
Shri Ram Swaroop Vs Shri S.J.P.S. Kanwar

I.A. No"s. 6033 of 2002 and 3702 of 2004 in C.S. (OS) No. 2021 of 2000

Court: Delhi High Court

Date of Decision: Sept. 25, 2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) – Order 37 Rule 2(2), Order 37 Rule 3, Order 37 Rule 3(5), Order 37 Rule 3(6), Order 37 Rule 4

Hon'ble Judges: Gita Mittal, J

Bench: Single Bench

Advocate: H.M. Sethi, for the Appellant; Arun Birbal, for the Respondent

Final Decision: Allowed

Judgement

Gita Mittal, J.

This application (IA No. 3702/2004) has been filed by the defendant under Order 37 Rule 4 of the CPC praying for setting aside of the ex parte judgment and decree dated 23rd April, 2004.

2. The plaintiff had filed the present suit seeking recovery of Rs. 25 lakhs under the summary procedure provided under the provisions of Order 37

Rule 4 of the Code of Civil Procedure. So far as the proceedings before this Court are concerned, it is undisputed that the defendant filed the

memo of parties and the application seeking leave to defend within the period statutorily prescribed for the same. The application filed by the

defendant seeking leave to defend being IA 6033/2002 was listed before the court on 6th November, 2003. On this date, counsel for the plaintiff

was stated to be out of town and the matter was adjourned to 13th February, 2004.

3. On 13th February, 2004, there was no appearance on behalf of the defendant. In these circumstances IA 6033/2002 of the defendant under

Order 37 Rule 3 CPC seeking leave to defend was dismissed in default. The suit was thereafter posted on 23rd April, 2004.

In view of the dismissal of the leave to defend application of the defendant and his non-appearance, on 23rd April, 2004, it was held that the

averments made in the plaint are deemed to have been admitted and the decree in the sum of Rs. 25 lakhs with costs was passed in favour of the

plaintiff and against the defendant.

It was further directed that the plaintiff would be entitled to pendente lite and future interest at the rate of 12% per annum from the date of filing of

the suit till realisation.

4. The present application has been filed shortly thereafter under the provisions of Order 37 Rule 4 of the CPC praying for setting aside of the ex-

parte decree dated 23rd April, 2004. Undoubtedly, Order 37 of the CPC provides a summary procedure in respect of certain suits which have

been specified in Sub-rule 2 of Rule 2 therein.

5. In the instant case, the suit was decreed on 23rd April, 2004 on account of dismissal of the defendant's application seeking leave to defend. By

way of IA No. 3702/2004, the applicant has explained the circumstances in which the defendant had failed to put in appearance on 13th February,

2004. It has been pointed out by learned Counsel for the applicant that on 6th November, 2003, counsel was awaiting listing of the case on the

top floor of the court premises. He had rushed to the court when the matter was about to reach but by the time he reached the court room, the

matter stood adjourned. Learned Counsel states that a day before 6th November, 2003, he had been informed by the plaintiff's counsel that an

adjournment would be sought as he was in a personal difficulty on the next date of hearing.

6. In these circumstances, the defendant's counsel has stated that he made enquiries from the court staff about the status of the case when he was

informed that the matter stood adjourned at the request of the plaintiff's counsel. The applicant has pleaded a mistaken understanding on the part

of the defendant's counsel in noting the next date of hearing as 13th May, 2004 instead of 13th February, 2004 which was actually given. Thus,

the next date in the present case was wrongly carried forward to 13th May, 2004 in the diary of the counsel as well.

Consequently, when the matter was called out on 13th February, 2004, none appeared on behalf of the defendant/applicant and IA 6033/2002

was dismissed for default of appearance. As the applicant and his counsel were not aware of the listing of the case on 23rd April, 2004, none

appeared on this date as well and as a result the suit was decreed as noticed above.

