

(2013) 07 DEL CK 0490

Delhi High Court

Case No: IAs. 3421, 3407 and 3408 of 2013 in CS (OS) 2693 of 2012

M/s. Shivam Enterprises

APPELLANT

Vs

M/s. Creation Point

RESPONDENT

Date of Decision: July 29, 2013

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 37 Rule 2, Order 37 Rule 2(3), Order 37 Rule 4, Order 37 Rule 7, Order 9 Rule 13
- Limitation Act, 1963 - Section 5

Citation: (2013) 9 AD 697 : (2013) 6 AD 405

Hon'ble Judges: M.L. Mehta, J

Bench: Single Bench

Advocate: Rajat Wadhwa, for the Appellant; A.K. Sakhuja and Mr. Puneet Saini, for the Respondent

Final Decision: Dismissed

Judgement

M.L. Mehta, J.

IA 3408/2013 (u/s. 5 of Limitation Act), IA 3407/2013 (u/o. 37 Rule 4 CPC for putting in appearance) & IA 3421/2013 under Order 37 Rule 7 read with Order 9 Rule 13 read with Section 115 CPC seeking setting aside of ex parte decree dated 7.12.2012

1. These applications have been filed on behalf of the defendant seeking filing of appearance and also leave to defend as also condonation of delay in seeking these reliefs. The plaintiff has filed a suit for recovery under Order 37 CPC, which came to be decreed under Order 37 Rule 2(3) CPC on 7.12.2012 on account of the defendant having failed to file appearance. The plaintiff has contested these applications. It is averred by the defendant that though he was served of the summons in the suit on 16.10.2012, but he could not enter appearance for being busy in attending his ailing mother, who was hospitalized with effect from 13.08.2012 to 20.08.2012 and again, on 31.10.2012 and 22.11.2012; and ultimately, expired on 29.11.2012. It is averred

that the defendant had left the summons in his factory, and thereafter, lost track of the same on account of continuous illness of his mother, and it was only in the first week of January, 2013 that he found the papers and thereafter, contacted his counsel. It was only on 13.01.2013 that he learnt from the website of the High Court about the ex parte decree passed on 7.12.2012. It is thus prayed that his not filing appearance within the ten days of the receipt of summons was not intentional or willful, but, for the reasons beyond his control. Simultaneously, the defendant has sought to put in appearance as contemplated under Order 37(2) CPC. For all these reasons, the condonation of delay in filing the appearance is sought.

2. Having heard the learned counsel for the parties, it is noted that the undisputed position is that the defendant was served of the summons on 16.10.2012, and as per the provisions contained under Order 37(2) CPC, the defendant was to enter appearance either in person or by a pleader within ten days of service. As per Order 37(3)(1) CPC, along with the appearance, he was also required to file address for service of notices. Further, as per Sub-Rule 3 thereof, on the day of entering appearance, notice of such appearance was also required to be given to the plaintiff in person or his counsel, as the case may be. Admittedly, the defendant had not entered appearance in the manner as contemplated by these provisions. Further, as per Rule 2 Sub-Rule 3 of Order 37 CPC, the defendant could not defend the suit unless he entered appearance and in default of his appearance, the allegations contained in the plaint are deemed to be admitted and the plaintiff entitled to a decree for a sum not exceeding the sum specified in the summons, together with the interest, at the specified rate, if any.

3. Before proceeding to see the further averments of the defendant, it may be noted that there is a distinction between the suits filed in the ordinary manner and those filed under Order 37 CPC. Rule 7 of Order 37 specifically provides that except as provided thereunder the procedures in suits under Order 37 shall be the same as the procedure in suits instituted in the ordinary manner. Order 37 being a Code in itself and provides the procedures till the time leave to defend is granted to the defendant. It is only after the leave to defend is granted that the procedure applicable to the suits instituted in an ordinary manner will apply. Rule 4 of Order 37 specifically provides for setting aside the decree, and therefore, the provisions of Order 9 Rule 13 CPC will not apply to a suit filed under Order 37 CPC. In an application under Order 9 Rule 13 CPC, if the defendant is set ex parte and that order is set aside, he would be entitled to participate in the proceedings from the stage he was set ex parte. But, in a suit under Order 37 CPC, the procedure for appearance of the defendant is covered by the provisions of Rule 3 thereof, and he is not entitled to defend the suit unless he enters appearance within ten days of service of summons. A reading of Rule 4 of Order 37 CPC shows that it empowers, under special circumstances, the court which passed ex parte decree under Order 37 to 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.

4. The expression "special circumstances" appearing under Order 37 Rule 4 CPC was considered in the decision of Apex Court in [Rajni Kumar Vs. Suresh Kumar Malhotra and Another](#), and it was observed thus:

9. 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 extra ordinary 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.

5. Further, in the same judgment, the Apex Court also observed the scope of Order 37 Rule 4 as under:

11. 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 the 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.

6. Now, advertent to the averments of the defendant, it is noted that in the applications which have been filed by the defendant for setting aside the decree dated 7.12.2012, the only reason that has been disclosed is that of the sickness of his mother. It was his case that his mother was admitted in hospital from 13.08.2012

to 20.08.2012, and thereafter, on 31.10.2012 and again, on 22.11.2012. So far as her admission for a week in hospital in the month of August, 2012, it is apparently much prior to the service of summons. Taking as correct that his mother was admitted on 31.10.2012, but, it is not seen as to when she was discharged and was re-admitted on 22.11.2012. Be that as it may, the sickness or admission in hospital of the mother of the defendant on these dates itself, in the given circumstances, cannot be said to constitute "special circumstances". The defendant had stated that he had kept his papers in his factory and was also not attending his business activities regularly. Nothing is brought on record to show that he did not attend his business after 16.10.2012 till his mother expired on 29.11.2012. In any case, the defendant stated having found the papers in the first week of January, 2013. That itself would show the utter negligence of the defendant even after the death of his mother in November, 2012. Moving further, the defendant stated having learnt about the order only on the website of High Court on 13.01.2013. This further establishes his negligence that despite having been served and knowing about the case and that considerable time had passed, he did not take step of even making appearance himself or through his pleader upto 1st February, 2013. There was no element of any "special circumstances" set up by the defendant in not entering appearance as per the provisions contained under Order 37 CPC.

7. Further, not only that there was no "special circumstance" pleaded by the defendant, he did not say a word about his defence or that the suit was not maintainable under Order 37 CPC or that he was not able to pay any amount as claimed in the plaint.

8. In view of the above observations made by the Apex Court in the case of Rajni Kumar (supra), as noted above, and the defendant having failed to show by affidavit or otherwise, facts which would entitle him leave to defend the suit, I do not see any reason to recall the order dated 7th September, 2012. In view of the above discussion, all the applications are hereby dismissed.