

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **C.R.P. 130/2009**

Reserved on : 09.02.2010

Pronounced on: 22.02.2010

IN THE MATTER OF :
BABU LAL YADAV

..... Petitioner

Through: Mr. Ram Singh Soni, Advocate

versus

M/S R.S. YADAV & CO. & ANR.

..... Respondents

Through: Nemo

CORAM

*** HON'BLE MS.JUSTICE HIMA KOHLI**

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| 1. Whether Reporters of Local papers may be allowed to see the Judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

HIMA KOHLI, J.

1. In the present revision petition, challenge has been laid by the petitioner to an order dated 10.09.2009 passed by the learned ADJ, allowing the application for condonation of delay filed by the respondents (defendants in the court below) in a summary suit for recovery filed by the petitioner (plaintiff in the court below) under the provisions of Order XXXVII CPC, subject to payment of costs of Rs.1,000/-. Before proceeding to deal with the grounds taken by the petitioner to assail the impugned order, it would be necessary to briefly advert to the sequence of events resulting in passing of the said order.

2. On 19.05.2009, the petitioner (plaintiff in the court below) instituted a summary suit under Order XXXVII CPC praying *inter alia* for a decree of Rs.5,40,000/- with interest against the respondents (defendants in the court below). The aforesaid suit was registered by the learned ADJ on 20.05.2009 and summons were directed to be issued in the prescribed format to the defendants on filing of process fee and registered cover, returnable on 31.07.2009. A perusal of the trial court record shows that while the respondents/defendants remained unserved by ordinary process, service was duly effected on them by Registered Post. A perusal of the Registered AD covers placed on the record shows that the same were dispatched from the post office at Patiala House, New Delhi on 25.05.2009, but the date of receipt of the summons is not indicated on the AD covers.

3. On 31.07.2009, counsels for the parties were present in Court. Counsel entered appearance on behalf of the respondents/defendants and prayed for some time to file the written statement. The order dated 31.07.2009 is reproduced hereinbelow:-

"Suit No.756/09

Present: Counsels for the parties

Defendants have been duly served in this case. Sh. Raj Kumar Yadav has put in his appearance on behalf of defendants and prays for some time to file the WS. Let the same be filed by next date of hearing i.e. 20.08.09.

(Ina Malhotra)

Add. District Judge South-II

PHC: New Delhi 31.07.09"

The record reflects that a *Vakalatnama* dated 31.07.2009, on behalf of the respondents/defendants was duly filed on the same date.

4. On 31.07.2009, counsel for the petitioner/plaintiff filed an application under Order XXXVII Rule 2(3) CPC, stating *inter alia* that as the respondents/defendants had not entered appearance within the stipulated period of ten days from the date of service of the summons upon them, the petitioner/plaintiff was entitled to a decree for the sum, mentioned in the plaint. He submitted that as the suit had been filed under the provisions of Order XXXVII CPC, counsel for the respondents/defendants had wrongly taken time to file the written statement. Vide order dated 4.8.2009, notice of the aforesaid application was issued to the respondents/defendants through counsel, returnable on the date fixed, i.e., 20.08.2009. On 20.08.2009, counsels for the parties were present. As notice of the aforesaid application filed by the petitioner/plaintiff could not be served upon the defendants' counsel, the same was accepted by him in Court and the matter was adjourned to 04.09.2009 for arguments.

5. On 04.09.2009, the respondents/defendants submitted their reply to the application filed by the petitioner/plaintiff under Order XXXVII Rule 2(3) CPC. They also filed an application for condonation of delay in entering appearance in the suit on the same date. The learned ADJ passed the following order :-

"Suit No.756/09

Present: Counsels for the parties

Reply has been filed by the defendant to the plaintiff's application under Order 37 Rule 2(3) CPC.

An application has also been filed for condoning the delay by the defendant. Further till date, no proper appearance has been filed in terms of the requirement of Order 37 CPC, therefore the same is not maintainable.

Adjourned to 10.09.09 for further proceedings.

(Ina Malhotra)
Add. District Judge South-II
PHC: New Delhi 04.9.09"

6. On 10.09.2009, the learned ADJ heard the arguments addressed by the parties and allowed the application of the respondents/defendants seeking condonation of delay, subject to payment of costs of Rs.1,000/- and adjourned the case for 16.09.2009 for payment of costs. Aggrieved by the aforesaid order, the plaintiff/petitioner has filed the present petition.