7. It is also pointed out that on both the afore noticed dates, the name of the counsel for the defendant was also not reflected in the cause list. For

this reason, the listing of the matter escaped notice when the daily cause list was checked as well. These facts were revealed to the defendant's

counsel only on or around 6th May, 2004 when an inspection of the court file was applied for to complete the record of the case. It was only

thereupon that the applicant and counsel learnt for the first time about the dismissal of the application for leave to defend and the decree passed in

the suit. The present application was filed immediately thereafter.

8. The application has been vehemently opposed on behalf of the plaintiff who has contended that these facts which have been noticed above do

not constitute special circumstances for setting aside the decree and no substantial ground has been laid before this Court for setting aside the ex

parte decree.

9. The defendant had filed IA No. 6033/2002 seeking leave to defend inter alia contending that the documents which were relied upon by the

plaintiff in order to file the suit did not amount a written contract. It is stated that no consideration in respect of the transaction which the document

was stated to evidence was stated nor any details or particulars of the amount in respect of which the agreement was arrived at, set out therein.

The defendant had challenged that the document was not even in the writing of the defendant and that the same did not amount to a written

contract in the eyes of law. According to the defendant for this reason the suit filed on the basis of the document dated 27th July, 1997 was not

maintainable under the provisions of Order 37 of the Code of Civil Procedure. The defendant asserts that for these reasons as well, it is entitled to

an opportunity to contest the suit.

10. Learned Counsel for the plaintiff has contended that at the stage of consideration of an application under Order 37 Rule 4 of the CPC, this

Court cannot go into the merits of the leave to defend application and the reasons thereof set out by the defendant.

11. In this behalf, it would be useful to advert to the provisions of Order 37 Rule 4 of the CPC which provides thus:

4. Power to set aside decree - After decree the Court may, under special circumstances set aside the decree, and if necessary stay or set aside

execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and

on such terms as the Court thinks fit.

12. The Apex Court in Rajni Kumar Vs. Suresh Kumar Malhotra and Another, had occasion to consider the principles applicable to consideration

of an application under Order 37 Rule 4 and held thus:

8. The expression "special circumstances is not defined in the C.P.C. nor is it capable of any precise definition by the Court because problems of

human beings are so varied and complex. In its ordinary dictionary meaning it connotes something exceptional in character, extraordinary,

significant, uncommon. It is an antonym of common, ordinary and general. It is neither practicable nor advisable to enumerate such circumstances.

Non-service of summons will undoubtedly be a special circumstance. In an application under Order 37, Rule 4, the Court has to determine the

question, on the facts of each case, as to whether circumstances pleaded are so unusual or extraordinary as to justify putting the clock back by

setting aside the decree; to grant further relief in regard to post-decree matters, namely, staying or setting aside the execution and also in regard to

pre-decree matters viz., to give leave to the defendant to appear to the summons and to defend the suit.

9. In considering an application to set aside ex parte decree, it is necessary to bear in mind the distinction between suits instituted in the ordinary

manner and suits filed under Order 37, C.P.C. Rule 7 of Order 37 says that except as provided thereunder the procedure in suits under Order 37

shall be the same as the procedure in suits instituted in the ordinary manner. Rule 4 of Order 37 specifically provides for setting aside decree,

therefore, provisions of Rule 13 of Order 9 will not apply to a suit filed under Order 37. In a suit filed in the ordinary manner a defendant has the

right to contest the suit as a matter of course. Nonetheless, he may be declared ex parte if he does not appear in response to summons, or after

entering appearance before framing issues: or during or after trial. Though addressing arguments is part of trial, one can loosely say that a defendant

who remains absent at the stage of argument, is declared ex parte after the trial. In an application under Order 9, Rule 11, if a defendant is set ex

parte. But an application under Order 9, Rule 13 could be filed on any of the grounds mentioned thereunder only after a decree is passed ex parte

against defendant. If the Court is satisfied that (1) summons was not duly served, or (2) he was prevented by sufficient cause from appearing when

