

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

% *Date of Decision: April 06, 2016*

+ **FAO(OS) 707/2015**

PRAYAG SCANNING PVT LTD & ORS Appellants
Represented by: Mr.Suman Tripathy, Advocate

versus

GE CAPITAL SERVICES INDIA Respondent
Represented by: Ms.Deepika V.Marwaha, Advocate
with Ms.Worthina Kasar and
Mr.Gaurav Singh, Advocates

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. Though seemingly it appears to be a case where the impugned order has to be set aside and matter remanded to the learned Single Judge with a direction that RA No.388/2015 which has been disposed of by Hima Kohli, J. be listed for fresh decision before Indermeet Kaur, J. whose order was sought to be reviewed, the reason it being settled law that if an Hon'ble Judge is available and review sought is of an order passed by that Judge the review application has to be decided by the same Judge; but for the facts which we note hereinafter it would be useless and an idle formality to do so.
2. GE Capital Services India (hereinafter referred to as GE) filed a suit under Order XXXVII of the Code of Civil Procedure impleading Prayag Scanning Pvt. Ltd. (hereinafter referred to as Prayag) as defendant No.1.

Mr.Rama Shankar Yadav, Mr.Abhishek Dwivedi, Mr.Manoj Kumar Yadav, Mr.Alok Yadav, Mr.Pulkit Yadav and Mr.Vinayak Sharma as defendants No.3 to 7, disclosing that defendants No.2 and 3 had offered guarantees and had executed promissory notes and that defendants No.4 to 7 were the directors of Prayag and had also stood personal guarantees and executed promissory notes. Seeking a decree in sum of ₹49,87,082.56 together with pendente lite and future interest @ 36% per annum, it was pleaded that Prayag was sanctioned a credit under a written agreement dated June 30, 2005 and pursuant thereto ₹49,50,000/- was disbursed. The credit advanced together with interest was repayable in 36 monthly instalments commencing from July 30, 2005 and ending on June 30, 2008. Disclosing that a meagre sum of ₹6,20,455/- was repaid. It was pleaded that the suit amount was the liquidated demand under the credit agreement dated June 30, 2005.

3. Served with summons in the suit as per proforma prescribed under Order 37 Rule 2 of the Code of Civil Procedure, neither defendant filed a memo of appearance. One Sh.R.S.Kundu (Advocate) appeared on May 03, 2012 as counsel for defendant No.1 filed a Vakalatnama executed in his favour by defendant No.4 : Manoj Kumar Yadav, but purporting to be authorizing the counsel to appear on behalf of Prayag. The fact that Mr.R.S.Kundu believed his authorization to appear only for defendant No.4, as recorded in the order dated May 03, 2012, is obviously a misunderstanding by the learned counsel. Giving full benefit of leeway to Manoj Kumar Yadav, we treat the authorization in favour of the counsel to be on behalf of Prayag and Mr.Manoj Kumar Yadav.

4. The requirement of law is to enter appearance within 10 days of the summons being served and filing the address on which summons for

judgment have to be served. Mr.R.S.Kundu, Advocate did not do so.

5. The result was the suit being decreed on July 16, 2012.

6. Two applications registered as IA No.17878/2012 and IA No.17879/2012 were filed by Sh.R.S.Kundu, the former under Order 37 Rule 4 of the Code of Civil Procedure and the latter under Section 5 of the Limitation Act, 1963 for delay to be condoned in filing the former application. Though captioned as applications on behalf of the defendants, the signatory to the application was Manoj Kumar Yadav who signed for himself and as Managing Director of Prayag. The averments in the applications were that being unwell Mr.Manoj Kumar Yadav could not take steps to defend himself and the company of which he was the Managing Director of.

7. Notice was issued in the two applications on September 25, 2012. Matter lingered on and it appears some verbal direction was issued by the Court for the reason no order directs Mr.Manoj Kumar Yadav to offer any security, but on May 22, 2013 an order was passed noting that counsel for the defendants shall deposit title documents of immovable property equivalent to the sum decreed. For reasons unknown the order records Mr.R.S.Kundu as counsel for the defendants. Title deeds of a property in the city of Allahabad were filed and considerable time was consumed to decide whether the value of the property is sufficient to satisfy the decree.

8. On March 25, 2014, IA No.17878/2012 and IA No.17879/2012 were dismissed noting that order dated May 22, 2013 had not been complied with and a proxy counsel had appeared.

9. IA No.7949/2014 was filed. Once again under the signatures of Manoj Kumar Yadav praying that order dated March 25, 2014 be recalled.

10. On November 26, 2014, IA No.7949/2014 was disposed of recalling the order dated March 25, 2014 and restoring IA No.17878/2012 and IA No.17879/2012 for the reason recorded that the two applications could not be dismissed on account of default in not complying with the order dated May 22, 2013.

