

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

+ **FAO No.518/2016**

% **10th August, 2017**

TAGORE EDUCATION SOCIETY Appellant

Through: Mr. Rakesh Mittal, Advocate
with Mr. Kamlesh Anand,
Advocate.

versus

COMPLETE EDUCATION SOCIETY & ANR. Respondents

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

C.M. No.41083/2016 (for condonation of delay)

1. For the reasons stated in the application, delay of 46 days
in filing the appeal is condoned.

C.M. stands disposed of.

FAO No.518/2016

2. In this FAO, notice was issued for today to the
respondents. However notice could not be issued as Registry has
recorded that process fee was returned with objections. I have

therefore heard the counsel for the appellant as to whether any fresh notice is required or that any notice should be issued at all to the respondents.

3. The challenge by means of this present appeal is to the impugned order of the court below dated 24.5.2016 by which the court below has dismissed the application under Order XXXIX Rule 2A of Code of Civil Procedure, 1908 (CPC) filed by the appellant/plaintiff. The subject suit was filed by the appellant/plaintiff seeking injunction against the respondents/defendants from using the franchise of TAGORE INTERNATIONAL SCHOOL or in any manner from using the word TAGORE etc. The appellant/plaintiff claimed to be the exclusive owner of the trademark and trade name TAGORE as also user thereof in the larger expression 'TAGORE INTERNATIONAL SCHOOL'. In this suit the application under Order XXXIX CPC filed by the appellant/plaintiff was allowed vide order dated 26.11.2011 and the operative portion of this order dated 26.11.2011 are contained in paras 11 and 12 and these paras read as under:-

“11. In view of the above facts and circumstances, this Court doth order as follows:-

“The defendants are restrained from representing as a franchise of “Tagore International School” as well as from using the name or mark of

“Tagore International School” or TAGORE, TIS or TES deceptively similar name/s or mark/s and also from using the syllabus, school, uniform, letter heads, stationery, fee receipts, school diary, copies, registers etc. of “Tagore International School” for the academic year 2012-13 and thereafter till final disposal of the suit. The defendants are further directed to continue to pay the quarterly advance payment for the entire academic session 2011-12.”

12. With the above directions the application under O XXXIX R 1 & 2 of CPC is disposed off.”

4. The suit itself was subsequently withdrawn as per order dated 4.10.2012 on the statement of the respondents/defendants with respect to non-user by the respondents/defendants of the trademark and trade name TAGORE as also TAGORE INTERNATIONAL SCHOOL. However, by the self-same order dated 24.5.2016, the application under Order XXXIX Rule 2A CPC which was pending on the date of withdrawal of the suit on 24.5.2016 was ordered to be taken up subsequently. It is this application under Order XXXIX Rule 2A CPC which has been dismissed by the court below.

5. It is important to note at this stage that there is no dispute that the appellant/plaintiff has filed after 4.10.2012 a suit for recovery of the moneys from the respondents/defendants for academic session 2011-12 and which was the subject-matter of the directions in the order dated 26.11.2011 by which the injunction application of the

appellant/plaintiff was allowed and for enforcement of which the subject application under Order XXXIX Rule 2A was pending. By the order dated 4.10.2012 no doubt the application under Order XXXIX Rule 2A CPC was detached from the main file and was to be decided separately, however, trial court notes in the impugned order which is appealed from that the appellant/plaintiff has already filed a separate suit for recovery of moneys and which counsel for the appellant/plaintiff admits pertains to the last line of para 11 of the order of the trial court dated 26.11.2011 i.e the recovery suit filed by the appellant/plaintiff is with respect to payments to be made by the respondents/defendants with respect to the entire academic session 2011-12 and which was the subject-matter of the application under Order XXXIX Rule 2A. This suit has admittedly been filed after 4.10.2012 when the application under Order XXXIX Rule 2A was directed to be detached for disposal. It is therefore seen that the appellant/plaintiff is pursuing two remedies against the respondents/defendants for the amounts payable for academic session 2011-12, one by way of a suit and second by the subject application under Order XXXIX Rule 2A.

6. The provision of Order XXXIX Rule 2A CPC gives a discretionary power to the court. It is not mandatory for the court in every case to pass orders giving directions by allowing the application under Order XXXIX Rule 2A. The discretion under Order XXXIX Rule 2A may or may not be exercised by the court for taking action against the alleged contemnors under Order XXXIX Rule 2A CPC. The application under Order XXXIX Rule 2A CPC is essentially for enforcement/execution, and more so in a case such as the present, the application under Order XXXIX Rule 2A is in the nature of recovery proceedings. Once therefore an independent suit being recovery proceedings are filed by the appellant/plaintiff with respect to the same relief which is the subject-matter of the application under Order XXXIX Rule 2A CPC, then, the trial court was justified in passing the impugned order dismissing the application under Order XXXIX Rule 2A CPC. No doubt, the application under Order XXXIX Rule 2A CPC was detached for being decided independently in terms of the order dated 4.10.2012, however, it is only after 4.10.2012 that appellant/plaintiff chose to exercise the option of filing of the independent suit for recovery of the same amount which was subject

matter of the application under Order XXXIX Rule 2A CPC, being the claim of moneys of the appellant/plaintiff against the respondents/defendants with respect to the academic session 2011-12.

7. There is no merit in the appeal. Dismissed.

AUGUST 10, 2017
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VALMIKI J. MEHTA, J