the suit was called for hearing, it has to make an order setting aside the decree against him on such terms as to cost or payment into Court or

otherwise as it thinks fit and thereafter on the day fixed for hearing by Court, the suit would proceed as if no ex parte decree had been passed. But

in a suit under Order 37 the procedure for appearance of defendant is governed by provisions of Rule 3 thereof. A defendant is not entitled to

defend the suit unless he enters appearance within ten days of service of summons either in person or by a pleader and files in Court in address for

service of notices on him. In default of his entering an appearance, the plaintiff becomes entitled to a decree for any sum not exceeding the sum

mentioned in the summons together with interest at the rate specified, if any, up to the date of the decree together with costs. The plaintiff will also

be entitled to judgment in terms of Sub-rule (6) of Rule 3. If the defendant enters an appearance, the plaintiff is required to serve on the defendant

a summons for judgment in the prescribed form. Within ten days from the service of such summons for judgment, the defendant may seek leave of

the court to define the suit, which will be granted on disclosing such facts as may be deemed sufficient to entitle him to defend and such leave may

be granted to him either unconditionally or on such terms as the Court may deem fit. Normally the Court will not refuse leave unless the Court is

satisfied that facts disclosed by the defendant do not indicate substantial defence or that defence intended to be put up is frivolous or vexatious.

Where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, no leave to defend the suit can be granted

unless the admitted amount is deposited by him in Court. Inasmuch as Order 37 does not speak of the procedure when leave to defend the suit is

granted, the procedure applicable to suits instituted in the ordinary manner, will apply.

10. It is important to note here that the power under Rule 4 of Order 37 is not confined to setting aside the ex parte decree, it extends to staying or

setting aside the execution and giving leave to appear to the summons and to defend the suit. We may point out that as the very purpose of Order

37 is to ensure an expeditious hearing and disposal of the suit filed thereunder, Rule 4 empowers the Court to grant leave to the defendant to

appear to summons and defend the suit if the Court considers it reasonable so to do, on such terms as Court thinks fit in addition to setting aside

the decree. Where on an application, more than one among the specified reliefs may be granted by the Court all such reliefs must be claimed in one

application. It is not permissible to claim such reliefs in successive petitions as it would be contrary to the letter and spirit of the provision. That is

why where an application under Rule 4 of Order 37 is filed to set aside a decree either because the defendant did not appear in response to

summons and limitation expired, or having appeared, did not apply for leave to defend this suit in the prescribed period, the Court is empowered

to grant leave to defendant to appear to the summons and to defend the suit in the same application. It is, therefore, not enough for the defendant

to show special circumstances which prevented him from appearing or applying for leave to defend, he has also to show by affidavit or otherwise,

facts which would entitle him leave to defend the suit. In this respect, Rule 4 of Order 37 is different from Rule 13 of Order 9.

13. In the light of the principles laid down by the Supreme Court, it is necessary to examine the circumstances on which leave to defend was

sought by the applicant in IA 6033/2002. These two applications have consequently been heard together. This application of the defendant has

been filed under Order 37 Rule 3(5) primarily on the ground that the suit of the plaintiff does not disclose that it is based on recovery of a debt or

liquidated demand in money payable by the defendant. It has further been stated that the document dated 27th July, 1997 is neither a negotiable

instrument nor a contract. The same does not arise out of any statutory enactment nor is a guarantee deed and consequently proceedings under

Order 37 of the CPC based thereon are wholly untenable.

14. In the light of the objections taken, it becomes necessary to examine the document dated 27th July, 1997 on which the suit is based. The same

reads as follows:

Received Rs. 25 lakhs from Shri Ram Swaroop President of Sarvpriya Sehkar Awas Samiti as advance against purchase of land in U.P. on behalf

of the society mentioned above.