7. Learned counsel for the petitioner/plaintiff submitted that the petitioner has a three-fold grievance against the impugned order. Firstly, the application filed by the respondents/defendants was not filed under the provision of Sub-rule(7) of Rule 3 of Order XXXVII CPC and hence, the same ought not to have been taken into consideration. Secondly, the said application was highly belated inasmuch as the respondents/defendants were served with the summons in the suit in the prescribed format in the end of May, 2009, but they did not file the memo of appearance within 10 days, or even thereafter. Instead, their counsel filed his power of attorney on 31.07.2009, which was not accompanied by any application for condonation of delay, under Order XXXVII Rule 3(7) CPC and even thereafter, when the application for condonation of delay came to be filed by the respondents/defendants on 04.09.2009, no explanation was offered for the delay in filing the same, for the period between 31.07.2009 to 04.09.2009. It was lastly contended that the order dated 10.09.2009 was in contradiction of the order dated 04.09.2009 for the reason that vide order dated 04.09.2009, the learned ADJ had observed that no proper appearance had been filed by the respondents/defendants in terms of the requirement of

Order XXXVII CPC and hence, the application filed for condonation of delay was not maintainable and despite the said observation, on the very next date of hearing, i.e., on 10.09.2009, she proceeded to allow the said application subject to costs.

8. It is relevant to note that despite service in the present petition, none entered appearance on behalf of the respondents. As a result, vide order dated 09.02.2010, they were directed to be proceeded against *exparte*.

9. I have heard learned counsel for the petitioner and carefully gone through the trial court record summoned in the case.

10. Order XXXVII of the CPC is a complete code in itself. The said provision not only lays down the manner in which a summary suit is required to be instituted, but also prescribes the format for issuing summons to the defendants and fixes a time period for entering appearance after the summons are served. For the purpose of deciding the case in hand, reference to Order XXXVII Rule 2(3) is relevant. The same reads as below:

"2. Institution of summary suits- (1) xxx

(2) xxx

(3) The defendant shall not defend the suit referred to in sub-rule(1) unless he enters an appearance and in default of his entering an appearance the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree for any sum, not exceeding the sum mentioned in the summons, together with interest at the rate specified, if any, up to the date of the decree and such sum for costs as may be determined by the High Court from time to time by rules made in that behalf and such decree may be executed forthwith."

11. The procedure for the appearance of the defendant in such a suit is dealt with by Rule 3 sub-rule (1), which states as follows:

"3 Procedure for the appearance of defendant-

.(1) In a suit to which this Order applies, the plaintiff shall, together with the summons under rule 2, serve on the defendant a copy of the plaint and annexures thereto and the defendant may, at any time within ten days of such service, enter an appearance either in person or by pleader and, in either case, he shall file in Court an address for service of notices on him."

12. The aforesaid sub-rule requires the defendant to take the following two steps within ten days after notice is served on him:

(a) He must enter an appearance either in person or by pleader and (b) he must file in Court, an address for service of notices on him. Both the steps would be required to be undertaken concurrently, within the prescribed period of ten days. The third step required to be taken by the defendant is prescribed under sub-rule (3) of Rule 3, which states as follows:

"3(3) On the day of entering appearance, notice of such appearance shall be given by the defendant to the plaintiff's pleader, or, if the plaintiff sues in person, to the plaintiff himself, either by notice delivered at or sent by a pre-paid letter directed to the address of the plaintiff's pleader or of the plaintiff, as the case may be."

13. In the present case, the defendant filed his power of attorney in Court on 31.7.2009. So the first requirement was fulfilled, but not within the time prescribed. The other two procedural formalities were not complied with by the respondents as laid down in the Statute. It is a different matter that as the counsel for the respondents entered appearance in the presence of the counsel for the petitioner on 31.7.2009, the petitioner had notice of his appearance. Counsel for the petitioner argued that the respondents cannot be regarded as having entered appearance, as they failed to file a memo of appearance and further, that the *vakalatnama* of the respondents had not only been filed highly belatedly, it was not accompanied by an

application as prescribed under the provisions of sub-rule(7) of Rule 3 of Order XXXVII of the CPC.

