(2009) 09 DEL CK 0325

Delhi High Court

Case No: IA No''s. 8634 and 8865 of 2006 and 13474 of 2007 in CS (OS) 2005 of 2003

Polo Singh and Co.		APPELLANT
	Vs	
Delhi Development Authority		RESPONDENT

Date of Decision: Sept. 15, 2009

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 7 Rule 8, Order 8 Rule 1, Order 8 Rule 10, Order 8 Rule 9, 148

Hon'ble Judges: Dr. S. Muralidhar, J

Bench: Single Bench

Advocate: S.S. Gautam, for the Appellant; Pawan Mathur, for the Respondent

Judgement

S. Muralidhar, J.

This is an application filed by the plaintiff under Order VIII Rules 9 and 10 read with Section 35B of the CPC praying that the written statement filed by Defendant No. 1 Delhi Development Authority ("DDA.) be taken off the record and judgment be pronounced against the Defendant.

2. The above suit filed against the DDA and its Executive Engineer, Defendants 1 and 2 respectively, is for the recovery of a sum of Rs. 40,43,554/- together with pendente lite interest and future interest at 12% per annum from the date of filing of the suit till the date of realisation together with costs.

3. On 25th November 2003, summons were issued in the suit returnable on 16th March 2004. The Defendants entered appearance on the next date. The complete set of papers were directed to be supplied to Defendants 1 and 2 through counsel within a week and written statement was directed to be filed "within 30 days of the receipt of the set of papers along with the original documents of the Defendants." Replication was permitted to be filed within the next 30 days.

4. The matter was next listed on 27th July 2004 when counsel appearing for Defendants 1 and 2 sought time to file written statement. The order passed by the

learned Joint Registrar on that day reads as under:

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Time is sought on behalf of the defendants to file the written statement, which has not been filed in terms of order dated 16.03.2004 and not having been filed within a period of 90 days computed there from, no further time can be granted here in terms of the amended Order 8 Rule 1 of the CPC 1908 as amended, the matter be thus placed before the Hon''ble Court qua the submission made on behalf of the defendants seeking further time to file the written statement, on 19.08.2004.

5. An application IA No. 11009 of 2003 was filed by the Defendants praying that the delay in filing the written statement beyond the period of 90 days of service should be condoned. This Court by an order dated 19th August 2004 dismissed the application and passed the following order:

In this application it is prayed that the delay beyond ninety days of service be condoned. In my view it is not open to a court to read down or ignore an amendment in the law which specifically states that a Written Statement should be filed within thirty days of service and that the power of the court to enlarge the time would also be exhausted after the ninety days.

In these circumstances the application is dismissed. The Written Statement is taken off the record.

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Since there is no defence to the Suit, I consider it appropriate to direct the plaintiff to lead evidence by way of Affidavits which should be filed within twelve weeks from today. Matter be listed before the Joint Registrar for Exhibition of documents on 9.12.2004.

6. Aggrieved by the aforementioned order, the DDA filed FAO (OS) No. 189 of 2004. While issuing notice in the appeal on 27th September 2004, the Division Bench of this Court stayed the order dated 19th August 2004. Ultimately on 1st March 2005 the Division Bench allowed the appeal holding that the prayer for extension of time for filing written statement would have to be considered under Rule 3 of Chapter VI of the Original Side Rules. Accordingly, the impugned order dated 19th August 2004 was set aside and IA No. 11009 of 2003 was revived for consideration by the Single Judge afresh.

7. When the matter was again placed before Court on 17th August 2005, it was noticed that the application IA No. 11009 of 2003 pertained to a different subject matter in the suit and that both the application for condonation of delay as well as the written statement of the DDA had been taken off the record. Since the application for condonation of delay in filing written statement was required to be heard, this Court directed that "the said application and written statement be now

placed on record and the learned Counsel for the Defendant to assist and ensure that the same is so placed on record."

8. IA No. 742 of 2006 filed by the DDA seeking condonation of delay in filing written statement was filed on 17th August 2004. In para 1 of the said application, it was stated that the Defendant received a copy of the plaint on 22nd March 2004 and engaged a counsel on 2nd April 2004. The comments on the plaint were supplied to the counsel on 26th June 2004 but the counsel was away from Delhi. After returning to Delhi in the first week of July 2004, counsel asked the concerned department to discuss the matter with him inasmuch as he found the comments to be wanting. The file sent to the concerned department was however misplaced. Thereafter it was traced on 12th August 2004, after which the counsel was contacted and the written statement was prepared.

