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

% **Date of decision: 02nd September, 2024**

+ CM(M)-IPD 15/2024 & CM APPL. 49502/2024

M/S. V-MEGA STORES & ORS.Petitioners
Through: Mr. Mukesh Kumar, Mr. Madhup
Kumar Tiwari, Mr. Adarsh Kumar
Pandey, Advocates (M:9015109285)
versus

V-MART RETAIL LIMITED & ANR.Respondents
Through: Mr. Prashant Sharma, Advocate
alongwith Mr. Mayank Singh,
Advocate (M:9121005321)

CORAM:
HON'BLE MS. JUSTICE MINI PUSHKARNA

MINI PUSHKARNA, J (ORAL)

1. The present petition has been filed impugning the order dated 22nd July, 2024 passed by learned District Judge (Commercial Court)-02, East District, Karkardooma Courts, Delhi passed in *CS(COMM) 361/2023*, whereby, learned Trial Court dismissed the applications of the petitioners, i.e., defendants in the suit, seeking condonation of delay in filing the written statement, with a cost of ₹ 50,000/- *inter alia* on technical ground that the same was not supported by properly executed affidavits.
2. The facts as canvassed in the present petition are as follows:
 - 2.1 The petitioner no.1 is a partnership firm constituted by the partners, vide partnership deed dated 03rd April, 2017. All the petitioners are partners of the partnership firm, except respondent no.2, i.e., defendant no. 2 in the



suit, who expired on 04th September, 2023.

2.2 A Power of Attorney has been executed in favour of defendant no.11, in the suit, by all the partners, except defendant no.2, who has already expired.

2.3 Though defendant no.2 in the suit, who is one of the partners of the defendant no.1-firm in the suit, has expired, the plaintiff therein, i.e., respondent no. 1 herein, has not taken any steps to implead the legal representatives of the defendant no.2.

2.4 A commercial suit bearing *CS(COMM) 361/2023* has been instituted by respondent no.1 herein, on 19th September, 2023, against the petitioners and respondent no.2 under Sections 134 and 135 read with Sections 27 and 29 of the Trade Marks Act, 1999, for mandatory injunction restraining infringement and passing off goods, rendition of accounts and damages of ₹ 50,00,000/- .

2.5 An *ex-parte* interim injunction was passed in favour of respondent no.1 on 26th September, 2023, and a Local Commissioner was also appointed, therein.

2.6 Subsequently, counsel for the petitioners, i.e., defendants in the suit, appeared before the learned Trial Court on 09th November, 2023, and sought time to file written statement along with affidavit of admission/ denial of documents.

2.7 Consequently, petitioners, being defendants in the suit, filed their written statement on 22nd January, 2024 along with documents. Along with the same, an application seeking condonation of delay in filing the written statement, and affidavit of admission/denial, was also filed.

2.8 Thereafter, the said application for condonation of delay filed by the



petitioners herein/defendants in the suit, was taken up for hearing on 06th May, 2024. On the said date, learned Trial Court observed that none of the petitioners had signed the application for seeking condonation of delay in filing the written statement.

2.9 Thus, liberty was granted by learned Trial Court to the petitioners, i.e., defendants in the suit, to file a fresh application for condonation of delay in filing the written statement.

2.10 Pursuant to the liberty granted by learned Trial Court vide order dated 06th May, 2024, petitioners herein, i.e., the defendants in the suit, filed a second application for condonation of delay before the learned Trial Court.

2.11 The second application seeking condonation of delay, was filed on 19th May, 2024, which in substance was verbatim similar to the first application dated 22nd January, 2024, and was in the nature of merely re-filing of the first one.

2.12 Since, there is no mechanism in the Trial Court for marking of defects, the petitioners herein could have only re-filed, once the defect was pointed out by the Court. Thus, there was no occasion for the petitioners to take back the first application seeking condonation of delay in filing the written statement, from the judicial record and re-file the same, after curing defects.

2.13 Subsequently, on 31st May, 2024, learned Trial Court heard arguments in the applications seeking condonation of delay. Vide impugned order dated 22nd July, 2024, the learned Trial Court dismissed both the applications of the petitioners herein/defendants in the suit.

2.14 Thus, the present petition has been filed, challenging the order dated 22nd July, 2024 passed by the learned District Judge (Commercial Court)-



02, East District, Karkardooma Courts, Delhi.

3. Learned counsel for the petitioners, i.e., defendants in the suit, submits that the applications of the petitioners have been dismissed erroneously, on the ground of technical defects, by holding that the affidavit in the said applications, preceded the date of drafting of the applications. It is contended that it has wrongly been held that the said applications were filed without proper supporting affidavit, and cannot be relied upon as per law.

