these difficulties it was necessary to make suitable amendment in clause(e) of Section 2 of the Act. Further, the matter is clinched by Annexure R-6 dealing with preparation of seniority lists of teachers in non-government recognised colleges. Annexure R-6 came into being in terms of Clause 6 of Appendix IX to Ordinance XVI of the Recognised Colleges, clause 3 whereof clearly talks that a governing body having more than one college shall have one consolidated list of seniority. This Court is even otherwise of the view that where a society, corporate body or any person or authority is having number of educational institutions and the employees working in the said institutions have a transferable job, it is always better to prepare a common seniroty list, otherwise it can create insurmountable difficulties, both for the employees as also the bodies managing educational institutions. It may be recalled that the petitioner lost his cause that he was pleading in the earlier writ with regard to transfer of some of the employees of the respondent institution. That necessarily follows that employees of the respondent-institute have transferable job. As mentioned above, for such employees, working in different institutions under the same management, it is always better for proper management and administration to have common seniority list.

(9) Finding no merit in this petition, I dismiss the same leaving, however, the parties to bear their own costs.

J.S.T.

Before Sat Pal, J,

SAT PAL SINGH,—*Petitoner*

versus

HARJIT SINGH,—*Respondent*

C.R. No. 2277 of 1996

30th March, 1998

Code of Civil Procedure, 1908—Order 37, Rls. 3(5) & 4 and S. 151—Summary suit—Leave to defend—Dismissal of application seeking leave to defend the suit for non-prosecution—Trial Court is required to examine the application to ascertain as to whether the presence of party or counsel is not necessary at the stage of consideration of defendant's application for leave of Court to defend suit—Order of dismissal in default set aside.

Held that, admittedly in the present case, the defendant had

filed an application under sub rule (5) of Rule 3 under order 37 CPC. Since the application was on record, the learned trial Court was required to examine this application to find out as to whether facts stated in the application indicate that he has a substantial defence to raise or the defence put up by the defendant was frivolous or vexatious. For this purpose the presence of the petitioner or his counsel was not necessary and as such the application filed by the defendant seeking leave of the Court to defend the suit, could not be ignored by the learned trial Court while passing the impugned judgment dated 28th September, 1992. From the judgment dated 28th September, 1992 I, however, find that the learned trial Court has not referred to any fact disclosed by the defendant in the application seeking leave of the Court to defend the suit. In view of this, the impugned order passed by the learned trial Court refusing to set aside the *ex parte* judgment and decree dated 28th September, 1992 cannot be legally sustained.

(Para 7)

Ravi Kant Sharma, Advocate, *for the Petitioner*

Kanwaljit Singh, Advocate, *for the Respondent*

JUDGMENT

(1) In this case respondent-plaintiff filed a suit against petitioner-defendant under order 37 of the CPC. Summons were served on the petitioner-defendant on 8.8.1990 and thereafter the petitioner appeared before the learned trial court on 15.8.1990. Summons for judgment were delivered to the defendant-petitioner on 11.9.1990 and on 29.9.1990 the petitioner filed an application under Order 37 Rule 3(5) seeking leave of the Court to defend the suit. Reply to this application was filed by the plaintiff-respondent on 29.10.1990. Thereafter, the case was fixed on 3.8.1992 and on that date the case was adjourned to 7.9.1992 for arguments on the application filed by the petitioner seeking leave to defend the suit. On 7.9.1992 since none appeared on behalf of the petitioner-defendant, the application filed by the petitioner under order 37 Rule 3(5) CPC seeking leave to defend the suit was dismissed in default and the case was adjourned to 26.9.1992 for documents and consideration. On 26.9.1992 the documents were filed by the respondent-plaintiff and arguments were heard and the case was adjourned to 28.9.1992 for orders. On 28.9.1992 the suit was decreed

in favour of the respondent-plaintiff and against the petitioner-defendant.

(2) On 10.10.1992 the petitioner-defendant filed an application under order 37 Rule 4 read with section 151 CPC and order 9 Rule 13 CPC for setting aside the judgment and decree dated 28.9.1992 passed by the learned trial court. In this application, *inter-alia,* it was stated that the learned counsel of the petitioner-defendant on 3.8.1992 had noted the next date of hearing as 10.10.1992 whereas according to court records the case was adjourned on that date to 7.9.1992. It was, therefore, contended that the absence of the learned counsel of the petitioner on 7.9.1992 was neither intentional nor deliberate. Notice of this application was issued to the respondent-plaintiff who filed the reply to this application. Thereafter issues were framed by the learned trial court and,—*vide* order dated 6.9.1995, the application filed by the petitioner-defendant for setting aside the judgment and decree dated 28.9.1992 was dismissed. Against the said order dated 6.9.1995, the present petition has been filed by the petitioner-defendant. Notice of this petitioner was issued to the respondent.