9. On 24th January 2006, this Court heard IA No. 742 of 2006. Learned Counsel for the plaintiff did not oppose the application "subject to terms." Accordingly, the application was allowed and it was directed that "the written statement is taken on record subject to payment of Rs. 3,000/- as costs to the plaintiff. The costs be paid within three weeks."

10. The case was thereafter listed before the learned Joint Registrar on 10th March 2006, long after the expiry of the period of three weeks after 24th January 2006. On that date none was present on behalf of the plaintiff. It was noted "learned proxy counsel for the Defendant is having with him costs of Rs. 3,000/- but none is present on behalf of the plaintiff to accept the costs. Learned proxy counsel submits that he will pay the costs to the plaintiff personally." By the same order it was noted that "the admission/denial of documents filed by the plaintiff cannot be carried out as learned proxy counsel for the Defendant has no authority to do the same." Accordingly, learned Joint Registrar granted "last and final opportunity to the parties for admission/denial of documents."

11. It must be noted that till 10th March 2006 the costs of Rs. 3,000/- had not been paid to the plaintiff. The order dated 24th January 2006 was already not complied with by that date. Even if the costs had been tendered to the counsel for the plaintiff, he could have declined since the time for payment of costs in terms of the order of this Court had already expired by then.

12. The case was next listed before the learned Joint Registrar on 25th April 2006. Learned Counsel for the plaintiff was present and informed the Court "that Defendant has not paid the costs of Rs. 3,000/- which was imposed on the Defendant by the Hon''ble Court vide order dated 24th January 2006." The record of appearance shows that on behalf of the DDA Mr. S.L. Garg, junior Law Officer appeared. He requested for "three days time to pay the costs to the plaintiff and to carry out the admission/denial of the documents." He further informed the learned Joint Registrar that "he is ready to bear the costs." Accordingly, the learned Joint

Registrar ordered "in view of the above facts one more last and final opportunity is being given for admission/denial of documents subject to payment of costs of Rs. 2,000 to the plaintiff within one week." The case was renotified for 2nd May 2006 since the next date before the Court was 3rd May 2006. Thereafter on the same day learned Counsel for the DDA appeared and informed the Joint Registrar that "he is having a cheque of costs bearing No. 407020 drawn on UCO Bank for payment of the same to the plaintiff." Therefore till that date i.e. 25th April 2006 costs had not been paid despite the proxy counsel for the DDA informing the learned Joint Registrar on 10th March 2006 that "she will pay the costs to the counsel for the plaintiff personally."

13. On 2nd May 2006 learned Counsel for the Defendant appeared before the learned Joint Registrar and handed over two cheques to learned Counsel for the plaintiff. One cheque was numbered 407020 dated 4th February 2006 for a sum of Rs. 3,000/-. The other was numbered 499970 dated 28th April 2006 for a sum of Rs. 2,000/-. The admission/denial of documents was carried out on that day.

14. The case was listed before the Court on 3rd May 2006. Learned Counsel for the plaintiff informed the Court that cheque No. 407020 dated 4th February 2006 for the sum of Rs. 3,000/- required to be revalidated. The said cheque was returned to learned Counsel for the plaintiff for revalidation and for being handed over to learned Counsel for the plaintiff within 15 days from that date. In other words, the revalidated cheque for costs of Rs. 3,000 was to be handed by DDA or its learned Counsel to learned Counsel for the plaintiff on or before 18th May 2006. The said order recorded that learned Counsel for the plaintiff did not wish to press the suit against Defendant No. 2. Accordingly, Defendant No. 2 was deleted from the array of parties. The Court framed issues in the matter. The case was then set down for trial and the case was sent to the learned Joint Registrar for recording of evidence.

15. The present application had been filed by the plaintiff on 31st July 2006. It was stated therein that the cheque for the costs of Rs. 3,000/- which was to be paid within a period of two weeks after 3rd May 2006 was not paid and, therefore, the written statement ought to be taken off the record. In addition, IA No. 8634 of 2006 was filed by the Defendant under Order XII Rule 8 CPC.

