

(2012) 12 DEL CK 0359
In the Delhi High Court
Case No : CS (OS) 2444 of 2011

National Institute of Electronic and Information Technology	APPELLANT
Vs	
Delhi SC/ST/OBC Minorities, Handicapped Financial and Development Corporation Limited (DSFDC)	RESPONDENT

Date of Decision : 07-12-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 2, Order 37 Rule 3, Order 37 Rule 3(1), Order 37 Rule 5

Citation : (2013) 1 AD 580

Hon'ble Judges : Reva Khetrapal, J

Bench : Single Bench

Advocate : Anil K. Khaware, for the Appellant; Rajesh Bawaja and Ms. Seema Seth, for the Respondent

Final Decision : Allowed

Judgement

Reva Khetrapal, J.

IA No. 8493/2012

1. By way of the present order, it is proposed to decide IA No. 8493/2012 filed by the defendant No. 1 praying for condonation of delay in filing the Memo of Appearance as required under Rule 3 of Order XXXVII. It is the case of the defendant No. 1 that on receiving the summons of the suit on 21.02.2012, the same were sent to different Sections of the defendant No. 1/Department to seek necessary opinion in the matter, whereafter the matter was forwarded to Standing Counsel of the defendant No. 1 and Memo of Appearance filed on 30.03.2012. It is further stated that the delay caused in filing the application is neither intentional nor deliberate.

2. Reply to the application has been filed by the plaintiff opposing the prayer made in the application. It is contended by the plaintiff that the Memo of Appearance has been filed by the defendant No. 1 on 26th/27th April, 2012, and

not on 30.03.2012, as contended by the defendant No. 1. It is stated that Memo of Appearance was apparently lying under office objection and was re-filed on 26th/27th April, 2012. It is further stated that service of Memo of Appearance was effected on the plaintiff's counsel on 30.04.2012 and the said date should be considered as the date of filing Memo of Appearance by the defendant No. 1, and thus there is a delay of 58 days. The counsel for the plaintiff has placed reliance on the judgment of this Court rendered in M/s. Emmsons International Ltd. Vs. M/s. Harshvardhan Chemicals & Minerals Ltd. 116 (2005) DLT 156.

3. Heard the learned counsel for the parties and scrutinized the record. Relevant facts which are borne from the records are that the defendant No. 1 was served with summons of the suit on 21.02.2012 for 26.04.2012. The Memo of Appearance filed through IA No. 8028/2012 was first filed on 30.03.2012 along with an application for condonation of delay, being IA No. 8493 of 2012, i.e., the present application. Certain objections were put by the Registry, which were removed by the plaintiff's counsel on 26th/27th April, 2012 and the two applications were listed before the Court on 04.05.2012.

4. Dealing first with the contention of the plaintiff that the counsel for the plaintiff was served with the Memo of Appearance on 30.04.2012 and the same should be treated as the date of filing, I am in agreement with the submission made by the learned counsel for the defendant No. 1 that it is only the entering of appearance which is the mandatory part of Rule 3 of Order XXXVII and filing of address for service or giving notice to the plaintiff's counsel are not mandatory provisions and if there is a violation thereof, the same can be compensated by costs. [Pal Jain and Another Vs. Mulakh Raj, ; Babu Lal Yadav vs. R.S. Yadav & Co. and Anr., 167 (2010) DLT 664; and Subir Kumar Bhattacharya Vs. Md. Habibar Biswas,].

5. Coming next to the delay caused in re-filing, the defendant No. 1 explains that the time taken in re-filing is attributable to some confusion caused due to the change in the name of the plaintiff after the filing of suit. Admittedly, initially the suit was filed in the name of "DOEACC Society, Chandigarh Centre", but thereafter on plaintiff's application for amendment, the name of the plaintiff was changed to "National Institute of Electronic and Information Technology". Although the said change was reflected in the records of Registry and summons issued to the defendant No. 1 were also issued in the new name of the plaintiff, the necessary changes were not carried out in the records of the filing counter, where the name of the plaintiff was still reflected as "DOEACC Society, Chandigarh Centre". Counsel for the defendant explains that it was in these circumstances that for no fault of his the Memorandum of Appearance filed by him on behalf of the defendant No. 1 was placed under office objection. I find merit in the said explanation given by the defendant No. 1 as the same is borne out from the computer-generated filing sheet dated 30.03.2012 and 28.04.2012, wherein the cause title of the suit is shown as "DOEACC Society, Chandigarh Centre vs. Delhi SC/ST/OBC Minorities, Handicapped Financial & Development

