No.2 to file an application for seeking deletion of his name, the purpose stands served in view of the amended memo of parties filed by the plaintiff.

4. Counsel for the defendant No.2 submits that as a consequence of allowing IA No.5836/2013, the plaintiff ought to have filed an amended plaint by undertaking consequential amendments and deleting a reference to the defendant No.2 wherever his name appears in the plaint and if necessary, mentioning him only by name.

5. Counsel for the plaintiff states that he be permitted to file an amended plaint by deleting the words, “defendant No.2” wherever it finds mention in the body of the plaint and referring to the said defendant by name.

6. Needful shall be done within two weeks, with a copy to the other side.

7. The application is disposed of.

CS(OS) 2457/2009

1. On 06.12.2012, it was recorded that as the leave to defend application filed by the defendant No.1 had been withdrawn by him on 06.07.2012 and the leave to defend application filed by the defendant No.3 was dismissed in default and his restoration application was also disallowed, the suit is liable to be decreed qua the said defendants.

2. On 11.04.2013, in view of the statement made by the

counsel for the plaintiff, the defendant No.4 was also deleted from the array of the defendants.

3. As for the remaining defendant No.2, in view of the orders passed today in I.A. 2092/2010, the said defendant has also been deleted from the array of the defendants. As a result, the suit is uncontested.

4. List for arguments on 3rd August, 2015 in the category of 'Short Cause'."

28. Now, it needs no explanation for the statement that once applications filed by defendants No.1 and No.3 praying for leave to defend to be granted to defend the suit were dismissed, qua them the suit ought to have been decreed there and then. But it was not. That is why we have written in paragraph 7 above : '*Who can harm, if God saves you*'. The suit still survives without any decree being passed. The defendant No.3 is saved and she may take such steps as she may desire and we only wish that the learned Single Judge would meaningfully read the plaint notwithstanding application seeking leave to defend filed by her being dismissed because a Court would always retain the power to suo motto peruse a plaint and find out whether a cause of action has been pleaded against a party. She is not concerned with the issue raised in the present appeal, where the parties to the debate are the appellants, who are the legal heirs of deceased defendant No.1 and Suresh Kumar Gera : the plaintiff.

29. After the appellants were brought on record as the legal heirs of deceased defendant No.1 they filed IA No.15435/2015 praying for leave to defend to be granted. Vide order dated August 03, 2015 the application has been dismissed by the learned Single Judge observing that their predecessor-

in-interest did not press IA No.2091/2010 under which he prayed for leave to defend to be granted and thus the appellants cannot seek any leave to defend.

30. Having heard learned counsel for the parties we find that the appellants would be bound by the admissions made by their predecessor-in-interest in an affidavit filed by him in the suit, copy whereof has been filed by the respondent along with the reply as Annexure R-5. Not only did deceased defendant No.1 not press application filed by him seeking leave to defend, on June 04, 2000 he acknowledged having received ₹2 crores from respondent No.1 and affirmed that he had not avoided the contract between him and the respondent No.1. Thus, the appellants cannot question the liability which their predecessor-in-interest acknowledged. Learned counsel for the appellants concedes to said position in law, but states that the appellants would be entitled to defend the suit on grounds personal to them. When asked as to what are those grounds personal to them, learned counsel states that the appellants have yet to inherit anything from the estate of the deceased because his estate is a subject matter of multifarious litigations.

31. Needless to state this is not a ground to defend a suit. It would be a ground available when the decree is put into execution.

32. We dismiss the appeal clarifying that if the plaintiff obtains a decree in the suit and puts it into execution, the appellants would be entitled to raise the issue of they not having inherited anything from the estate of the deceased for the reason the realization of the decree has to be from the estate of the deceased.

33. No costs.

CM No.21040/2015

Dismissed as infructuous.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

FEBRUARY 23, 2016
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