16. The case came up before the learned Joint Registrar on 4th August 2006. None appeared for the Defendant. In both the aforementioned applications notice was directed to issue to the Defendant, returnable on 14th September 2006. On the next date i.e. 14th September 2006 again none appeared for the Defendant. It was noticed that the process fee filed by the plaintiff for service of notice in the present application had been returned under objection. Fresh notice was accordingly directed to issue, returnable on 2nd November 2006.

17. When the case came up on 2nd November 2006, Mr. Pawan Mathur learned Counsel appeared for the DDA and accepted notice in the IA. He was supplied a copy

of the application there itself. He sought time to file a reply. The case was renotified for 18th January 2007. On the next date i.e. 18th January 2007 reply had still not been filed in the IAs and further time for this purpose was granted to learned Counsel for the DDA.

18. The Presiding Officer happened to be on leave on the next three dates. The case was next listed on 26th November 2007 before the learned Joint Registrar on which date he was informed by learned Counsel for the Defendant that reply has already been filed in the present IA as well as IA No. 8634 of 2006.

19. On its part DDA filed IA No. 13474 of 2007 u/s 151 CPC on 19th July 2007 praying that this Court should direct the plaintiff "to accept the cheque No. 400836 dated 3rd May 2007 for Rs. 3,000 in lieu of the time barred cheque No. 407020 dated 4th February 2006 for Rs. 3,000, which has not (been) encashed by the plaintiff." In the said application it was stated in paras 2, 3, 4 and 5 as under:

(2) That the plaintiff has moved an application under Order Application Under Order 8 Rules 9 and 10 read with Section 35B and 151 of the Code of Civil Procedure, which is registered as I.A. No. 8865 of 2006.

(3) That the defence of the DDA in the said application is that the DDA has already tendered the cheque No. 407020 dated 4.2.2006 for Rs. 3,000/- towards the payment of the cost. It is also stated by the defendant that without prejudice to the rights and contentions of the Defendant and in order to cut short the controversy the Defendant is willing to issue another cheque in view of the time barred cheque No. 407020 dated 4.2.2006 in favour of the plaintiff M/s. Polo Singh & Company. The defendant/applicant craves leave of this Hon''ble Court to refer to the contents of the reply filed by the defendant to the I.A. No. 8865 of 2006.

(4) That the Defendant could not tender the fresh cheque to the plaintiff on the last date of hearing i.e. 3rd May, 2007 since the Hon''ble Court was on leave and the case was adjourned for 28.7.2007.

(5) That keeping in view the fact that the Defendant has prepared another cheque in lieu of the time barred cheque No. 407020 dated 4.2.2006 for Rs. 3,000/- and had brought a fresh cheque for Rs. 3,000/- payable in favour of the plaintiff company, it would be appropriate that the defendant tenders the same to the plaintiff.

20. In the above application the learned Joint Registrar passed an order directing the plaintiff to file a reply within four weeks. The IAs were listed for 26th March 2008.

21. In the reply filed on 18th July 2007 by the DDA to the present application the explanation offered was that the cheque No. 407020 dated 4th February 2006 was sent by the DDA to its previous panel lawyer on 6th February 2006 to do the needful. The said counsel had informed the office that the counsel for the plaintiff had refused to accept the same before the next date of hearing. When the case was next listed before the learned Joint Registrar on 25th April 2006, the counsel could not

attend the matter and it was adjourned for 2nd May 2006. The aforementioned cheque dated 2nd April 2006 was tendered but by the order dated 3rd May 2006, it was directed to be revalidated and handed back to the counsel for the plaintiff within two weeks. The allegation in para 5 of the reply by the DDA is that the counsel for the plaintiff "refused to accept the cheques with the remarks that the cheques should be issued in favour of the lawyer instead of the plaintiff i.e. M/s. Polo Singh & Company. The counsel Mr. S.S. Gautam also explained that his client would perhaps not pay the costs to him." According to the DDA, this was placed before the Hon''ble Judge by the counsel for the DDA and requested to resolve the peculiar problem raised where the payment had been released by the DDA in compliance with the orders passed by this Court. On the intervention and the direction of the Joint Registrar the cheques were collected by the counsel for the plaintiff though no receipt of the same was given in Court. It is then alleged that the cheque No. 407020 dated 4th February 2006 "which was revalidated up to 30th September 2006 and delivered to the counsel for the plaintiff has been presented for encashment till date and the same has become time-barred."

