

* **HIGH COURT OF DELHI AT NEW DELHI**

+ **CS (OS) No.1342/2004**

Date of decision : July 03, 2009

M/S. SWAROVSKI INDIA PVT. LTD. PLAINTIFF
Through : Mr. Prag P. Tripathi, Senior
Advocate with Mr. Sanjay
Grover, Advocate.

Versus

M/S. SPA AGENCIES & ANR. DEFENDANTS
Through : Mr. J.P.Sengh, Advocate with
Mr. Pankaj Kumar, Advocate

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CORAM:
HON'BLE MS. JUSTICE ARUNA SURESH

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not? Yes
- (3) Whether the judgment should be reported in the Digest ? Yes

J U D G M E N T

ARUNA SURESH, J.

IA No.2001/2006 (Order 37 Rule 3(5) CPC) and IA No.2002/2006 (s. 5 of the Limitation Act) in CS (OS) No.1342/2004

1. Plaintiff company has filed the present suit under Order 37 of the Code of Civil Procedure (hereinafter

referred to as 'CPC') for recovery of Rs.27,47,587/- i.e. Rs.20,52,995/- as the principal amount and Rs.6,94,592/- as interest on the outstanding amount @ 12% per annum for the period from October, 2001 till 30.9.2004 against the defendant for the supply of goods against 15 invoices for the period from October, 2001 to December, 2001 which the defendant failed to pay despite service of legal notice dated 24.5.2004.

2. Defendants were duly served with summons for appearance and they entered appearance. Thereafter plaintiff filed an application under Order 37 Rule 3 CPC seeking service of summons for judgment on the defendants. Summons for judgment were duly served upon the defendants at their correct address and the defendants put in their appearance in the court through their counsel on 6th January, 2006 but no application for leave to defend the said suit was filed. Defendants took two adjournments and thereafter filed the applications under consideration. Both the applications have been contested by the plaintiff.

IA No.2002/2006

3. This application has been filed under Section 5 of the Limitation Act seeking condonation of delay in filing the application under Order 37 Rule 3 (5) CPC for leave to defend and contest the suit.
4. Defendants have sought condonation of delay in filing the application for leave to defend contending inter alia that defendant No.2 was out of station in the month of January, 2006 and hence was not aware about the proceedings/summons for judgment through publication, that when he came back to India on 13.2.2006 he came to know about the proceedings through publication published on 6.1.2006 and thereafter he contacted his counsel and filed an application for grant of leave to defend and contest the suit, that delay in filing the application under Order 37 Rule 3(5) CPC is neither intentional nor deliberate but because of bona fide reasons of defendant No.2 being out of station and not aware of the proceedings. Hence, this application for condonation of delay.

5. Plaintiff has contested this application on various grounds alleging that defendants were served as far back as on 17.12.2005 and they could have moved an application for leave to defend within ten days thereafter by 27.12.2005, but the application has been filed after delay of nearly 60 days without any justification and the same is hopelessly barred by limitation, that defendant No.2 has not disclosed as to when he left India and has not enclosed copy of the pass port to show the date on which he left India and came back, that defendant No.2 is a resident of Chennai and the affidavit has been prepared and sworn in Delhi whereas defendant No.2 has not disclosed when he came to Delhi, that there was no publication at all in this case nor there was any order of publication and therefore the defendant No.2 has made a false statement that he came to know about summons through publication published on 6.1.2006, that defendants had been served on 17.12.2005 and remained silent till the filing of this application, that delay is willful and deliberate and defendants all along been were

aware of the proceedings through their advocate who was appearing in this case therefore, this application deserves dismissal with costs and the plaintiff is entitled to a decree under Order 37 CPC for the amount claimed.

6. I have heard Mr. Prag P. Tripathi, Senior counsel for the plaintiff, Mr. J.P.Sengh learned counsel for the defendants and have perused the file carefully.
7. After receipt of summons for appearance, defendants filed their appearance under order 37 Rule 3 (1) CPC on 5.2.2005. Plaintiff filed application under Order 37 Rule 3(4) CPC for issuance of summons for judgment upon the defendants on 15.2.2005. Since defendants had changed their address, summons for judgment could not be served upon them when issued by the court. Thereafter, the plaintiff filed correct and new address of the defendants by way of IA No.9526/2005 under Order 5 Rule 17 & 20 CPC.
8. Summons for judgment were accordingly ordered to be issued upon the defendants at their new address

on 28.11.2005 and the matter was listed for 6.1.2006.