(3) Mr. Ravi Kant, the learned counsel appearing on behalf of the petitioner submitted that once an application under order 37 Rule 3 has been filed by the defendant seeking leave of the court to defend the suit, the said application can not be dismissed in default, even if the defendant or his counsel is not present in the court when the case is fixed for arguments on this application. He submitted that the learned trial court has only to examine the averments made in this application to ascertain as to whether the facts stated in the application are sufficient to entitle the defendant to defend the suit. He, therefore, contended that even in the absence of the defendant or his counsel, the learned trial court ought to have applied his mind after examining the facts stated in the application and the application could not have been dismissed for non-prosecution. In support of this submission, the learned counsel placed reliance on a judgment of this court in *M/s Sushila Production Engineer Chandigarh and others* vs. *State Bank of India, Chandigarh* (1).

(4) The learned counsel further submitted that on 3.8.1992, the learned counsel of the petitioner noted in his diary the next date of hearing as 10.10.1992 though as per court records the case was adjourned to 7.9.1992. He, therefore, contended that his

(1) 1989 (2) Current Law Journal 683.

absence on 7.9.1992. was in the circumstances neither intentional nor deliberate and was rather due to wrong noting of the date in the diary of the counsel. He submitted that wrong noting of date in the diary of the counsel was sufficient cause and as such the application filed by the petitioner-defendant under order 9 Rule 13 CPC and order 37 Rule 4 read with section 151 CPC should have been allowed by the learned trial court. In support of his submissions, the learned counsel placed reliance on a Division Bench judgment of Delhi High Court in *Messrs N.K. Private Ltd.* vs. *Hotz Hotels (P) Ltd.* (2) and a judgment of this Court in *Sat Pal Maini* vs. *Ram Ashra* (3).

(5) Mr. Kanwaljit Singh, the learned counsel appearing on behalf of the respondent, however, submitted that though in the application filed for setting aside *ex-parte* judgment and decree, it was stated that on 3.8.1992, the learned counsel of the petitioner-defendant has wrongly noted the next date of hearing as 10.10.1992 instead of 7.9.1992 but from the diary of the counsel produced before the learned trial court, it was found by the learned trial court that the case in question was also entered in the page of the diary dated 26.9.1992. He submitted that in view of this fact, it was observed by the learned trial court in the impugned order that in case the applicant's counsel had entered the date as 10.10.1992 then how the case was also entered on 26.9.1992. It was in these circumstances that the learned trial court came to the conclusion that no reliance could be placed on the diary of the learned counsel. As regard the other contention of the learned counsel of the petitioner that the application seeking leave to defend the suit could not be dismissed in default, the learned counsel of the respondent submitted that there was no such requirement under order 37 CPC. He, therefore, contended that there was no merit in this petition.

(6) I have given my thoughtful consideration to the averments made by the learned counsel for the parties and have perused the records. The case as put by the learned counsel of the defendant is that on 3.8.1992, he had inadvertantly noted the next date of hearing as 10.10.1992 instead of 7.9.1992. The learned counsel himself has appeared as a witness and had produced the diary in the court. From the diary it was found by the learned trial court that the case in question was also entered in the page of the diary

(2) ILR 1974(1) Delhi 500
(3) 1987(2) Current Law Journal 540

dated 26.9.1992. The learned counsel of the petitioner, however, could not explain as to how the case was entered in the page of the diary on 26.9.1992 when according to his own case he had noted the next date as 10.10.1992. It was in these circumstances that the learned trial court held that no reliance can be placed on such a diary. During the pedency of this case, the learned counsel of the petitioner submitted that the case entered in the diary dated 26.9.1992 was a criminal matter but the name of the parties of that criminal case were identical to that of the present case. On this submission the learned counsel was directed to file an affidavit in support of this averment,—vide order dated 28.7.1997. In pursuance of this order, affidavit dated 27.11.1997 of the learned counsel was filed but in the affidavit it was stated that the said criminal case was not fixed on that date. In view of these facts, I am of the opinion that the learned trial court was right in holding that no reliance could be placed on the diary, of the learned counsel of the petitioner-defendant. The judgments in the case of *Messrs N.K. Private Ltd.* (supra) and in the case of *Sat Pal Maini* (supra) relied upon by the learned counsel of the petitioner are of no assistance to the petitioner as in those cases there was no such finding that the diary of the learned counsel could not be relied upon.

