

Union of India Vs. Creative Software (P) Ltd.

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Court : Delhi

Decided On : Mar-06-1997

Reported in : 1997IIAD(Delhi)865; 66(1997)DLT383; 1997(41)DRJ371; (1997)116PLR41

Judge : Jaspal Singh, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 37

Appeal No. : Civil Revision Appeal No. 70 of 1996

Appellant : Union of India

Respondent : Creative Software (P) Ltd.

Advocate for Pet/Ap. : B.P. Aggarwal,; Manoj Sharma and; Shambhu Nath, Advs

Judgement :

Jaspal Singh, J.

(1) What happens when, within ten days of service of summons issued in a suit under Order 37 in Form Iv, Appendix B of the Code of Civil Procedure, the defendant appears in court and files not only the Vakalatnama but an application for leave to appear and defend as well? Would that amount to putting the appearance? No! says the learned trial Judge. Is she right? This is the question posed in this revision petition.

(2) Let us first have a look at the broad outline of the procedure to be followed in a suit instituted under order 37. It is: On institution of a suit under order 37 a summons is issued under Rule 2(2) to the defendant in Form 4 of Appendix B. Rule 2(3) provides that a defendant shall not defend the suit 'unless he enters appearance' either in person or by pleader and that too within ten days of his service. The sub-rule (3) provides that on the day of entering the appearance, 'notice of such appearance shall be given by the defendant to the plaintiffs pleader, or, if the plaintiff sues in person, to the plaintiff himself, either by notice delivered at or sent by a prepaid letter directed to the address of the plaintiffs pleader or of the plaintiff, as the case may be.' Once the defendant has entered appearance, sub-rule 4 requires the plaintiff to obtain from the court and serve on the defendant a summons for judgment in Form 4A prescribed in Appendix B returnable not less than 10 days from the date of its service. Within ten days of the service of summons for judgment, the defendant is required to apply for leave to defend the suit. If he fails to so apply, decree would follow. However, if he does apply, the court may grant or refuse leave to defend. In case of refusal too, judgment would follow.

(3) In the present case, within ten days of service of summons under Rule 2 in Form No.4 in Appendix B, the defendant moved an application for leave to defend. It is not disputed that on the day the said application was moved the counsel for the plaintiff was present in court and had in fact been delivered a copy of the said application. It is further not disputed that Along with the said application for leave to defend was filed the power of attorney of the counsel for the defendant duly signed by the defendant and that it contained the lawyer's address. The learned Additional District Judge, however, did not treat it as 'entering the appearance' on the ground that the procedure laid down in sub-rule (3) had not been followed. She thus passed a decree in favor of the plaintiff.

(4) Undoubtedly, it is not only 'entering the appearance' which sub-rule (3) talks of. After entering the appearance what a defendant is further required to do is to give notice of such appearance to the plaintiffs pleader, or, if the plaintiff sues in person, to the plaintiff himself, either by notice delivered at or sent by a prepaid letter directed to the address of the plaintiffs pleader or the plaintiff, as the case

may be. Sub-rule (3) thus comprises of two distinct steps. One of entering appearance and the second of giving notice. Surely then, 'entering the appearance' stands apart.' It is a distinct condition in itself independent of the formality to give notice of appearance. The question is: Are both these steps mandatory?

(5) Undoubtedly, and this was not even disputed, entering the appearance is a condition which has to be complied with mandatorily. What about the requirement of giving of notice? The learned Additional District Judge has treated it as mandatory and during arguments she won full-throated approval of the learned counsel for the plaintiff. I think, with respect, they stand on a hopeless wicket. As far back as on July 20, 1981 T.P.S.Chawla J. while construing the provisions of Order 37, Rule 2 held: 'Sub rules (1) and (3) of Rule 3 indicate that entering appearance is one thing; filing an address for service another and giving notice of appearance to the plaintiff or his counsel a third. Sub-rule (3) of rule 2 has nothing to say as to the effect of non-compliance with the second and third requirements. In accordance with the principle of harmonious construction the words 'enters an appearance' in that sub-rule must be read in the same sense as is derived from sub- rules (1) and (3) of rule 3. Those sub-rules lead irresistibly to the conclusion that entering an appearance does not of itself involve or import the filing of an address for service in court or serving notice of such appearance on the plaintiff or his counsel. For, otherwise those two requirements would not have been stated additionally and separately.' (Arjan Lal Verma vs . Smt. Rawel Kaur : AIR1982 Delhi148 .) I am in respectful agreement.

(6) The main question still remains. Can the act of the defendant in filing an application for leave to appear and defend the suit and the Vakalatnama within ten days of service of summons issued under Rule 2(2) in Form 4 of Appendix B and delivery of copy of the said application to plaintiffs counsel in court on the same day, be said to amount to putting of appearance? Undoubtedly, it was no stage to move an application for leave to appear and defend the suit. Such an application is required to be moved only within ten days of service of summons for judgment issued in Form 4A in Appendix B. That stage had not yet come. It was to come only after covering a lot of ground. As stated above, the requirement of giving

notice does not constitute nor is intended to constitute a part of the act of entering appearance.

(7) But then, how does a defendant put the appearance? Is any norm laid down for the same? Surely not. Any prescribed form? None, at all. Any required methodology? None, so to say. In fact, 'Appearance' is not even defined. But then, this silence is quite eloquent. Let us not forget the object of the special provision. If no appearance is entered, there is no need to record *ex parte* evidence. Judgment would follow forthwith. But, if the defendant does enter appearance, his act serves the object of signalling the plaintiff to proceed ahead. This object can be served either by filing a power of attorney by the lawyer of the defendant or by the defendant simply appearing before the court within the stipulated period of ten days and informing the court even orally that he is present in response to the summons received. In the present case, the defendant did something more. Not only that the lawyer filed his Vakaltanama, even an application for leave to appear and defend the suit was moved and its copy too was handed over to the lawyer of the plaintiff that very day in court itself. The object was thus pre- eminently served and the condition of law fulfilled.

(8) For the reasons recorded above the revision petition is accepted and the impugned order is set aside. Parties are directed to appear before the learned trial Judge on March 26, 1997 for further proceedings.