9. Perusal of the record indicates that defendants were served through approved courier service 'Blazeflash Couriers Limited' with summons for judgment on 17.12.2005. The sender copies are enclosed with an affidavit of service of Shir Sanjeev Kumar, the court clerk of the counsel for the plaintiff. Defendant No.2 also received summons for judgment vide registered AD card on 17.12.2005 at 1.30 P.M. Defendant No.2 is either a proprietor or partner of defendant No.1. Thus, it is clear from the record that defendants were duly served with summons for judgment on 17.12.2005. Defendants were required to file their application for leave to defend the present suit within ten days of the service of summons for judgment upon them.
10. Admittedly, the defendants did not file any application seeking leave to defend and contest the suit within the prescribed period of ten days. The application was filed only on 14.2.2006 i.e. almost

about two months of the service of summons for judgment upon them.

11. In the application, the defendants have pleaded that they came to know of the service of summons for judgment through publication published on 6.1.2006 on 13.2.2006 as defendant No.2 was out of India in the month of January. It is pertinent to mention here that the defendants have not mentioned the name of the paper in which the summons for judgment of this case were allegedly published on 6.1.2006 nor any cutting of the newspaper has been placed on record. Infact, though an application under Order 5 Rule 17 & 20 CPC was filed by the plaintiff, the court did not order any service for summons for judgment by way of publication. The court ordered for service of summons for judgment on PF and registered AD cover and through approved courier service at the new and correct address of the defendants. Therefore, to my mind, the defendants willfully and deliberately made a false statement in the application with a view to misguide the court that

summons for judgment were published on 6.1.2006 in a newspaper.

12. Defendant No.2 has alleged that he was out of India in January, 2006. The fact remains, summons for judgment were received by him on 17.12.2005 by approved courier service as well as by registered AD card. He was very much in India at the relevant time and had all the opportunity and time to contact his Advocate, brief him and ensure that application for leave to defend and contest the suit was filed within the period of limitation of ten days. Besides the defendants have not disclosed as to when defendant No.2 had left India. He has not disclosed the destination where he had gone.
13. After receipt of summons for judgment, counsel for the defendants Mr. Subhash Tagra advocate appeared in the court on 6.1.2006. Even at that time there was no mention to the court that defendant No.2 was out of India and therefore the defendants needed time to file application for leave to defend and contest the suit. The matter was

listed for 15.2.2006. Just two days before the said date, the present application along with other application under Order 37 Rule 3 (5) CPC for leave to defend and contest the suit was filed.

14. Under these circumstances, I am of the opinion that defendants has made every endeavor to misguide this court by creating the facts and representing them in such a manner which when read left an impression on the court's mind that it was because of just and bonafide reasons that the defendants could not file their application for leave to defend and contest the suit within the prescribed period of ten days. However, when read properly in the context of the record, it is obvious that the defendants were properly served on 17.12.2005 but deliberately delayed the filing of the application under Order 37 Rule 3 (5) CPC with a view to delay the proceedings of the case.

15. Under Order 37 Rule 3 (7) CPC court has the power to excuse the delay of the defendants in entering the appearance and applying for leave to defend

the suit if sufficient cause is shown by the defendant. Order 37 is a complete Code in itself and it does not need any assistance of Section 5 of the Limitation Act for condonation of delay.