The document in original has been placed before the court. This document neither mentions the total area of the land to be purchased nor its

location. The sale consideration of the land is also not mentioned nor the rate at which the same is to be purchased. There is no mention of the total

consideration which is payable to the defendant for undertaking the transaction. Undoubtedly, the essential terms and conditions on which the

transaction was to be completed are not laid out and prima facie it is not possible to hold that the document evidences a concluded contract

between the parties which could be enforced in law.

15. Another material fact to my mind is the statement in this document that the amount has been paid on behalf of a society. Undoubtedly, the suit

has been filed by the plaintiff in his personal capacity. The suit claims payment in cash of Rs. 25 lakhs without any other evidence of the payment

other than this receipt. The defendant/applicant has denied receipt of the payment either from the plaintiff or any other person on behalf of the

Sarvpriya Sehkari Awasi Samiti Limited. It has been contended that the defendant was induced to enter his signatures on blank stamp papers and

other papers for the purposes of completion of formalities for enrolment as a member of this society by the plaintiff. According to the defendant,

the plaintiff took these signatures stating that the documentation cannot be completed without checking the samiti records. This was to enable the

defendant to acquire a residential plot in the colony which was being developed by the samiti. The defendant/applicant has submitted that this

document which has been dated as 27th July, 1997 was not in his handwriting. The defendant claims that he paid Rs. 10,000/- also in cash to the

plaintiff towards the miscellaneous expenses for enrolment of the society which was to be accounted for at the time of execution of formal receipts

and documentation.

There is a bare denial to the assertions of the defendant in the reply which was filed by the plaintiff. The defendant has questioned the very

transaction pointing out that a society could not conduct a cash transaction unsupported by any other records, even if a transaction of this volume

was legally so permitted.

16. Having regard to the complete facts and circumstances relied upon by the defendant, it cannot be held that the defence urged on behalf of the

defendant is sham or moonshine or that the same does not disclose a triable issue. The applicant denied the very cause of action for the suit. A

bare look at the agreement renders the same suspect. The same is not witnessed by any other person. Certainly, the handwriting does not match

the signatures. The contents of the document read with the assertions in the plaint further lends suspicion to the pleaded transaction. Certainly, it

cannot be held that the defence set up by the defendant is moonshine or can be rejected without anything more established and proved in

accordance with law by the plaintiff. In my view, the present case is not such in which the defendant does not deserve to be granted leave to

defend.

17. The defendant/applicant has therefore placed adequate grounds on the merits of the dispute in support of the reasons and circumstances

justifying its prayer for setting aside the ex parte decree dated 23rd April, 2004 and grant of the application under Order 37 Rule 3(5) of the CPC.

In the light of the above discussion, the applicant has thus made out special circumstances justifying exercise of discretion in its favour.

18. It is well settled that rules of procedure are hand maiden to the ends of justice. It cannot be disputed that the defendant was pursuing the

present matter diligently and no negligence can be attributed to the defendant till the non-appearance on 13th February, 2004. The defendant

regularly appeared before the court and took all steps within the time statutorily prescribed except for the non-appearance on 13th February,

2004. The explanation given for the non-appearance on this date of hearing is also a plausible and a reasonable one. IA No. 3702/2004 filed by

and on behalf of the defendant is supported by an affidavit of the counsel who has been conducting the case on behalf of the defendant. The

application has been filed without undue delay upon learning of the ex-parte decree. In my view, the applicant has given sufficient explanation for

the circumstances in which the applicant was not present on 13th February, 2004. The same is bonafide. The ex parte decree was passed on the

sole ground that the application seeking leave to defend under Order 37 Rule 3 of the CPC was dismissed for default of appearance.

The order dated 13th February, 2004 and the decree dated 23rd April, 2004 deserves to be set aside.

In view of the above discussion, IA No. 3702/2004 and IA No. 6033/2002 of the defendant have to be allowed.

The decree dated 23rd April, 2004 is also hereby set aside. The order dated 13th February, 2004 dismissing the application of the defendant for

the failure to appear is hereby set aside. As a consequence of the above discussion, the defendant is granted leave to defend the suit.

There shall be no order as to costs.