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A.No.4822 of 2022

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in
C.S. (Comm.Div.) No.70 of 2022

C.SARAVANAN, J.

This application has been filed by the applicant/defendant to condone the delay of 17 days in filing the application for leave to defend in the above Summary Suit filed under Order XXXVII of CPC for a summary Judgment.

2. The suit Summons which was served by the respondent/plaintiff on the applicant/defendant through RPAD on 12.04.2022 was returned with a remark 'Left'. Under these circumstances, paper publication was ordered under Order V Rule 20 of CPC on 27.07.2022, pursuant to which, the respondent/plaintiff effected paper publication on 04.08.2022. The case was thereafter listed on 17.08.2022, when, the applicant/defendant entered appearance through its counsel.

3. The learned counsel for the applicant/defendant also formally filed Notice of Appearance on 22.08.2022. Before the said date, the respondent/plaintiff attempted to send a copy of the plaint, the documents,



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all other applications and affidavits on the learned counsel for the applicant/defendant.

4. On 30.08.2022, Summons for Judgment in Form 4A of Appendix - B to the CPC, was sent through Speed Post to the office of the learned counsel for the applicant/defendant which was delivered on 01.09.2022. An Affidavit of Service dated 05.09.2022 together with acknowledgment of Summons for Judgment in Form 4A of Appendix - B to the CPC was also filed by the respondent/plaintiff before this Court to prove the service of Summons on the learned counsel for the applicant/defendant. It is also acknowledged with the seal of the office of the learned counsel for the applicant/defendant.

5. Since the Summons for Judgment was received by the learned counsel for the applicant/defendant on 01.09.2022, the limitation for filing application for leave to defend in the above Summary Suit under Order XXXVII Rule 3(5) of CPC would have expired on 11.09.2022.



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6. When this case came up before this Court on 14.09.2022, the learned counsel for the applicant/defendant informed that they were not aware of the Summons for Judgment having been received by them. However, on 19.09.2022, the learned counsel for the applicant/defendant informed the Court that the Summons for Judgment which was received was misplaced and therefore requested a copy of the Summons for Judgment. On 20.09.2022, another copy of the Summons for Judgment was served on the learned counsel for the applicant/defendant.

7. On 28.09.2022, the present application for condonation of delay of 17 days in filing the application for Leave to Defend in the above Summary Suit, was filed by the applicant/defendant. Thus, it is clear, the application for leave to defend in the above Summary Suit was filed with delay of 17 days from 11.09.2022.

8. The present application is opposed by the respondent/plaintiff represented by the learned Senior Counsel on the ground that the applicant/defendant having slept over the rights was not entitled to



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condonation of delay. Secondly, it is mentioned that the Summons for Judgment was delivered on 01.09.2022 at the address given in the Notice of Appearance filed by the learned counsel for the applicant/defendant and therefore, in terms of Order XXXVII Rule 3(2) of CPC, Summons for Judgment is deemed to have been duly served on the applicant/defendant as the said Summons for Judgment was left at the address given by applicant/defendant in the Notice of Appearance.

9. It is further submitted that even otherwise, the affidavit that was served on the respondent/plaintiff by the applicant/defendant for condonation of delay in filing the application for leave to defend in the above Summary Suit, was that of the learned counsel for the applicant/defendant and not that of the applicant/defendant. At a later point of time, on 19.10.2022, the applicant/defendant substituted it with the party's affidavit while retaining the documents of the affidavit filed on 28.09.2022. It is submitted that even otherwise, the application to leave to defend should have accompanied with the affidavit of the party on 28.09.2022.



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10. That apart, the present application is defended by the respondent/plaintiff on the ground that the Suit Summons issued in Form 13-B of Appendix-II to the Original Side Rules, was purportedly refused and therefore, the respondent/plaintiff was constrained to effect the paper publication. It is that only pursuant to the paper publication effected, the applicant/defendant entered appearance through its counsel and has delayed the proceedings in the above Summary Suit. It is therefore submitted that the actual delay was 38 days (19 + 19) from 11.09.2022 and therefore, the applicant/defendant was not entitled for condonation of 17 days delay in filing the application for leave to defend in the above Summary Suit.

11. The learned Senior Counsel for the respondent/plaintiff further submits that since there is enormous delay without seeking leave for condonation of delay in appearance, the present application for condoning the delay in filing the application for leave to defend in the above Summary Suit, cannot be countenanced.



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12. The learned Senior Counsel for the respondent/plaintiff has
relied on the following decisions:-

- i. **Escorts Finance Ltd. Vs. Nielcon Ltd. and Another**, 2000 (55) DRJ 48 : 2000 SCC OnLine Del 39,
- ii. **Swarovski India Pvt. Ltd. Vs. M/s. SPA Agencies & Another**, ILR (2009) 6 Delhi 541 : 2009 SCC OnLine Del 1778.

13. By way of rejoinder, the learned counsel for the applicant/defendant submits that Order XXXVII Rule 3(7) of CPC confers wide power on the Court to excuse the delay of the defendant in entering an appearance or in filing application for leave to defend in the above Summary Suit, if sufficient cause is shown by the defendant.

14. The learned counsel for the applicant/defendant has relied on the following decisions:-

- i. **Rashmi Metaliks Ltd. Vs. Soneko Marketing (P) Ltd.**, 2019 SCC OnLine Cal 246.
- ii. **Goyal Mg Gases Ltd. Vs. Premium International Finance Ltd.**, 2007 (93) DRJ 831 : 2006 SCC OnLine Del 839.
- iii. **Hanumant Vs. Devidas**, (2017) 3 Mh.L.J. 262.

