

A
RAJNI KUMAR
v.
SURESH KUMAR MALHOTRA AND ANR.

MARCH 28, 2003

B [SYED SHAH MOHAMMED QUADRI AND ASHOK BHAN, JJ.]

Practice and Procedure:

C *Civil Procedure Code, 1908: O. 9, Rules 11 and 13, O. 34 and O. 37, R. 4: Suit for recovery—Trial Court decreed suit ex-parte—Dismissed application under Order 37 Rule 4 thereafter holding no special circumstances/facts averred in the application justifying entitlement of petitioner to defend the suit—Revision petition dismissed by High Court—On appeal, held, though appellant has shown sufficient cause for his absence on the date when court passed ex-parte decree, he failed to disclose facts which would entitle him to defend the case—Hence, High Court rightly declined to set aside ex-parte decree under O. 37 Rule 4—Since liability does not arise out of commercial transactions, rate of interest reduced from 18% to 6% p.a.—Directions issued.*

E *O. 37—Leave to defend—Procedure—Grant of—Held: Since O. 37 does not speak of the procedure while granting leave to defend, the procedure applicable to suit instituted in the ordinary manner will apply.*

Suits instituted in the ordinary manner and suits filed under O. 37, R. 4—Distinction between—Discussed.

F *Words & Phrases:*

'Special circumstances'—Meaning of in the context of suit filed under O. 37 CPC.

G **Respondent-landlord filed a suit for recovery of certain amount towards water and electricity charges due from his tenant-appellant for the period of tenancy. Civil Court decreed the suit ex-parte. Aggrieved tenant filed application under O. 37 Rule 4 to set aside the ex-parte decree. Application was dismissed by the Trial Court holding that no special**

circumstances had been disclosed in the application which would entitle him to defend the suit. Revision petition was dismissed by the Hih Court. Hence the present appeal. A

It was contended for the appellant that in the absense of proof of service of notice to appellant he was having special reason for non-appearance; and that since sufficient amount as an advance had already been deposited with the respondent, O.37 CPC was not applicable to the facts of the case and appellant had good defence to the suit. B

Dismissing the appeal, the Court

HELD: 1.1. The expression 'special circumstances' is not defined in the CPC 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. [71-D] C D

1.2. In an application under Order 37, Rule 4, the court has to determine the question, on the facts of each case, as to whether the 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. [71-E] E

1.3 In considering an application to set aside an 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 CPC. 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 trial. In an application under Order 9 Rule 11, if a 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 an application under Order 9 Rule 13 could be filed on any of the grounds mentioned thereunder only after a decree is passed F G H

- A** 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.
- B** But in a suit under Order 37 the procedure for appearance of defendant is governed by provisions of Rule 3 thereof. In default, the plaintiff becomes entitled to a decree for the sum mentioned in the summons together with interest at the rate specified, if any, upto the date of the decree together with costs. The plaintiff will also be entitled to judgment
- C** 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 the time prescribed, the defendant may seek leave of the court to defend the suit, which will be granted on disclosing such facts as may be deemed sufficient to entitle him to defend
- D** and such leave may be granted to him either unconditionally or on such terms as the court may deem fit. 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.

[71-F, G, H; 72-A-G]

- E** 1.4. 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. 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
- F** 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. It is 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. [72-H; 73-A-C]

- G**
- H** 1.5. In the instant case, though the appellant has shown sufficient cause for his absence on the date of passing ex parte decree, he failed to disclose facts which would entitle him to defend the case. The respondent was right in his submission that in the application under Rule 4 of Order 37, the appellant did not say a word about any amount being in deposit

with the respondent or that the suit was not maintainable under Order 37. The High Court was right in accepting existence of special circumstance justifying his not seeking leave of the court to defend, but in declining to grant relief since he had mentioned no circumstances justifying any defence. Inasmuch as having regard to the provision of Section 34 C.P.C. and the facts of the case the liability does not arise out of a commercial transaction. The grievance of the appellant with regard to rate of interest is justified. Hence the rate of interest is reduced from 18 per cent to 6 per cent per annum. [73-E, F, G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2538 of 2003.

From the Judgment and Order dated 15.10.2001 of the Delhi High Court in C.R. No. 138 of 2001.

A. Sharan, Amit Kumar, Mrs. Madhu Sharan, Samit Ali Khan, Amit Anand Tiwari and C.D. Singh for the Appellant.

In-person, for Respondent No. 1.

The Judgment of the Court was delivered by

SYED SHAH MOHAMMED QUADRI, J. Leave is granted.

In this appeal, from the Judgment and Order of the High Court of Delhi in C.R. No.138 of 2001 dated October 15, 2001, the short point that arises for consideration is : whether the High Court committed jurisdictional error in declining to set aside the ex parte decree on the application of the appellant under Rule 4 of Order 37, on the ground that he failed to disclose facts sufficient to entitle him to defend the suit.