16. Section 5 of the Limitation Act is a discretion which the court can exercise in the way in which judicial power and discretion ought to be exercised upon principles which are well understood. The words '*sufficient cause*' in Order 37 (3) (7) CPC receives a liberal construction so as to advance substantial justice when no negligence nor inaction nor want of bona fide is imputable to the application. In '**DCM Finance Services Limited vs. Khaitan Hostombe Spinels Ltd., 75 (1998) Delhi Law Times 629**', it has been held that the test whether or not a cause is sufficient is to see whether delay could have been avoided by the party seeking condonation by exercise of due care and attention as nothing could be deemed to be done bona fide and in good faith which is not done in due care and attention. It was observed:-

“7. The contents of the application filed by the defendant under Section 5 of the Limitation Act would abundantly and clearly prove and establish that instead of explaining the cause for the delay not to speak of proving sufficient cause for condonation of delay the defendant sought to assert that its appearance was within time of 10 days as provided for under rule 3 of Order XXXVII as the summons were not served on the defendant. The aforesaid assertion of the plaintiff was negatived both by the order dated 5.8.1997 passed by this court and order dated 12.1.1998 passed by a Division Bench of this Court. The aforesaid assertion of the defendant that the summons were not served on the defendant and that appearance had been made within 10 days of coming to know about the pendency of the case, was found to be incorrect and contradicted by the documents available on record. The defendant has failed to plead any cause much less sufficient cause for the delay in making appearance in the court in terms of Rule 3 of Order XXXVII CPC. No Explanation is forthcoming from the defendant about the reasons and grounds for the delay in making appearance. The test whether or not a cause is sufficient is to see whether it could have been avoided by the party by the exercise of due care and attention as nothing shall be deemed to be done bonafide or in good faith which is not done with due care and attention. In order to find out and adjudge whether there is sufficient cause or not to condone the delay there should have been pleadings in the application giving reasons and

grounds and making out a case of sufficient cause for the delay in making appearance in the court. In the absence of any such pleading this court is not in a position to hold that the defendant was prevented by sufficient cause in making appearance in the case in terms of rule 3 of Order XXXVII CPC. Thus the application filed by the defendant under Section 5 of the Limitation Act and registered as I.A. 11951/1996 stands rejected."

17. Reference is also made to **'Escorts Fiance Ltd. vs. Nielcon Ltd. & Anr., 2000 (55) DRJ'** and **'Rane Parkash & Ors. vs. Central Bank of India, 105 (2003) Delhi Law Times 373'**.
18. Coming back to the present case it was for the defendants who sought condonation of delay in filing the leave to defend application to explain each days delay and making certain delayed and imaginary grounds cannot be considered sufficient for condonation of delay in the present case.
19. As discussed above liberal construction to '*sufficient cause*' in this case is not available to defendant No.2 because he was negligent and inactive in taking appropriate steps for compliance of summons for judgment.

20. As discussed above, there is lack of bona fide on the part of defendant No.2. He is also responsible for his carelessness, want of due diligence and therefore cannot claim the shelter of liberal interpretation of 'sufficient cause'. The provisions of order 37 are special enactment which apply to certain categories of cases specified therein. This provision has been enacted with an object that the defendants do not unnecessarily prolong litigation and prevent the plaintiff from obtaining early decree in a case falling within the ambit of the said decision where speedy decisions are desirable in the interest of trade and commerce.

21. Hence, from the discussion as above, I conclude that defendants have not been able to explain sufficient cause in not filing the application for leave to defend within the prescribed period of limitation. The delay is attributable to their own malafides, lack of diligence and indifferent attitude to the summons received by them. The delay is not only of few days but is of about three months. Therefore, I find no merits in the application and the same is

accordingly dismissed.

IA No.2001/2006 (Order 37 Rule 3(5) CPC) in CS (OS) No.1342/2004

In view of my discussion in IA No.2002/2006 (delay), the application for leave to defend and contest the suit being barred by period of limitation is hereby dismissed.

CS (OS) No.1342/2004

1. Since application of the defendants for leave to defend is dismissed being barred by period of limitation, plaintiff is entitled to the decree for the principal amount as prayed for. Since as per the averments in the plaint itself, admittedly, there is no agreement between the parties that the defendants shall be liable to pay interest @ 12% if the payment was not made in time, plaintiff is not entitled to any interest as claimed.

2. Hence, I hereby pass a decree for Rs.20,52,995/- with proportionate costs in favour of the plaintiff and against the defendants. Plaintiff is awarded interest pendent lite and future interest on the said principal

amount @ 12% per annum from the date of the institution of the suit till realization of the decretal amount.

3. Decree sheet be prepared accordingly.

**ARUNA SURESH
(JUDGE)**

**JULY 03, 2009
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