4. Per contra, learned counsel for the respondent no. 1, i.e., plaintiff in the suit, submits that the impugned order dated 22nd July, 2024 is absolutely correct. He submits that the petitioners, i.e., defendants in the suit, have nowhere stated the date of drafting of the applications or that the drafting of the applications were done prior to attestation of the affidavits. He, thus, submits that though the affidavits were attested earlier, however, the applications were drafted only subsequently.

5. I have heard learned counsels for the parties and have perused the record.

6. At the outset, this Court notes that the first application filed by the petitioners, i.e., defendants in the suit, prayed for condonation of delay in filing the written statement. When the said application came up for hearing before the learned Trial Court, the learned Trial Court took note of the fact that the said application had been signed only by the counsel and not by the petitioners, i.e., defendants in the suit. Thus, liberty was granted to the petitioners, i.e., defendants in the suit, to file a fresh application seeking condonation of delay in filing the written statement. The relevant portions of the order dated 06th May, 2024, read as under:



“xxx xxx xxx

Ld. Counsel for plaintiff has submitted that Ld. Counsel for defendants has not filed the Special Power of Attorney by which all the defendants (except defendant no. 2) had authorized defendant no. 11 to file written statement, affidavit of admission/denial of documents and application seeking condonation of delay till date. The affidavit annexed with application seeking condonation of delay has only been signed and sworn by defendant no. 11 and not by all the defendants. The application seeking condonation of delay is not bearing signatures of any of the defendants therefore, the same may not be taken on record.

Ld. Counsel for defendants has submitted that he will file re-file the application seeking condonation of delay and also the documents by which all the defendants (except defendant no. 2) has authorized defendant no. 11 to file written statement, affidavit of admission/denial of documents and the application seeking condonation of delay within 15 days.

Heard. Request allowed.

Interim order is continued till next date of hearing.

Put up on 31.05.2024 at 12:30PM.”

(Emphasis Supplied)

7. Pursuant to the liberty granted by learned Trial Court, petitioners herein, i.e., defendants in the suit, filed a second application seeking condonation of delay in filing the written statement. The said application was taken up for hearing, along with the first application seeking condonation of delay in filing the written statement. The said applications were dismissed by common order dated 22nd July, 2024, in the following manner:

“xxx xxx xxx

7 (i).....



(ii) The first application seeking condonation of delay in filing WS was not signed by any of the defendants, but was only signed by Ld. Counsel for the defendants and that application was drafted on 21.01.2024 which is mentioned at the end of the application. **The said application is not supported by affidavit of the Counsel, but was supported by an affidavit of defendant no. 11, which was drafted and attested on 20.01.2024 i.e., preceding the date of drafting of the said application. Therefore, it is deemed that the said application is without proper supporting affidavit and hence, cannot be relied upon as per law.**

(iii) Moreover, Ld. Counsel cannot act as Attorney and as Counsel simultaneously in view of the case law titled as Anil Kumar & Another vs. Amit, 2021 SCC OnLine Del. 5020 decided by the Hon'ble High Court of Delhi on 17.11.2021, wherein it has been held in para no. 7 that:

7. It is made clear that the practice of advocates acting as power of attorney holders of their clients, as also as advocates in the matter is contrary to the provisions of the Advocates Act, 1961. Any advocate who is engaged by a client would have to play only one role, i.e., that of the advocate in the proceedings and cannot act as a power of attorney holder and verify pleadings and file applications or any other documents or give evidence on behalf of his client. This aspect has to be scrupulously ensured by all the Trial Courts. This legal position has been settled by various decisions. In Baker Oil Tools (India) Pvt. Ltd. v. Baker Hughes Ltd., (2011) 47 PTC 296 (Del), the Court held:

“Thus as is manifest from the said rule, it would be a professional misconduct if a lawyer were to don two hats at the same time. However not only that, the partnership firms have a hurdle for acting in the said two capacities even under The Partnership Act, as every partner in a partnership firm is an agent of another and if one were to be acting as an advocate for a client, the rest would also be in the same capacity by virtue of agency and the same would be the situation in case of an advocate acting as a client. However, it cannot be forgotten by any who has ever been graced with the honour of wearing the robe that the lawyer is first an officer of the court and his prime duty is to assist the court in the administration of justice. The rules of conduct as per the Bar Council Of India Rules may act as a guardian angel for ensuring the moral conduct of the lawyers but the legacy of the traditions of the Bar cannot be bedaubed by a few for the lucre of commercial gains. A lawyer cannot forget that this is called a noble profession not



only because by virtue of this he enjoys an aristocratic position in the society but also because it obligates him to be worthy of the confidence of the community in him as a vehicle of achieving justice. The rules of conduct of this profession with its ever expanding horizons are although governed by the Bar Council of India Rules but more by the rich traditions of the Bar and by the canons of conscience of the members of the calling of justice of being the Samaritans of the society. Thus the foreign companies and firms must respect the laws of this land and the solicitors and law firms are equally not expected to discharge their duties as clients for these foreign companies/firms. Law is not a trade and briefs no merchandise and so the avarice of commercial gains should not malign this profession. Hence there can be no divergent view on the legal proposition that an Advocate cannot act in the dual capacity, that of a constituted attorney and an advocate.”