The facts relevant for the disposal of this appeal may be noted here.

The appellant-tenant had taken on rent residential flat No.C 470, Sarita Vihar, Ground Floor, New Delhi - 110 004, from the respondent-landlord for a period of nine months under an agreement of lease reduced to writing on November 26, 1993. After the expiry of the term of tenancy she continued to occupy the said premises as tenant till January 11, 1997. Alleging that the appellant did not pay the electricity and water consumption charges for the period starting from November 26, 1993 to January 11, 1997, the respondent

- A filed suit No.597 of 1997 in the Court of Senior Civil Judge, Delhi, under Order 37 of Code of Civil Procedure (C.P.C.), for recovery of Rs.33,661. On the ground that on April 21, 1999 summons for judgment was sent by registered post A.D. to the appellant pursuant to the order of the Court dated April 16, 1999 the Court drew inference of deemed service on him, proceeded with the case and decreed the suit ex parte on August 12, 1999. The appellant, however, filed application under Rule 4 of Order 37 C.P.C. in the trial court to set aside the ex parte decree. On January 6, 2001, the application was dismissed as no special circumstances were stated in the petition both in regard to there being illegality in deeming service of summons for judgment on the appellant as well facts sufficient to entitle him to defend the suit.
- C Aggrieved by the order of the trial court, the appellant filed revision C.R.No.138 of 2001 in the High Court, which was also dismissed on October 15, 2001. That order of the High Court is assailed in appeal before us.

- D Mr. A. Sharan, learned senior counsel appearing for the appellant, strenuously contended that there was no proof or record to show that any notice by registered post with acknowledgment due was issued to the appellant by the respondent who had taken the notice from the court but did not file any proof of issuing the notice to the appellant, therefore, there was special reason for the appellant not to appear in response to the summons for judgment. He argued that sufficient amount was deposited with the respondent as advance and that Order 37 C.P.C. was not applicable to the facts of the case, therefore, the appellant had good defence to the suit. The trial court as well as the High Court, submitted Mr. Sharan, erred in dismissing the application under Rule 4 of Order 37 C.P.C.
- E

- F The respondent appeared in-person and argued his case with precision and perfection. He submitted that summons for judgment was issued on April 21, 1999 and that the court had rightly drawn presumption of service on the appellant; that nowhere in her application had the appellant stated anything about her defence to the suit and therefore the order under challenge was rightly passed by the courts below.

- G To appreciate the contentions of the parties it would be useful to refer to Rule 4 of Order 37 C.P.C. which is in the following terms :

“Order XXXVII -Summary Procedure

- H (1) to (3) xxx xxx xxx

(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.” A

A careful reading of Rule 4 shows that it empowers, under special circumstances, the court which passed an ex parte decree under Order 37 to set aside the decree and grant one or both of the following reliefs, if it seems reasonable to the court so to do and on such terms as the court thinks fit : B

- (i) to stay or set aside execution and C
- (ii) to give leave to the defendant (a) to appear to the summons and (b) to defend the suit.

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, extra-ordinary, 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. D E F

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 G H

- A 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* and that order is set aside, he would be entitled to participate in the proceedings from the stage he was 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.
- B 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 an 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, upto 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.
- C 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 defend 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
- D 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.
- E
- F
- G

H 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.

Now advertng to the facts of this case, though appellant has shown sufficient cause for his absence on the date of passing ex parte decree, he failed to disclose facts which would entitle him to defend the case. The respondent was right in his submission that in the application under Rule 4 of order 37, the appellant did not say a word about any amount being in deposit with the respondent or that the suit was not maintainable under Order 37. From a perusal of the order under challenge, it appears to us that the High Court was right in accepting existence of special circumstances justifying his not seeking leave of the court to defend, but in declining to grant relief since he had mentioned no circumstances justifying any defence.

In this view of the matter, we do not find any illegality much less jurisdictional error in the order under challenge to warrant interference of this Court. Inasmuch as having regard to the provisions of Section 34 of the C.P.C. and the facts of the case that the liability does not arise out of a commercial transaction, we are of the view that the grievance of the appellant with regard to rate of interest is justified. We, therefore, reduce the rate of interest from 18 per cent to 6 per cent per annum.

We directed the appellant to deposit the decree amount to serve as security for the suit amount in the event of this Court granting him leave to

A defend the suit. Since that relief is not granted to him, it will be open to him to withdraw the said amount or have it adjusted in satisfaction of the decree. Subject to above modification of the order of the trial court as confirmed by the High Court the appeal is dismissed.

No costs.

B

S.K.S.

Appeals dismissed.