22. A copy of the aforesaid reply filed by the DDA on 18th July 2007 was given to learned Counsel for the plaintiff only on 18th March 2008. In his rejoinder, the plaintiff categorically denied having received the revalidated cheque No. 407020 dated 4th February 2006. He stated that the said cheque "was never returned to the counsel for the plaintiff either within three weeks or even thereafter." He objected to the allegation that he had refused to accept the cheque on the ground that it should be drawn in his name as being "false, frivolous, scandalous and derogatory." It is stated specifically as under:

All the aforesaid pleas are although false, frivolous but are scandalous pleas and derogatory remarks in the reply filed by the defendant which are supported by affidavit and as the same are against the record of the Hon''ble Court. The same are taken with a view to save the adverse order of striking out the defence of the defendant, with malafide intention which called for action of false statement for the perjury as such it is requested that action according to law may be taken against the official who has filed false and frivolous supporting affidavit knowing it to be false.

23. It is further stated that when the Defendant himself states that the cheque for Rs. 2,000/- was given in the name of the plaintiff was encashed there was no question of not encashing the other cheque if it was indeed delivered to the counsel for the plaintiff after 3rd May 2006. In para 7 of the rejoinder it was reiterated as under:

The cheque was never delivered by the defendant to the plaintiff after 3rd May 2006 when the cheque was returned in the court by the counsel for the plaintiff to the counsel for the defendant for revalidation of the same, and further directions of the Hon''ble Court to defendant to deliver the cheque to the counsel for the plaintiff within two weeks. The cheque was never returned to the counsel for the plaintiff. It

is submitted that there was no controversy in the order.

24. It is submitted by Mr. S.S. Gautam, learned Counsel for the plaintiff that there is no valid explanation offered by the Defendant for not paying the costs of Rs. 3,000/- within the time permitted by the Court. In particular, he states even if the delay in tendering the costs prior to 3rd May 2006 were to be ignored, there was absolutely no justification for the DDA not to have paid the costs within a period of two weeks from that date. Mr. Gautam submits that the pleas taken by the Defendant in its reply are palpably false. The net result is that the costs of Rs. 3,000/- has not been paid even till date. He pointed out that IA No. 13474 of 2007 u/s 151 CPC ought not to be entertained. That application shows that DDA had prepared a cheque dated 3rd May 2007 for Rs. 3,000/- in lieu of the time-barred cheque which has not been encashed and yet had not tendered it to the plaintiff even till the date of the filing of the application i.e. 18th July 2007. Finally it is prayed that since the written statement is to be taken off the record, the judgment for the plaintiff in terms of Order VIII Rule 10 CPC should follow.

25. Mr. Pawan Mathur, learned Counsel for the DDA submits that learned Counsel for the plaintiff is being technical. The failure to pay Rs. 3,000/- as costs was for bonafide reasons. Mr. Mathur repeatedly stated that he entered into the picture as a panel lawyer for the DDA only on 2nd November 2006. He has no explanation to offer why previous counsel for the DDA who was appearing in the matter did not handover the cheque dated 4th February 2006 to the plaintiff till that date although it had been handed over to him by the DDA on 6th February 2006 itself. According to him the controversy was needlessly being created by learned Counsel for the plaintiff who had accepted the revalidated cheque but had not deposited it. However, Mr. Mathur does not dispute that there is no document with him or with the DDA to show that the revalidated cheque was handed over to Mr. Gautam. Mr. Mathur pleads that since the matter involves the conduct of a panel lawyer for the DDA, a lenient view should be taken.

26. The pronouncement of judgment in terms of order VIII Rule 10 CPC consequent upon the taking off of the written statement would, according to Mr. Mathur, be too harsh. On being asked whether the DDA would be prepared to pay exemplary costs for its conduct of being totally lackadaisical in pursuing its case, Mr. Mathur stated that it would be difficult to make any statement in that behalf.