Corporation Limited (DSFDC)". Otherwise also, delay caused due to re-filing is not fatal because re-filing has been done within the maximum time allowed for re-filing i.e. 30 days, and as such the date of filing will relate back to the original date of filing.

6. Adverting now to the aspect of delay in filing Memo of Appearance, the defendant No. 1 was served on 21.02.2012 and the Memo of Appearance ought to have been filed within 10 days, i.e., latest by 2nd March, 2012. Instead the same has been filed on 30th March, 2012, after a delay of 28 days. Reliance is placed by the learned counsel for the plaintiff on the judgment of M/s. Emmsons International (Supra) in this regard. In the said case, it was held by the Court as under:

6. The whole purpose of expeditious and indeed summary disposal of an Order XXXVII suit which avowedly prescribes summary procedure is totally defeated if the defendant who under Order XXXVII Rule 3(1) has already been served with the statutory summons is given further opportunity to file the application for condensation of delay in filing the memo of appearance as postulated under Order XXXVII CPC. A defendant who has already been served with the statutory summons and is obviously not interested in any expeditious disposal, can easily delay proceedings by making himself scarce. This will defeat the whole purpose of expeditious and indeed summary disposal of an Order XXXVII suit. Once the defendant has been served and is represented through counsel after notice under sub section (1) of Order XXXVII rule (3), then the summons for judgment under sub-section (4) is only required to be served on such counsel, who files the memo of appearance on behalf of the defendant within the stipulated time of 10 days of the receipt of summons for appearance. All such hearings could have been averted and valuable judicial time and effort saved in case the defendant's counsel had taken care in filing the memo of appearance on behalf of the defendant within the stipulated time of 10 days of the receipt of summons for appearance even after availing so many opportunities so as to enable the Court to proceed to decree the suit in case leave to defend was not filed within the period stipulated under Order XXXVII Rule 5). Order XXXVII Rule 3 CPC provides a procedure for the appearance of the defendant and the defendant is required to enter appearance within 10 days of service which is dated 17th February, 2004. Since the defendant has not entered appearance in the stipulated period under Order XXXVII Rule 3 CPC, the consequences indicated under Order XXXVII of 2 CPC follow and the plaintiff is entitled to succeed in the suit.

7. The aforesaid judgment, in my opinion, has no bearing whatsoever on the present case and the reliance placed upon it by the counsel for the plaintiff is inapposite. In the said case, no Memorandum of Appearance was ever filed by the defendant even after the lapse of almost 8 months from the date of service, whereafter also the defendant sought further time to file Memo of Appearance along with application for condonation of delay, whereas in the present case the defendant No. 1 has filed Memo of Appearance albeit belatedly. It is trite that

condonation of delay is a matter of discretion of Court and if the Court finds that the delay is adequately explained and no mala fides can be imputed to the applicant, the Court is well within its powers to accept the explanation and condone the delay. In the present case, the delay of 28 days has been sufficiently explained by the defendant No. 1 and this Court is of the considered opinion that the delay caused is neither intentional nor deliberate and the interest of justice would be sub-served if the same is condoned subject to payment of costs of Rs. 10,000/-. The prayer for condonation of delay is accordingly allowed. Application stands disposed of. Costs of Rs. 10,000/- shall be paid to the counsel for the plaintiff before the next date.

IA No. 8028/2012

In view of the orders passed in the IA No. 8493/2012, the prayer in the present application is allowed. Memo of Appearance is taken on record. Application stands disposed of.

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List on 21.01.2013 before the Joint Registrar for further proceedings.