

\$~39

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

%

Date of Decision: 19.07.2019

+ **FAO(OS) (COMM) 169/2019**

GAURAV GARG

..... Appellant

Through: Mr. Abhishek Malhotra and
Ms. Shilpa, Advocates.

versus

ALY MORANI & ORS

..... Respondents

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI

HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

G.S. SISTANI, J. (ORAL)

1. The present appeal is directed against the order dated 13.5.2019 passed by the learned Single Judge of this Court, whereby, the learned Single Judge has dismissed the O.A. filed by the appellant herein, which was filed against the order dated 2.5.2019 passed by the learned Joint Registrar, whereby, the learned Joint Registrar has closed the plaintiff's/appellant's evidence and listed the matter for defendant's/respondent's evidence.
2. It is not disputed that the present appeal is not maintainable in view of proviso to Section 13(1A) of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Court, Act, 2015.
3. We have, however, examined the order passed by the learned Single

Judge wherein he has taken pains to list out various dates on which the matter was listed but the evidence could not be recorded. We reproduce paras 5 and 6 of the order passed by the learned Single Judge herein below for ready reference:-

“5. The Court has heard learned counsel for the Plaintiff at length. The impugned order passed by the learned Joint Registrar is not an outcome of the proceedings that transpired before the Court on the said date. It is a culmination of the conduct of the Plaintiff exhibiting total lack of interest as reflected in several previous proceedings. Issues were framed on 26th April 2012. Thereafter, the plaintiff filed its list of witnesses some time in September 2012. A perusal of the orders thereafter shows that there is a complete lack of interest exhibited by the Plaintiff. Repeated adjournments have been sought by the Plaintiff on numerous dates on one ground or another. The records (relevant portions) of the learned Joint Registrar for the period from 2012 to 2018, reveal as under:

Date	Particulars
11.09.2012	Affidavit of Mr. Gaurav Garg is ready and advance copy of the same would be supplied to counsel for defendant today itself. Witness is stated to be not available today.
6.03.2013	The recording of the evidence is not complete as yet
22.11.2013	PW 1 is present, examined in chief in part. Learned counsel for the plaintiff seeks time on the ground that he is to file an affidavit for compliance Under Section 65 of the Indian Evidence Act.
25.03.2014	Witness PW1 is present. However, counsel for the plaintiff submits that the affidavit under Section 65B of the Evidence Act shall be filed during the course of the day. Advance copy is supplied to counsel for defendant today in the court. Matter is also listed for tomorrow. Plaintiff is directed to ensure that this affidavit comes on record positively on record by tomorrow. Put up the matter for plaintiffs evidence on the date already fixed 26 March, 2014 at 2:00p.m.
26.03.2014	Plaintiff filed the affidavit under section 65 B of the Indian Evidence Act yesterday has not come on record. The

	witness is not present who is stated to be in traffic jam.
10.10.2014	Matter is listed for plaintiff's evidence. Witness/PW1 is not present as stated to be travelling. On the last 2 dates i.e. 25.03.2014 & 26.03.2014, evidence of the plaintiff was not record in the case as on the one date requisite affidavit under Section 65B of Indian Evidence Act was not available and on the other date, witness was struck up in the traffic jam. When date of today was given on 26.03.2014, witness should have adjusted his travelling schedule accordingly. However, in facts, one last opportunity is given to the plaintiff subject to cost of Rs. 5,000/- payable to defendant no. 1, 3 & 4.
6.04.2015	Matter is listed for plaintiff's evidence. Witness is stated to be on his way to court. However, it is stated by the counsels for all the parties that parties are exploring the possibilities of amicable settlement and some more time may be given for the settlement. In facts, subject to payment of earlier cost of Rs. 5,000/-, parties are given one last opportunity for settlement.
06.07.2015	Matter today is listed for reporting about the settlement. It is stated that compromise talks have not materialise. Plaintiff also seeks time to pay the previous cost of Rs. 5,000/-. Be so paid positively on the next date of hearing. PW1 is present today. Put up for plaintiff's evidence on 19th October, 2015.
19.10.2015	Previous cost of Rs. 5,000/- paid to counsel for defendant today in the court. PW1 Mr. Gaurav Garg further partly examined-in-chief and his further examination-in-chief is deferred on request as the witness intends to file another certificate under Section 65B of Indian Evidence Act pertaining to remaining exhibits of his affidavit, which have not been included in the certificate already filed on record.
05.04.2016	Witness/PW1 is present but yet seeks adjournment on the ground that witness has not brought the original documents. Even Section 65B certificate under Indian Evidence Act has not been filed as requested on the last date of hearing. Adjournment is strongly opposed. On in the interest of justice, plaintiff is given last opportunity to conclude the examination-in-chief of PW1 subject to cost of Rs. 5,000/- payable to defendants.
15.07.2016	Matter is listed for plaintiff's evidence. Witness/PW1 is present. However, plaintiff seeks one more opportunity to file 65B Certificate and produce the original

