

## Shyam Singh Khatri and Another Vs M/s ICICI Home Finance Co. Ltd.

**Court:** Delhi High Court

**Date of Decision:** May 11, 2012

**Acts Referred:** Civil Procedure Code, 1908 (CPC) – Order 37 Rule 3(1), Order 37 Rule 3(7), 96

**Citation:** (2012) 194 DLT 673

**Hon'ble Judges:** Valmiki J Mehta, J

**Bench:** Single Bench

### Judgement

Valmiki J Mehta, J.

This case is on the Regular Board of this Court since 27.2.2012. The case was called out on earlier occasions and an order was recorded on one such date i.e. 3.5.2012 wherein respondent appeared through counsel and adjournment was granted for 7.5.2012 and

counsel for the respondent stated that he will inform counsel for the appellants of the appeal having been called out for hearing. The matter has

been called out today in the Regular Matters as the same is effective item no. 1. No one appears for the parties. I have therefore perused the

record and am proceeding to dispose of the appeal. The challenge by means of this Regular First Appeal filed u/s 96 of the Code of Civil

Procedure, 1908 (CPC) is to the impugned judgment of the trial Court dated 4.5.2004 decreeing the suit filed by the respondent/plaintiff under

Order 37 CPC inasmuch as the trial Court held that the appearance was not filed within the prescribed period of limitation. Following are the

observations of the trial Court for decreeing the suit:

I have perused the record, the documents placed on record and heard the Id. counsel for the defendant.

The summons for appearance were reported to have been served on the defendants on 8.11.2003 at house no. 557 instead of house no. 62 as the

defendants had shifted to house no. 557. The defendant No. 2 has admitted having shifted from house no. 62 to house no. 557 and thus, though

the defendants have denied having received the summons on 8.11.2003, however, there is no reason to disbelieve the report on the summons.

Still further, defendant no. 1 had personally appeared on 27.1.2004 and therefore file was inspected twice through counsel on 7.2.2004 and

9.2.2004, however, no appearance as required under order 37 rule 3(1) CPC was filed. The appearance should have been filed immediately on

7.2.2004 having come to know that the present suit is under order 37 CPC. Even assuming that the defendants came to know that the present suit

is under order 37 CPC only on 7.2.2004, the appearance was not filed till 17.2.2004 and has been filed only on 27.2.2004. Availability of

certified copy of the plaint etc. is not required for filing the appearance as at the time of filing of appearance, nothing is to be stated on the contents

of the plaint and as such the explanation furnished by the defendants is far from satisfactory.

Accordingly, the application for condonation of delay in filing the appearance is dismissed and since there is no appearance put in by the

defendants and the suit being under order 37 CPC based on a written contract, original of which has been filed, the suit of the plaintiff is decreed

for a sum of Rs. 4,07,564/- with pendente lite interest @ 9.25% p.a. and future interest till realization @ 9.25% p.a.

Cost of the suit also awarded to the plaintiff.

Decree sheet be prepared accordingly.

File be consigned to record room.

2. It is therefore clear that there is undoubtedly delay in filing the appearance inasmuch as defendant was served on 8.11.2003 and appearance

was filed on 27.2.2004 i.e. delay of about 3 months and 10 days. The defendant had also appeared earlier and taken inspection, and there seems

to be some amount of confusion as to whether the suit was under Order 37 CPC or not. Though it cannot be said one way or the other with clarity

as to the existence of confusion, however, the more important aspect is that endeavour of Court should be to see that recovery suits are not

decreed on technical grounds unless the delay is substantial and there is no explanation for the same. The Supreme Court in the case of N.

Balakrishnan Vs. M. Krishnamurthy, has held that once an application is filed for condonation of delay obviously there has to be some amount of

lapse or negligence, and which is why the delay occurs, however the Supreme Court has said that unless there is complete want of action or gross

negligence delays must be condoned because a party does not want to act against his own interest by delaying the matter.

3. Considering that in the facts of the present case there is undoubtedly a delay in filing appearance, however the delay is not so huge that it can be

said that delay is malafide or there is complete want of action or negligence, therefore, in the facts of the present case, I deem it fit that the delay in

filing the appearance is condoned under Order 37 Rule 3 sub-rule 7 CPC. The delay is however condoned subject to payment of costs of Rs.

20,000/- considering that the decree is passed for a sum of Rs. 4,07,564/- and respondent is put to costs of this appeal. Appeal is accordingly

allowed and disposed of by holding that the delay in filing the appearance shall stand condoned. Trial Court record be sent back.