11. On April 28, 2015, while adjourning hearing of the two applications the learned Single Judge : Indermeet Kaur, J. recorded that the two applications were filed only on behalf of defendants No.1 and 4 and therefore the decree dated July 16, 2012 shall operate against the other defendants.

12. R.P.No.388/2015 was filed pleading that the two applications were as a matter of fact filed on behalf of all the defendants. Listed before Indermeet Kaur, J. on August 12, 2015, notice in R.P.No.388/2015 was issued returnable for October 09, 2015. But on September 14, 2015 IA No.17878/2012 and IA No.17879/2012 were dismissed by Hima Kohli, J. who recorded that in view of dismissal of the two applications date October 09, 2015 in RA No.388/2015 is cancelled.

13. The grievance of the appellant that Hima Kohli, J. could not have disposed of RP No.388/2015 is therefore unfounded keeping in view the facts noted hereinabove. Vide said petition review of the order dated April 28, 2015 was prayed for concerning the observations therein that IA No.17878/2012 and IA No.17879/2012 were filed only by defendant No.1 and 4 and therefore the decree dated July 16, 2012 remained unaffected qua other defendants. The prayer was to recall said fact recorded in the order dated April 28, 2015 and replace it with the observation that the two applications were filed on behalf of all the defendants. Once the two

applications were dismissed by Hima Kohli, J., there was no need to clarify anything or recall and replace any observations in the order dated April 28, 2015.

14. That apart, as noted hereinabove it was only Mr. Manoj Kumar Yadav who had been contesting the proceedings and notwithstanding Vakalatnama issued by him in favour of R.S. Kundu indicating that it was on behalf of Prayag, we take it that the Vakalatnama was even for his benefit. The two applications registered as IA No.17878/2012 and IA No.17879/2012 were signed by Mr. Manoj Kumar Yadav and as noted hereinabove, though captioned to be on behalf of the defendants, make pleadings qua the disability of Manoj Kumar Yadav and the prayer clause would show that the benefit prayed for in the two applications was for defendant No.1 and defendant No.4.

15. We therefore now deal with the impugned order concerning disposal of IA No.17878/2012 and IA No.17879/2012.

16. Learned counsel for the respondent conceded that the order is fairly inchoate and one has to labour to give meaning to the order. The order notes summons being issued to the defendants on May 03, 2012, Mr. R.S. Kundu appearing on behalf of defendant No.4. Memo of appearances not being filed and the suit being decreed on July 16, 2012, followed by the two applications being filed under the signatures of defendant No.4 for self and as Managing Director of defendant No.1. The order records that after notice was issued in the two applications counsel for defendants No.1 and 4 said that his clients will deposit the title documents of some immovable property equivalent to the value of the decree but none was filed. The order records that the two applications were dismissed on March 25, 2014 but restored.

The order records the submission of learned counsel for the plaintiff that defendant No.1 and 4 were adopting all kinds of delay tactics and we reach page 7 of the 14 page impugned order. The order then records that the reason for not filing memo of appearance was the claim of defendant No.4 to be unwell. The learned Single Judge has then noted a few judgments which highlight that under Order 37 Rule 4 of the Code of Civil Procedure special circumstances must be shown. The learned Single Judge has highlighted that none was shown.

17. Regretfully there is no discussion on the factual aspects projected in the two applications.

18. The correct approach ought to be to have first decided IA No.17879/2012 for the reason if delay in IA No.17878/2012 was not condoned, that would be the end of the matter.

19. Pleading for delay to be condoned it is pleaded that after the decree was passed on July 16, 2012 the father of defendant No.4 died on July 31, 2012. On August 06, 2012 certified copy of the order July 16, 2012 was applied and was received on September 04, 2012 and this was the cause for the delay.

20. Now, what was the need to apply for the certified copy of the order dated July 16, 2012 when it was passed in the presence of the proxy counsel sent by Mr.R.S.Kundu, Advocate and the application admits that defendant No.4 was made aware of the order in question. In our opinion no sufficient cause has been shown to condone the delay in filing IA No.17878/2012.

21. As regards IA No.17878/2012 it must suffer a dismissal as a consequence of dismissal of IA No.17879/2012. Additionally we note that no reason has been disclosed therein as to why memo of appearance could

not be filed even till when the suit was decreed. In the application it is not denied that a written agreement as claimed in the plaint was executed pursuant where to defendant No.1 was advanced a loan. The defence taken is that the plaintiff agreed to buy back an existing CT Scanner for a sum of ₹16,50,000/-. The plea runs in the teeth of the written agreement under which the loan was financed. At best the plea would warrant a suit for specific performance to be filed by the defendant No.1 for enforcement of the so called agreement under which the plaintiff agreed to buy an existing second hand CT Scanner or for damages. Therefore, we do not find any special circumstances shown warranting allowing IA No.17878/2012.

22. The appeal is accordingly dismissed.

23. No costs.

CM No.32189/2015

Dismissed as infructuous.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

APRIL 06, 2016

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