(iv) A perusal of second application shows that it was drafted at New Delhi on 19.05.2024 and was filed by defendant no.11 on his behalf as well as on behalf of other defendants in the court on 31.05.2024. **The said application was supported by an affidavit of defendant no. 11, which was drafted on 11.05.2024 and the same was attested also on the same day by the NOTARY at Mangunoor, Siddipet District, Telangana State Cell and it was filed in the court on 31.05.2024. Therefore, it is apparent that the supporting affidavit annexed with the second application precedes the date of drafting the said application, hence it is deemed that this application is also not supported by proper affidavit.**

The submissions of Ld. Counsel for defendants that the second application is only extension of the first application, is without any merits as Ld. Counsel for the defendants could not have moved or filed the said application himself on behalf of the defendants in view of the aforesaid reasons and cited case law. **The submission of Ld. Counsel for the defendants that the date at the bottom of second application is not the date of drafting the same, but the same was date of filing, is also devoid of any merits since as per practice, the date of filing is never mentioned on any of the applications and that was not so mentioned on the second application. The WS was not filed by the defendants within the stipulated period of thirty days from the date of service or first appearance by their Counsel in the court, the applications seeking condonation of delay in filing WS are not in consonance with law, as explained above, therefore the said applications are dismissed with cost of Rs. 50,000/(rupees fifty thousand only) to be paid by the defendants to the plaintiff on or**



prior to the next date of hearing, since the defendants have caused delay to the suit of the plaintiff, by filing the aforesaid applications recklessly. Resultantly, the Written Statement, affidavit of admission-denial of documents and reply to the interim application of plaintiff, filed by defendants, cannot be taken on record.

xxx xxx xxx”

(Emphasis Supplied)

8. Perusal of the aforesaid order shows that applications filed by the petitioners herein, have been dismissed on the ground *inter-alia* that the counsel for the petitioners could not have acted as their attorney simultaneously. This Court notes that the said issue was not even material in the present case, as the affidavit in question, was duly signed on behalf of the defendants/petitioners herein. Merely, because the first application was not signed by the petitioners herein, cannot be taken to mean that the counsel for the petitioners herein, i.e., the defendants in the suit, was appearing as attorney for the defendants in the suit, simultaneously. The finding in this regard by the learned Trial Court is totally misplaced, and liable to be set aside.

9. This Court further notes that the applications for condonation of delay in filing the written statement, have been dismissed on the ground that the same were not supported with proper affidavits. This finding by the learned Trial Court is again not acceptable.

10. With respect to the first application, the learned Trial Court has held that the said application was attested on 20th January, 2024 and was drafted only on 21st January, 2024. Thus, it has been held that the first application was without proper affidavit, as the attestation of the affidavit, preceded the date of drafting of the said application.



11. Similarly, as regards the second application, the learned Trial Court has held that the said application was attested on 11th May, 2024, whereas, the same was drafted and signed on 31st May, 2024. Thus, it has been held that the second application was also attested, prior to drafting of the said application.

12. On a pointed query from learned counsel for the respondent, i.e., plaintiff in the suit, no law or Rule has been pointed out by learned counsel for the respondent herein, that there is any statutory requirement of mentioning as to the date of drafting of the application.

13. Further, this Court notes that the petitioners in the present case, who are the defendants in the suit, are stationed at Siddipet District, Telangana. Therefore, accordingly, it is clear that after the drafting of the application, the same was sent for attestation to Siddipet, Telangana. After the affidavit was duly notarized in Siddipet District, Telangana, the same was sent back to the counsel for filing, before the learned Trial Court.

14. Learned Trial Court has erred in presuming that the date of attestation of the application precedes the date of drafting of the application. The learned Trial Court has presumed that at the time of attestation of the applications, the same had not been drafted. There is nothing on record to show that the applications had not been drafted on the date of attestation of the affidavits. Learned Trial Court has proceeded on conjectures and surmises.