14. It is trite that condonation of delay is a matter of discretion of the Court. Section 5 of the Limitation Act, 1963 does not prescribe that such a discretion can be exercised by the Court only if the delay is for a certain period of time, rather the length of delay is hardly relevant. What is to be considered is the explanation offered for the delay. Thus each case has to be examined in its own facts and as long as there is a satisfactory explanation offered for the delay, the Court is well within its powers to accept the explanation and condone the delay. Merely because the title of the application does not reflect the correct position of law, can also not be a ground to oust a party. What has to be examined is the explanation offered in the application and the relief sought. In other words, substantial justice cannot be permitted to be sacrificed at the alter of technicalities. In the case of N.Balakrishnan Vs. M.Krishnamurthy reported as **(1998) 7 SCC 123**, the Supreme Court relying on its earlier decisions in the case of Shakuntala Devi Jain Vs. Kuntal Kumari reported as **(1969) 1 SCR 1006** and State of West Bengal Vs.Administrator, Howrah Municipality reported as **(1972) 1 SCC 366**, held that the words" sufficient cause" as mentioned in Section 5 of the Limitation Act, 1963 ought to receive a liberal construction so as to advance substantial justice for `court knows that refusal to condone delay would result in foreclosing a suitor from putting forth his cause'. It was further observed that "it must be remembered that in every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is

not put forth as part of dilatory strategy, the Court must show utmost consideration to the suitor". It was also observed as under:

9. It is axiomatic that condonation of delay is a matter of discretion of the court. Section 5 of the Limitation Act does not say that such discretion can be exercised only if the delay is within a certain limit. Length of delay is no matter, acceptability of the explanation is the only criterion. Sometimes delay of the shortest range may be uncondonable due to a want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is satisfactory. **Once the court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior court should not disturb such finding, much less in revisional jurisdiction, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse.** But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding even untrammelled by the conclusion of the lower court.

10. The reason for such a different stance is thus:

The primary function of a court is to adjudicate the dispute between the parties and to advance substantial justice. The time-limit fixed for approaching the court in different situations is not because on the expiry of such time a bad cause would transform into a good cause.

11. Rules of limitation are not meant to destroy the rights of parties. They are meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation fixes a lifespan for such legal remedy for the redress of the legal injury so suffered. Time is precious and wasted time would never revisit. During the efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the courts. So a lifespan must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is thus founded on public policy. It is enshrined in the maxim *interest reipublicae ut sit finis litium* (it is for the general welfare that a period be put to litigation). **Rules of limitation are not meant to destroy the rights of the parties. They are meant to see that parties do not resort to dilatory tactics but seek their remedy promptly.** The idea is that every legal remedy must be kept alive for a legislatively fixed period of time."(emphasis added)

15. In the case of HDFC Vs Anil Laul reported as **85(2000) DLT 343**, while condoning the delay on behalf of the defendant entering appearance, a

Single Judge of this Court observed as below:

"Para 4: It is correct that under Order 37 of the Code, on receipt of summons in Form IV Appendix B the defendant is required to enter appearance within 10 days from the date of service of summons upon the defendant. **But this Court can also not ignore the fact that when summons are received by a layman who has hardly appeared in Court, he can be misled by the date which is mentioned on the summons. A perusal of the summons shows that the party was informed that the matter will be taken up by the Court on 20th July, 1999. No mala fides have been imputed to the defendant nor any reason has been shown as to why the defendant who wants to contest the suit would not enter appearance in case he was aware that on not filing appearance within 10 days decree will be passed against him. At best it can be a case of casual approach of the defendant to the whole matter. However, it cannot be said that the mistake on the part of the defendant in not entering appearance within 10 days was not bona fide.** It can also not be said that by writing the date of 20th July, 1999 on the summons when the defendants were informed that the matter will be listed before the Joint Registrar, the defendant was not misled. In my view, therefore, there is sufficient cause for not entering appearance within time and a good cause has been shown for the delay in entering appearance. I accordingly allow this application subject to payment of Rs.1,000/- as costs and condone the delay in entering appearance by the defendant. No further orders are required to be passed on this application and the same stands disposed of. "

(emphasis added)

16. In the case of Hector M.Mehta Vs. CRB Capital Markets Ltd. reported as **98(2002) DLT 127**, a Single Judge of this Court held as follows:

"Para 4: As per the provisions of Order XXXII Rule 3 Sub-rule (7) CPC, the Court may excuse the delay in entering appearance for sufficient cause shown by the defendant. The words "sufficient cause" though have not been defined but have been interpreted by the Supreme Court in a catena of judgments in

reference to Section 5 of the Limitation Act. **It is held in a number of judicial pronouncements that the words "sufficient cause" should be liberally construed so as to advance substantial justice. The Supreme Court in (1998) 7 SCC 123, N. Balakrishnan v. M. Krishnamurthy, held that in the absence of anything showing malafides or deliberate delay as a dilatory tactic, Court should normally condone the delay. It has also been held that length of delay is not material, acceptability of the explanation is the only criterion as sometimes delay of the shortest range may be uncontainable due to want of acceptable explanation whereas in certain other cases, delay of a very long range can be condoned as the explanation thereof is found satisfactory. It is held that there is no presumption that delay in approaching the Court is always deliberate.** "(emphasis added)

17. In the present case, no *mala fides* have been imputed to the respondents, nor has any reason been shown as to why the respondents would not want to contest the suit, in case they were aware of the fact that in the event of their failure to appear within ten days, a decree would be passed against them. It can also not be said that the mistake on the part of the respondents for not entering appearance within ten days, was not *bona fide*. The explanation offered by the respondents in their application was that they were unaware of the technicalities involved in a summary suit and contacted his counsel only two days prior to the date fixed before the Court. The counsel filed his *vakalatnama* on the said date. The learned Additional District Judge has accepted the explanation offered by the respondents as 'sufficient'. The trial court having so exercised its discretion in favour of the respondents, this court is not inclined to disturb such a finding as the exercise of discretion by the trial court has not been assailed on the ground that it is wholly untenable or so adverse or arbitrary that it cannot stand.

Rather, a perusal of the impugned order shows that the trial court has duly taken into consideration the fact that no formal application for appearance was filed by the respondents, though the application for seeking condonation of delay was filed and thus, the delay was condoned, subject to payment of costs of Rs.1,000/-.

18. The contention of the counsel for the petitioner that there is a contradiction in the earlier order dated 4.9.2009 and the order dated 10.9.2009, is also untenable. On 4.9.2009, the Court did notice that the formality of entering appearance in terms of the requirement of Order XXXVII was not complied with by the respondents, but on the said date, the application filed by the respondent for condonation of delay was not considered or disposed of. Rather, the matter was adjourned to 10.9.2009, on which date, after hearing the parties, the impugned order came to be passed, whereby the delay was condoned and the respondents were mulcted in costs.

19. Assuming that there is some ambiguity in the meaning of the words "enters an appearance", as mentioned in sub-rule(3) of Rule 2, this Court would prefer to be guided by the interpretation given to the said provision in the case of Arjan Lal Verma Vs. Smt.Rawel Kaur reported as **AIR 1982 DELHI 148**, wherein a Single Judge of this Court observed as below:

"5. I do not agree with this argument. Sub-rule (3) of R.2, the relevant part of which I have already quoted, prohibits a defendant from defending the suit 'unless he enters an appearance'. Sub-rules (1) and (3) of R.3 indicate that entering appearance is one thing, filing an address for service another and giving notice of appearance to the plaintiff or his counsel a third. Sub-rule (3) of R.2 has nothing to say as to the effect of non-compliance with the second and third

requirements. **In accordance with the principle of harmonious construction, the words 'enters an appearance' in that sub-rule must be read in the same sense as is derived from sub-rules (1) and (3) of R.3. Those sub-rules lead irresistibly to the conclusion that entering an appearance does not of itself involve or import the filing of an address for service in court or serving notice of such appearance on the plaintiff or his counsel. For, otherwise, those two requirements would not have been stated additionally and separately.**

And, even supposing there is some ambiguity in the meaning of the words 'enters an appearance' in sub-rule (3) of R.2 (which I do not concede), I think, they must be given a narrow and restricted meaning considering that the right of the defendant to defend the suit is at stake...."
(emphasis added)

20. For the aforesaid reasons, this Court does not find that the learned ADJ has acted in the exercise of its jurisdiction illegally or with material irregularity. Nor is there any illegality, arbitrariness or perversity in the impugned order which deserves interference. The impugned order is confirmed. The petition is dismissed, with no orders as to costs.

(HIMA KOHLI)
JUDGE

FEBRUARY 22, 2010
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