

Chunnilal Vs. Vinod Kumar

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Court : Madhya Pradesh

Decided On : Sep-23-1999

Reported in : 2000(1)MPHT529

Judge : S.P. Khare, J.

Acts : Code of Civil Procedure (CPC) - Order 37, Rules 2(2), 2(3), 3(4), 3(5) and 4

Appeal No. : Civil Revision No. 1068/98

Appellant : Chunnilal

Respondent : Vinod Kumar

Advocate for Def. : V.K. Dubey, Adv.

Advocate for Pet/Ap. : Ku. M. Bhatia, Adv.

Disposition : Revision allowed

Judgement :

ORDER

S.P. Khare, J.

1. This is a revision by the defendant against order dated 2-9-1998 in M.J.C. No. 5 of 1998 by which his application under Order 37 Rule 4 C.P.C. for setting aside the decree dated 16-7-1996 in Civil Suit No. 373-B of 1995 has been rejected.

2. Plaintiff Vinod Kumar instituted a summary suit against defendant Chunnilal. The summons as required by Order 37 Rule 2 (2) C.P.C. was issued. That was served on the defendant on 11-2-1996. The defendant entered an appearance on 19-2-1996 with his counsel. On that date the Presiding Judge was on leave. The case was fixed on 27-2-1996 but it was not taken up on that date. On 4-4-1996 both parties were present. The trial Court at no stage followed the procedure prescribed by Order 37 Rule 3 (4) C.P.C. in as much as the summons for judgment was not served on the defendant in Form No. 4-A in Appendix B. Therefore, there was no occasion for the defendant to apply for leave to defend as required by Sub-rule (5) of Rule 3. The decree was passed on 16-7-1996.

3. After hearing the learned counsel for both the sides this Court is of the opinion that non service of summons for judgment in Form No. 4-A on the defendant is a fatal defect. It is only on service of such summons that the defendant could apply for leave to defend. The use of the word 'shall' in Sub-rule (4) of Rule 3 shows that the service of summons in Form No. 4-A is a mandatory requirement. In the absence of such summons the defendant could not apply for leave to defend and therefore, further procedure could not be followed.

4. In *Sharda Talkies v. Dhadiwal Exhibitors*, AIR 1987 M.P. 164, it has been held that various Rules and sub-rules of Order 37 prescribe a complete Code for trial and adjudication of such suits. According to Sub-rule

(3) of Rule 2, the defendant upon whom summons of the suit is served in Form IV in Appendix-B, has to enter appearance. If he does not so enter appearance, the allegations in the plaint shall be deemed to be admitted and a decree shall follow for an amount not exceeding the sum mentioned in the summons together with interest at the rate specified, if any, up to the date of the decree and also costs. In order, therefore, to avoid an ex parte decree, the defendant receiving such summons in Form IV must cause appearance. Such appearance by the defendant would, therefore, only prevent the Court from proceeding to pass an immediate decree which may otherwise follow in default of such appearance. Such an appearance by him only permits him to defend the suit. According to Sub-rule

(4) of Rule 3, after the defendant has entered appearance and filed an address for service of notice on him, the plaintiff shall serve on him a summons for judgment in Form 4A in Appendix-B. This will be supported by an affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit. It is then that the defendant's participation comes up. He may at any time within ten days from the service of 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. Such leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just. (Sub-rule

(5) of Rule 3 of Order 37). The scheme of Order 37 thus shows that the defendant has first, within ten days of service upon him of a summons under Rule 2 to enter an appearance only to prevent a judgment and decree which may follow in default of that appearance. It is only when summons for judgment in Form 4-A is served upon him that he has to apply for leave to defend. In *United Western Bank v. Manoj Hosier*, 1997 (II) MPWN 92, it has been held relying upon *Ramesh Chandra v. Central Bank*, 1992 J.L.J. 434 that the provision under Rule 3

(4) of Order 37 is mandatory.

5. In view of the above legal position the decree dated 16-7-1996 without following the mandatory procedural requirement was not valid. It ought to have been set aside under Order 37 Rule 4 C.P.C.. This revision is allowed and the decree is set aside. The trial Court is directed to restore the suit and proceed as per Order 37 Rule 3 (4) C.P.C.. The parties are directed to appear before the trial Court on 1-11-1999.