15. Law in this regard is very clear that even if the affidavit had not been attested, the same is considered to be a mere irregularity, which is capable of being cured. Thus, in the case of ***Raj Kumar Gupta Versus Narang Constructions & Financiers Pvt. Ltd., Through its Director Mr. Arun***



Rathi, 2023 SCC OnLine Del 40, this Court has held as follows:

“xxx xxx xxx

35. The short question is whether in light of the case laws as discussed above, the petitioner has been able to establish a ground for condonation of delay in refiling the petition. The entire issue hinges on the determination of whether the first filing on 29th June, 2019 (which was admittedly within the period as prescribed under Section 34 of A&C Act, 1996) can be considered as a filing or is it a non-est filing. **The main objections taken to the first filing were that the Statement of Truth and the Affidavit were not attested and the number of pages at the time of first re-filing were increased to 297 pages from 94 pages.**

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49. **The effect of non-attestation of the affidavit filed in respect of the plaint was considered in Alka Kasana v. Indian Institute of Technology, 2015 SCC OnLine Del 11455, and it was held that Order VI CPC does not provide for or envisage any consequence for non-compliance of the provisions contained therein.** The inevitable inference is that Order VI CPC is a provision that signifies the date on which a suit is deemed to have been instituted for purposes of limitation. The original side Rules of High Court of Delhi specifies the manner in which the plaint is required to be scrutinized and stipulates the timeline granted to the plaintiff to cure the defects/objections, if any, raised by the Registry at the time of scrutiny. The introduction of the Clause providing for an affidavit in respect of the pleadings by the Amendment Act of 1999 was only to hasten the process of disposal of a suit by fixing the responsibility on a party who initiates the suit. However, the said object and reason cannot be interpreted to hold that the plaint itself can be rejected mechanically without examining the merits of the case. **It was thus, held that non-attestation of the accompanying affidavit was a mere irregularity that was capable of being cured and cannot be treated as fatal to the institution of the suit.**

50. **In light of the above discussions, the objection of the non-attestation of the affidavit cannot make the first filing as non-est. It only suffered a defect which was curable and was in fact cured at the time of first re-filing on 31.08.2019.**

xxx xxx xxx”

(Emphasis Supplied)



16. It is to be noted that the Supreme Court has even gone to the extent of stating that even if an improper affidavit is filed, so long as deficiency is cured by filing a proper affidavit, when directed to do so, the same shall be considered as proper filing. Thus, in the case of ***Ponnala Lakshmaiah Versus Kommuri Pratap Reddy and Others, (2012) 7 SCC 788***, Supreme Court has held, as follows:

“xxx xxx xxx

28. *The decisions relied upon by Mr Rao do not in terms deal with a comparable situation to the one this Court was dealing with in Sardar Harcharan Singh Brar case [(2004) 11 SCC 196] . The format of the affidavit is at any rate not a matter of substance. What is important and at the heart of the requirement is whether the election petitioner has made averments which are testified by him on oath, no matter in a form other than the one that is stipulated in the Rules. **The absence of an affidavit or an affidavit in a form other than the one stipulated by the Rules does not by itself cause any prejudice to the successful candidate so long as the deficiency is cured by the election petitioner by filing a proper affidavit when directed to do so.***

xxx xxx xxx

31. *Suffice it to say, that in the absence of any provision making breach of the proviso to Section 83(1) a valid ground of dismissal of an election petition at the threshold, we see no reason why the requirement of filing an affidavit in a given format should be exalted by a judicial interpretation to the status of a statutory mandate. **A petition that raises triable issues need not, therefore, be dismissed simply because the affidavit filed by the petitioner is not in a given format no matter the deficiency in the format has not caused any prejudice to the successful candidate and can be cured by the election petitioner by filing a proper affidavit.***

xxx xxx xxx”

(Emphasis Supplied)

17. In the present case, it is to be noted that the affidavits in question, had been duly attested by notary before filing. Therefore, affidavits filed in support of both the applications seeking condonation of delay in filing the



written statement, were proper. Even if the affidavits supporting the applications were deficient in any manner, even then, the applications in question could not have been dismissed on the said ground. However, in the present case, the affidavits were duly signed and attested/notarized. Thus, it is apparent that the impugned order has been passed on the basis of conjectures and surmises, by presuming that the applications in question did not exist, on the date of attestation of the said affidavits in support of the applications. Such presumption made by the learned Trial Court, is not borne from the record.

18. Accordingly, the impugned order dated 22nd July, 2024, is hereby set aside.

19. The matter is remanded back to the learned Trial Court, who shall hear the applications seeking condonation of delay in filing written statement, filed by the petitioners herein, i.e., defendants in the suit, afresh.

20. Needless to state, the learned Trial Court shall hear the applications on their merits, without being affected by anything that is contained in the present order. Rights and contentions of both the parties are left open.

21. With the aforesaid directions, the present petition is disposed of, along with pending applications.

MINI PUSHKARNA, J

SEPTEMBER 2, 2024/au