

Condonation of Delay in Seeking Leave to Defend the Summary Suit

- Presented by

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Introduction

Before understanding the concept of condonation of delay in the matters of seeking leave to defend the summary suit by the defendant, we have to know what the summary suit is and how it is distinguished from the ordinary suit. A summary suit is filed under Order

37 of CPC and it is filed only in the matters of disputes concerning negotiable instruments where the plaintiff seeks to recover debt or liquidated amount of money other than a penalty payable by the defendant with or without interest arising out of a written contract, enactment or guarantee. The summary suit is a unique legal procedure used for enforcing a right in an efficacious manner as the courts pass a judgment without hearing the defence. Unlike in an ordinary suit the defendant is not entitled to defend the summary suit without seeking prior leave of the court and that leave is to be taken within the stipulated period of ten days. Furthermore, the difference between summary suit and ordinary suit lies in the fact that the decree passed in the former may be set aside by the trial court itself under special circumstances whereas in the latter the decree cannot be set aside by the trial court except on review. It is, however the choice of the plaintiff that he sues the defendant either under ordinary procedure or under the summary procedure. For that purpose even if a suit is filed in ordinary procedure it can by amendment be converted in a suit under Order 37. In a summary

suit the plaintiff is entitled at any point of time to abandon or give up a part of the claim unilaterally. It is to be remembered that the provisions of Order 37 are merely rules of procedure. They do not alter the nature of the suit or jurisdiction of courts. The object behind the summary suit to be filed by the plaintiff is in fact to prevent unreasonable obstruction by the defendant who has no defence and to assist expeditious disposal of cases.

Content

- Rule 3 of Order 37 provides the procedure for the appearance of the defendant under which the defendant may at any time within ten days of service of summons on him enter an appearance either in person or by pleader and submit his address to the court for future service of notices on him. Sub-rule 3 of Rule 2 of Order 37 provides that the defendant shall not defend the summary suit 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.

- *The defendant may at any time within the stipulated period of ten days apply for leave to defend the summary suit and such leave may be granted to him unconditionally or upon such terms as the court deems fit and proper. It is to be noted that the granting of leave cannot be presumed only because the defendant filed the written statement within 10 days of service of summons on him. Leave has to be taken specifically to appear and to defend and the written statement can only be filed after such leave is granted either conditionally or unconditionally. Simultaneously, without a written statement being filed it is premature to grant leave to defend and to impose condition thereon. When the defendant on entering appearance did not specifically seek for leave to appear in the suit, he would not be entitled to defend it under the provisions of Order 37. Obviously, the provisions of Order 37 have to be strictly complied with.*
- *The court while granting leave to defend the suit shall exercise judicial discretion meaning thereby if the defendant prima facie satisfies the court that he has triable issue, the court should grant the leave. Of*

the defence appears to be good, unconditional leave should be granted. It is noteworthy that leave to defend has to be granted after summons for judgment has been served.

- *An important case needs to be discussed on the point of leave to defend and the case is K. Balkrishna Rao v. M.S. Volga Restaurant AIR 1995 DEL 40. The plaintiff filed a suit under Order 37 to claim for refund of the security amount he deposited while entering into an agreement to supply South Indian dishes to a restaurant run as a partnership firm. The partners of the firm requested the banker to freeze their accounts. It has been held that such an act of the partners cannot be a defence in that suit and there is no triable issue for which a leave can be granted and resultantly the suit had to be decreed.*
- *On another case Standard Chartered Bank v. M.S. Honda AIR 1995 DEL 252, it was held that no leave to defend could be available to the defendant when he failed to deposit the whole amount in compliance of the order of the court within the stipulated time and as a result, the plaintiff was found entitled to judgment forthwith in respect of the amount.*

- *On re Kiranmoyee Dassi v. Chatterjee AIR 1949 CAL 479 and Mechalac Engineers v. Basic Equipments AIR 1977 SC 577, the Calcutta High Court and the Supreme Court respectively have laid down the following guidelines to be followed by the court while granting or refusing leave to defend the summary suit :*

(i) *The defendant should be given unconditional leave to defend when he discloses his defence in his affidavit which appears to the court to be a good defence.*

(ii) *The defendant is entitled to get leave to defend unconditionally when he discloses a triable issue in his affidavit which indicates that he has a fair reasonable or bona fide defence.*

(iii) *If the affidavit of the defendant discloses such facts as may be deemed sufficient to enable him to defend, the court may conditionally grant leave, albeit the condition should not be about payment or furnishing security.*

(iv) The court may grant leave to defend leniently in case the defendant deposited the claimed amount in the court.

- Now the question arises as to what would happen when the leave is not being sought for within the stipulated time of ten days. Sub-rule 7 of Rule 3 is attracted in that case which provides that the court for sufficient cause shown by the defendant may excuse the delay of the defendant in entering an appearance or applying for leave to defend the suit. The Punjab & Haryana High Court while amending the said rule substituted it by the applicability of the provision of Section 5 of the Indian Limitation Act which provides that the court may extend the prescribed period in certain cases of filing appeal or application, but an application under Order 21 of the CPC if the appellant/ the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within the prescribed period. *On re Pleasant Securities and Finance Limited v. N.R.I. Financial Services Limited AIR 2000 DEL 245*, the defendant's application for appearance was allowed

and delay in filing thereof was condoned when the plaintiff did not make sufficient efforts to effect service of summons along with a copy of the plaint and annexures thereto on the defendant in strict compliance of Rule 3(1) of Order 37 of CPC.

Conclusion

Order 37 of CPC provides for a summary procedure in respect of certain suits with the object to prevent unreasonable obstruction by a defendant who has no defence. In a summary suit, the trial begins after the court grants leave to the defendant to contest the suit. The provisions of this order have been held not to be repugnant to Article 14 of the Constitution as they are based on reasonable classification. In fact, the summary suit confines merely to all suits on bills, hundies and promissory notes where the plaintiff seeks only to recover a debt or liquidated demand in money by the defendant with or without interest other than a penalty. The word 'liquidated' means ascertained and/or apportioned meaning thereby the amount clearly shown to be payable is referred to as a liquidated

amount. Where the parties agree that a sum stated shall be paid, such sum is also a liquidated sum.

In a summary suit, the defendant cannot appear before the court as of right. He has to seek for leave to defend it and that too within a period of ten days from the service of summons upon him and such leave will only be granted if his affidavit shows sufficient grounds. If no such leave is granted, the plaintiff is entitled for a decree. However, the court shall not refuse the leave to defend unless it is satisfied that there is absence of substantial defence or that the defence is frivolous or vexatious. Leave to defend may be refused where the object of the defendant is merely to prolong the litigation by untenable defences.

It has, thus become clear that the period of limitation for an application of leave to appear and defend is clearly ten days, but the delay may be excused if the defendant shows sufficient cause thereof and as such the main ground for delay condonation in seeking leave to defend in a summary suit is sufficient cause to be shown by the defendant alike Section 5 of the Limitation Act.