

A. Sudhershnan Vs. K. Ashok Kumar

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Court : Andhra Pradesh

Decided On : Jan-31-2007

Reported in : 2007(3)ALD204

Judge : Bilal Nazki, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 151 - Order 37, Rules 1, 2, 2(2), 2(3), 3, 3(4), 3(5) and 4

Appeal No. : CRP No. 4138 of 2006

Appellant : A. Sudhershnan

Respondent : K. Ashok Kumar

Advocate for Def. : T. Yathi Raju, Adv.

Advocate for Pet/Ap. : N. Ashok Kumar, Adv.

Disposition : Petition allowed

Judgement :

ORDER

Bilal Nazki, J.

1. The revision petitioner is the plaintiff and the respondent is the defendant in the suit being O.S. No. 315 of 2004. This revision is filed against an order passed by

the learned III-Senior Civil Judge, Secunderabad allowing LA. No. 1597 of 2005 filed in O.S. No. 315 of 2004. The application was filed under Order 37 Rule 4 read with Section 151 of the Code of Civil Procedure (for short 'CPC') seeking setting aside of the ex parte decree passed on 6-10-2002. A leave was also sought to defend the suit.

2. It appears that the plaintiff filed the suit for recovery of a sum of Rs. 2,82,500/-. In terms of Order 37 of CPC, the defendant received summons under Form No. 4 in Appendix-B on 27-2-2004 and he filed an application for grant of leave to defend the suit. The leave application was withdrawn reserving the right to file such application at appropriate time. The defendant neither appeared nor filed written statement and the suit was decreed in ex parte on 6-10-2005. Thereafter, he filed the present application seeking setting aside of the ex parte decree. The plaintiff opposed the application. He contended that the suit for recovery was filed on the strength of a promissory note executed by the defendant. Even after issuing summons under Form No. 4 in Appendix-B and even after making his appearance on 30-4-2004, the defendant did not choose to file his written statement and got his application seeking leave to be withdrawn, however, reserving his right to file the application at appropriate time. The trial Court took into consideration the contention of the defendant that he had never received any amount under the suit promissory note and the note was fabricated and the trial Court came to the conclusion that there was a valuable defence and therefore, it allowed the application. The plaintiff had contended that there should be extraordinary and special circumstances to concede the plea of the defendant to condone the delay beyond 30 days in filing the petition under Order 37 Rule 4 of CPC.

3. In these circumstances, this Court will have to see whether such an application under Order 37 Rule 4 of CPC could have been allowed or not. Before that a look at Rules 1, 2 and 3 of Order 37 of CPC is necessary.

4. Rule 1 of Order 37 of CPC lays down the Courts and classes of suits to which Order 37 applies. Rule 2 of Order 37 of CPC lays down the procedure for institution of suits, which are summary. Sub-rule (2) of Rule 2 of Order 37 of CPC lays down that the summons of the suit shall be in Form No. 4 in Appendix - B and

Sub-rule (3) of Rule (2) lays down that the defendant shall not defend the suit unless he enters an appearance and in default of his entering an appearance the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be 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 and such sum for costs as may be determined by the High Court, from time to time, by rules made in that behalf and such decree may be executed forthwith. Rule 3 of Order 37 of CPC lays down the procedure for the appearance of the defendant. The plaintiff is supposed to serve together with the summons under Rule 2 on the defendant a copy of the plaint and annexures thereto and the defendant is required at any time within 10 days of such service enter his appearance either in person or by pleader. Under Sub-rule (4) of Rule 3, if the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment in Form No. 4A in Appendix-B returnable not less than in 10 days from the date of the service and under Sub-rule (5) of Rule 3 the defendant may, within ten days from the date of the deemed service of such summons for judgment, apply for leave to defend such suit.

5. So in the present case, the defendant had appeared before the summons for judgment had been given to him under Sub-rule (4) of Rule 3 of Order 37, but after the summons under Sub-rule (4) of Rule 3, he did not appear nor presented any application seeking leave to defend but waited for the judgment to be pronounced and then came under Order 37 Rule 4 of CPC, which lays down that after the decree, the Court may under special circumstances set aside the decree. Therefore, it is necessary that in order to get relief under Order 37 Rule 4 of CPC, the petitioner should show the special circumstances to set aside the decree 1 have gone through the impugned order. There is no special circumstance except the Court has stated that there is a defensible case. To examine whether a case is defensible or not is a requirement under Order 37 Rule 3(5) of CPC and not under Order 37 Rule 4 of CPC. There is no explanation given at all as to why the petitioner did not appear before the Court after a notice was given to him under Order 37 Rule 3(4) of CPC. Since no special circumstances had been shown, therefore, the trial Court was wrong in passing the impugned order.

6. For these reasons, the revision petition is allowed and the impugned order is set aside. No order as to costs.

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