(7) To appreciate the contention of the learned counsel of the petitioner that once an application under order 37 Rule 3(5) has been filed by the defendant seeking leave of the court to defend the suit, the said application could not be dismissed in default, it will be appropriate to re-produce Rule 3(5) or Order 37 which reads as under:—

Order 37 Rule 3 :

"(5)—The defendant may, at any time within ten days from the service of such summons for judgment, by affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such suit and leave to defend may be granted to him unconditionally or upon such terms as may appears to the Court or Judge to be just:

Provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious:

Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court."

From the first proviso under sub-rule (5) it is clear that leave to defend can not be refused unless the court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious. Admittedly in the present case the defendant had filed an application under sub-rule (5) of Rule 3 under order 37. Since the application was on record, the learned trial court was required to examine this application to find out as to whether facts stated in the application indicate that he has a substantial defence to raise or the defence put up by the defendant was frivolous or vexatious. For this purpose the presence of the petitioner or his counsel was not necessary and as such the application filed by the defendant seeking leave of the court to defend the suit, coult not be ignored by the learned trial court while passing the impugned judgment dated 28th September, 1992. From the judgment dated 28th September, 1992, I however find that the learned trial court has not referred to any fact disclosed by the defendant in the application seeking leave of the court to defend the suit. In view of this, the impugned order passed by the learned trial court refusing to set aside the *ex-parte* judgment and decree dated 28th September, 1992 can not be legally sustained. In this connection reference may be made to the judgment of this Court in the case of *M/s Sushila Production Engineer, Chandigarh* (supra) wherein it was held that in a case filed under order 37 CPC, the learned trial court was required to give a finding on the facts disclosed by the defendants in their application seeking leave to defend the suit.

(8) For the reasons recorded herein above, the petition is allowed and the impugned order dated 28th September, 1992 is set aside and the case is remanded to the learned trial court to pass the judgment afresh after examining the facts stated in the application filed by the petitioner-defendant under order 37, Rule 3(5) seeking leave of the court to defend the suit. It is, however, made clear that no further hearing will be given to the petitioner-defendant for this purpose as the absence of the defendant and his counsel on 7th September, 1992 and 26th September, 1992 has not been held to be *bona fide*. Since the case has already been argued by the learned

counsel of the plaintiff, he is also not required to address any further arguments and the learned trial court will only examine the application filed by the petitioner-defendant under order 37, Rule 3(5) as stated herein above. The parties are, however, left to bear their own costs.

(9) Registry is directed to send a copy of this order to the learned trial court directly forthwith for compliance.

R.N.R.

Before Jawahar Lal Gupta & B. Rai. JJ

GEE KAY TEXTILES LTD. & OTHERS,—*Petitioners*

versus

HARYANA INDUSTRIAL DEVELOPMENT CORPORATION AND ANOTHER,—*Respondents*

CWP 12856 of 1997

15th September, 1997

Constitution of India, 1950—Arts. 226/227—State Financial Corporation Act, 1951—S.29—Loan due to the Corporation not cleared by the petitioner despite opportunity given—Continuous default in repayment of loan—Possession of factory taken under S.29—Challenge thereto—Respondent Corporation is dealing in public funds and it cannot ignore its own interest, has to remain vigilant & take possession before its too late—Discretion has to be exercised by the authorities and not by the Court—Action is legal & valid.

Held that, Section 24 provides that the Board shall act on 'business principles'. It shall have due regard to the interests of the industry, commerce and the general public. The very purpose of establishing a Financial Corporation is to finance the industry. However, a fact which cannot be ignored is that the Financial Corporations deal with public money. They have, thus, to act on 'business principles'. While a Corporation cannot act like the traditional money lender who was crafty and exploited the helpless, it cannot ignore its own interests either. It is with this objective that the Corporation has been armed with a right to take over the management and possession of the industrial concern which makes "any default in repayment". The Corporation does not have to wait