15. I have considered the arguments advanced by the learned



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counsel for the applicant/defendant and the learned Senior Counsel for respondent/plaintiff.

16. In this case, after a paper publication was effected, the applicant/defendant entered appearance on 17.08.2022 and filed Notice of Appearance on 22.08.2022. However, even prior to the applicant/defendant could formally enter appearance by filing of Notice of Appearance, the respondent/plaintiff proceeded to serve a copy of the plaint and documents on 18.08.2022.

17. On 30.08.2022, the Summons for Judgment was dispatched by the respondent/plaintiff in Form 4A of Appendix-B to the CPC under Order XXXVII Rule 3 of CPC and served the same on the learned counsel for the applicant/defendant at the address given in the Notice of Appearance filed by the counsel.

18. It was delivered on 01.09.2022 at the office of the learned counsel for the applicant/defendant as is evident from the Acknowledgment Card bearing the seal of the office of the learned counsel



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for the applicant/defendant.

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19. Thus, there was a proper service of Summons for Judgment on the applicant/defendant on 01.09.2022 though in Form 4A of Appendix-B to the CPC. The fact however remains that there is service of Summons for Judgment in Form 4A of Appendix-B to the CPC.

20. Under Order XXXVII of CPC, a Summary Suit has to follow a particular pattern. It starts with filing of a suit and thereafter, service of Summons to appear in Form 4 of Appendix-B to the CPC under Order XXXVII Rule 2 of CPC. Once Suit Summons is served, the defendant has to file a Notice of Appearance containing the address, on which, the plaintiff can serve Summons for Judgment in Form 4A in Appendix-B to the CPC under Order XXXVII Rule 3 of CPC.

21. However, this Court is governed by the Original Side Rules framed under Section 129 of CPC. Therefore, Order XXXVII of CPC and Form 4 and Form 4A of Appendix-B to the CPC have to be read with Order VII Rule 3 of the Madras High Court Original Side Rules. Form



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13A of Appendix-II to the Madras High Court Original Side Rules deals with the Summons in Summary Suit on negotiable instrument. Form 13B of Appendix-II to the Madras High Court Original Side Rules deals with the Summons in Summary Suit for recovery of liquidated claim.

22. Two stages which are contemplated under Order XXXVII Rules 2 & 3 of CPC have been fused into one stage in Form 13B of Appendix-II to the Madras High Court Original Side Rules read with Order VII Rule 3 of the Madras High Court Original Side Rules. This is evident from a reading of Order VII Rule 2 of Madras High Court Original Side Rules. Order VII Rule 3 of the Madras High Court Original Side Rules contemplates the Summons for Suit and for Judgment. Order VII Rules 2 & 3 of the Madras High Court Original Side Rules reads as under:-

<i>Order VII Rule 2 of the Madras High Court Original Side Rules</i>	<i>Order VII Rule 3 of the Madras High Court Original Side Rules</i>
Subject to the provisions of Rule 7 below, the procedure prescribed by this order shall be followed in all suits instituted under Rule 1 above, the ordinary procedure being excluded to that extent.	The summonses shall be in Form No.13-A or 13-B in Appendix II to these rules, or in such other form as may be from time to time prescribed.



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23. After the Summons is served in Form 13B of Appendix-II to the Madras High Court Original Side Rules under Order VII Rule 3 of the Madras High Court Original Side Rules, the defendant is required to appear and mark his appearance and in default, the plaintiff is entitled, at any time after expiration of period prescribed, to obtain a decree for any amount and for costs and interest on the said amount and costs at the rate of 6% per annum from the date of decree till the date of payment.

24. In case, the defendant enters appearance, an application to Leave to Defend the Summary Suit has to be filed by the defendant showing that there is a credible defence in the suit on the merits, or that it is reasonable that the defendant should be allowed to defend the suit.

25. The summary proceedings is intended to speed track proceedings as it is based on the documents where there are no disputed questions of fact regarding the liability. If the Court is of the view that the defendant has no case, the Summary Suit has to be decreed even if the defendant appears within the time stipulated in the Suit Summons issued



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under Order VII Rule 3 of the Madras High Court Original Side Rules in Form 13B in Appendix-II to the Madras High Court Original Side Rules.

26. The application for Leave to Defend should have been filed by 11.09.2022. The application for Leave to Defend was filed on 19.10.2022. The previous presentation of Leave to Defend in the above suit on 28.09.2022 with the affidavit of the counsel was not a proper presentation. If at all, the proper presentation for Leave to Defend along with the application for condonation of delay in filing the application for Leave to Defend would be on 19.10.2022. Therefore, there is a delay of 38 days reckoned from 11.09.2022.

27. The delay of 38 days in filing the application for Leave to Defend in the above Summary Suit can be condoned under Order XXXII Rule 3(7) of CPC as ultimately the Court has to consider whether the applicant/defendant was indeed entitled for a Leave to Defend in the above Summary Suit. Right to file an application for Leave to Defend in a Summary Suit is a substantive right and therefore, delay if any in filing such Leave to Defend, can be condoned.



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WEB COPY 28. A decree which is to be passed if leave to defend is to be rejected will put an end to all hopes for a regular trial. Therefore, this Court is inclined to condone the delay of 38 days in filing the application for leave to defend notwithstanding the fact that the applicant/defendant was not diligent in filing the application.

29. This application for condonation of delay of 38 days in filing the application for leave to defend in the above Summary Suit is allowed.

06.02.2023
(1/2)

jen

Note: Registry is directed to number the application for leave to defend in the above Summary Suit and list the same on 13.03.2023.



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