27. The above submissions have been considered. It appears to this Court that in the absence of any document to show that the revalidated cheque No. 407020 dated 4th February 2006 was handed over by learned Counsel for the DDA to the learned Counsel for the plaintiff the statement in DDA''s reply to that effect cannot be accepted. Para 5 of the DDA''s reply extracted hereinbefore does not mention when the revalidated cheque was handed over. The reply is supported by the affidavit dated 18th July 2007 of one Mr. Shekhar Dey, Chief Engineer-SEZ, DDA. The affidavit states that the reply has been "drafted by our counsel under our instructions, the

contents of which are true and correct." It has a verification stating that "the contents of the affidavit are true and correct."

28. The above assertions cannot be true. The fact is that even according to Mr. Mathur he entered the picture only on 2nd November 2006 when he first appeared in the case. He therefore could have no personal knowledge as to when prior to that date the previous counsel for the DDA had handed over the revalidated cheque to Mr. Gautam. This fact could also not have been in the personal knowledge of Mr. Shekhar Dey, Chief Engineer-SEZ, DDA. Mr. Dey has therefore taken the risk of swearing to an affidavit in support of the reply making an assertion about something not within his knowledge.

29. What is a matter for concern is that in the reply of the DDA to the present application personal allegations have been made against the counsel for the plaintiff. Statements have been attributed to him which are not fair to him. The reply alleges that he insisted on the cheque being issued in his own name instead of the plaintiff and that this was because "his client would perhaps not pay the costs to him." This was obviously not within the personal knowledge of either Mr. Mathur or Mr. Dey for otherwise the precise date and time when the above conversation took place would have been indicated. It is indeed surprising that this kind of an allegation in a reply has been supported by the affidavit of a person who obviously had no personal knowledge of what transpired and that too between the previous counsel for the DDA and Mr. Gautam. In the above circumstances, the protest by Mr. Gautam that the allegation is "false, frivolous, scandalous and derogatory" is understandable.

30. Interestingly, in para 4 of the IA No. 13474 of 2007 it is stated by the DDA that "the Defendant could not tender the fresh cheque to the plaintiff on the last date of hearing i.e. 3rd May 2007 since the Hon''ble Court was on leave and the case was adjourned for 28th July 2007." This excuse is surprising since at one stage the proxy counsel for the DDA offered to pay costs to the counsel for the plaintiff "personally." It is incomprehensible how and why none of the counsel for the DDA could till 19th July 2007 pay a paltry amount of Rs. 3,000 to the plaintiff.

31. The law as explained by the Supreme Court in recent judgments may now be noticed. In Kailash Vs. Nanhku and Others, it was observed:

42. Ordinarily, the time schedule prescribed by Order 8, Rule 1 has to be honoured. The defendant should be vigilant. No sooner the writ of summons is served on him he should take steps for drafting his defence and filing the written statement on the appointed date of hearing without waiting for the arrival of the date appointed in the summons for his appearance in the Court. The extension of time sought for by the defendant from the Court whether within 30 days or 90 days, as the case may be, should not be granted just as a matter of routine and merely for the asking, more so, when the period of 90 days has expired. The extension can be only by way

of an exception and for reasons assigned by the defendant and also recorded in writing by the court to its satisfaction. It must be spelled out that a departure from the time schedule prescribed by Order 8, Rule 1 of the Code was being allowed to be made because the circumstances were exceptional, occasioned by reasons beyond the control of the defendant and such extension was required in the interest of justice, and grave injustice would be occasioned if the time was not extended.

44. The extension of time shall be only by way of exception and for reasons to be recorded in writing, howsoever brief they may be, by the court. In no case, shall the defendant be permitted to seek extension of time when the court is satisfied that it is a case of laxity or gross negligence on the part of the defendant or his counsel. The court may impose costs for dual purpose: (i) to deter the defendant from seeking any extension of time just for the asking, and (ii) to compensate the plaintiff for the delay and inconvenience caused to him.