	documents for the reason that despite efforts, he has not been able to trace out the original TDS certificate claimed to be issued by defendant no. 3 exhibited as Ex. PW1/5 in the affidavit and in the alternative now he has to take copy from the Income Tax Website and shall be filing 65B Certificate along with that document within two days. Same is strongly opposed for the reason that more than sufficient opportunities have been given to plaintiff since framing of issues in April, 2012 and plaintiff has not examined any witness including himself. However for the reason that endeavour should be made to decide the matter on merits and defendant can be compensated in terms of cost, plaintiff is given another last opportunity to conclude his evidence subject to cost of Rs. 10,000/- payable to defendant. No further opportunity shall be granted to the plaintiff in this regard.
22.09.2016	Matter is listed for plaintiff's evidence as last opportunity with specific order that no further opportunity shall be granted. Today there is a request for adjournment on behalf of the witness plaintiff himself on the ground that his maternal grand-father died yesterday night only and as such is not in a position to come to the Court today. None is present for the defendant. Though it was last opportunity for today yet considering the fact that the close relative is stated to have died, another last opportunity is granted to the plaintiff for his evidence subject to filing the death certificate of the maternal grand-father before the next date of hearing.
7.12.2016	Matter is listed for plaintiff's evidence as another last opportunity. His exemption sought again for today on the ground that he has been asked to vacate by his landlord and he is in the process of shifting from G.K to Jhansi and as such is not in position to come to court for this evidence. Though record does not justify giving any further opportunity to plaintiff for leading his evidence, yet with an endeavour not to condemn him without being heard on merits, he is given another last opportunity subject to cost of Rs. 20,000/- payable to defendant. It is also specified that no further opportunity shall be granted to plaintiff on any ground whatsoever
17.07.2017	It is stated by learned proxy counsel for defendants that main counsel is down with fever, therefore he is not in a position to cross-examine PW1. He further states that this fact was duly informed to the opposite side on Saturday itself, which is confirmed by learned proxy counsel for

	plaintiff. In these circumstances, adjournment sought by learned proxy counsel for defendants is granted, subject to last opportunity for defendants to cross-examine PW 1.
18.9.2017	PW1 is present for his cross-examination. However, it is stated by learned counsel for the defendants that there is possibility of settlement in the present ease and for exploring the same, the matter may be referred to Mediation. The same is acceptable to learned counsel for plaintiff. In these circumstances, on the joint request of learned counsels for both the parties, the matter is referred to Delhi High Court Mediation and Conciliation Centre for 26.09.2017 at 2.30 pm
8.12.2017	It is jointly submitted by learned counsel for parties that mediation has failed. In terms of earlier order, matter is now adjourned for cross-examination of PW-I for 15.02.2018.
15.2.2018	The matter is listed for cross-examination of PW1. However adjournment is sought by learned counsel for plaintiff on the ground that the witness is out of station. Not opposed. Re-notify the matter for PE on 01.05.2018. Last opportunity is granted to plaintiff to produce PW1 for his evidence
1.5.2018	PW-1 Mr. Gaurav Garg is present, he is partly cross-examined by learned counsel for defendant nos. 1 to 3. His further cross-examination is deferred as it is already 01.15 p.m. and the learned counsel for defendant is not available after 02.00 p.m. Put up for further cross-examination of PW-1 on 23.07.2018. Witness is directed to produce the original of Ex.Pw-1/9 on next date of hearing
23.7.2018	PW-1 is present. In view of the fact that despite directions, PW-1 not brought the document Ex.PW1/9. Hence, the case is adjourned with the directions to PW-1 to bring the document Ex.PW1/9 on the next date of hearing, so that evidence can be concluded. Put up for plaintiffs evidence on 19th September, 2018 before the concerned Ld. Joint Registrar (Judicial).
19.9.2018	Matter is fixed today for PE. Adjournment is sought by learned counsel for defendant with contention that main counsel is not available today due to some personal difficulty and this fact was duly intimated in advance to learned counsel for plaintiff. Request not opposed.

	Witness is not present due to above reason. Put up for PE on 13.11.2018
13.11.2018	Today, the matter is fixed for PB. PW-1 Mr. Gaurav Garg is present. However, at joint request, the matter is adjourned. The witness is discharged unexamined.
19.12.2018	Matter is fixed today for cross-examination of PW-1 Mr. Gaurav Garg. Witness is not present and adjournment is sought by learned counsel for plaintiff with contention that witness is out of station. Request is opposed by learned counsel for defendants. Considering the overall facts and circumstances, matter is now adjourned for cross-examination of PW-1 subject to cost of Rs. 8000/- payable to defendants for 07.02.2019.
7.2.2019	Matter is fixed today for cross examination of PW-1 subject to payment of cost. Learned counsel for plaintiff states that they have filed one application for waiver of cost which has not come on record. It is jointly stated by learned counsel for the parties that there are chances of settlement between the parties. A short adjournment is sought;
2.5.2019 (impugned) (reproduced in para 1 above)	Adjournment sought for PE on the ground that PW-1 has not been called as learned counsel for defendant has not filed his Vakaltnama on record and examination of witness was not suppose to be done by the defendant. Adjournment opposed. Out of 31 dates of hearing including last and final opportunity for PE on 15.07.2016, 22.09.2016, 07.12.2016, 17.07.2017, 08.12.2017 and 15.02.2018. Even cost has been imposed upon plaintiff on multiple occasion for non availability of witness. As such, plaintiff is just delaying the case on the one ground or other. No ground for further adjournment as no plausible reason has been given for adjournment today. PE closed.

6. The above record of proceedings reveals that the Plaintiff had been taking repeated adjournments on one ground or the other. Imposition of costs on multiple occasions also did not deter him. Such casual approach cannot be countenanced. Such cases like the present one where the Plaintiff has been dragging the litigation clogs the system and need to be weeded out.”

4. Despite repeated adjournments and opportunities, the plaintiff/appellant has failed to lead evidence. We find no infirmity or illegality in the order passed by learned Single Judge which requires interference.

5. The appeal is hereby dismissed.

G.S.SISTANI, J

JYOTI SINGH, J

JULY 19, 2019

AK