32. Later, a three-judge Bench of the Supreme Court in R.N. Jadi and Brothers and Others Vs. Subhashchandra, considered the earlier decision in Kailash v. Nankhu. P.K. Balasubramanyan J., who was party to the earlier decision in his concurring judgment observed:

14. It is true that procedure is the handmaid of justice. The court must always be anxious to do justice and to prevent victories by way of technical knockouts. But how far that concept can be stretched in the context of the amendments brought to the Code and in the light of the mischief that was sought to be averted is a question that has to be seriously considered. I am conscious that I was a party to the decision in Kailash v. Nanhku which held that the provision was directory and not mandatory. But there could be situations where even a procedural provisional could be construed as mandatory, no doubt retaining a power in the Court, in an appropriate case, to exercise a jurisdiction to take out the rigour of that provision or to mitigate genuine hardship. It was in that contest that in Kailash v. Nanhku it was stated that the extension of time beyond 90 days was not automatic and that the court, for reasons to be recorded, had to be satisfied that there was sufficient justification for departing from the time-limit fixed by the Code and the power inhering in the court in terms of Section 148 of the Code. Kailash is no authority for receiving written statement, after the expiry of the period permitted by law, in a routine manner.

15. A dispensation that makes Order 8 Rule 1 directory, leaving it to the courts to extend the time indiscriminately would tend to defeat the object sought to be achieved by the amendments to the Code. It is, therefore, necessary to emphasise that the grant of extension of time beyond 30 days is not automatic, that it should be exercised with caution and for adequate reasons and that an extension of time beyond 90 days of the service of summons must be granted only based on a clear satisfaction of the justification for granting such extension, the court being conscious of the fact that even the power of the court for extension inhering in Section 148 of the Code, has also been restricted by the legislature. It would be

proper to encourage the belief in litigants that the imperative of Order 8 Rule 1 must be adhered to and that only in rare and exceptional case, will the breach thereof will be condoned. Such an approach by courts alone can carry forward the legislative intent of avoiding delays or at least in curtailing the delays in the disposal of suits filed in courts. The lament of Lord Denning in Allen v. Sir Alfred McAlpine & Sons that law''s delay have been intolerable and last so long as to turn justice sour, is true of our legal system as well. Should that state of affairs continue for all times?

33. The above decisions have been discussed and reiterated recently by the Supreme Court in Mohammed Yusuf Vs. Faij Mohammad and Others,

34. In the light of the law as explained, on the facts of the present case this Court is unable to take a lenient view of the conduct of the DDA. The history of the case as has been set out hereinbefore amply demonstrates that despite being put to terms for committing default in not filing its written statement within time, the DDA committed another. The repeated defaults in not paying costs of Rs. 3,000, which is not a substantial sum, cannot be excused. To condone DDA''s conduct in the matter would reduce the provisions of the CPC, after the amendment in 2002, to a dead letter. It was urged that learned Counsel for the plaintiff was perhaps not being reasonable in accepting the payment of costs notwithstanding the delay in tendering them to him as DDA ought not to be visited with the severe consequence of the suit being decreed because of the default of its counsel. This submission is again unacceptable. Counsel for the plaintiff cannot possible be asked to waive the right of his client to ask the court to decree the suit which is available to him under Order VIII Rule 10 CPC, particularly where he has been waiting for over four years for the written statement of the DDA. Also, this is a case where the DDA''s first default was in fact condoned by counsel for the plaintiff when he did not oppose the allowing of the first application for condonation of delay subject to payment of costs. To expect the counsel for the plaintiff to repeatedly come to the rescue of the DDA is neither proper nor reasonable.

35. The written statement of the Defendant DDA is directed to be taken off the record.

36. The written statement of the DDA having been taken off the record, the question that arises is whether the plaintiff is entitled to a judgment in terms of Order VIII Rule 10 CPC.

37. Considering the nature of the suit, which is a claim for money on account of breach of the contract by the DDA, the plaintiff will still have to prove its case. IA No. 8865 of 2006 is accordingly disposed of in the above terms. Accordingly, IA No. 13474 of 2007 is hereby dismissed.

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38. The plaintiff will file affidavits of the witnesses by way of examination- in-chief within four weeks. Place before the learned Joint Registrar on 10th November 2009 for the appearance of the plaintiff''s witnesses and for further steps. To be placed before the Court after the recording of evidence is complete.

IA No. 8634/2006

39. This is an application by plaintiff under Order XII Rule 8 CPC seeking production of documents as set out in the annexure to the application. The reply of the Defendant to the application has been considered. The application deserves to be allowed. The Defendant is directed to produce at the time of that hearing before the learned Joint Registrar on 10th November 2009 the documents listed in the annexure to the application.

40. The application is disposed of.