

Sukhdev Kumar Vs. Nasim Ansari and ors.

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Court : Delhi

Decided On : Sep-21-1979

Reported in : 17(1980)DLT40

Judge : S. Ranganathan, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 37, Rule 3

Appeal No. : Criminal Revision Appeal No. 681 of 1978

Appellant : Sukhdev Kumar

Respondent : Nasim Ansari and ors.

Advocate for Pet/Ap. : S.P. Kaira and; S.L. Chhibbar, Advs

Judgement :

S. Ranganathan, J.

(1) This revision petition is directed against an order of the Commercial Sub Judge, Delhi dated 6-3-1978. The defendants are the petitioners. The plaintiff had filed a suit against the present petitioners for the recovery of a sum of Rs. 23210.00 based on a Hundi drawn by the plaintiff for a sum of Rs. 19,668,90 in respect of goods, dispatched to the defendants, the said hundi having been dishonoured when presented for payment on 30-12-1973. The suit was filed under the provisions of Order VII of the Code of Civil, Procedure amended by Act 104 of

1976 w.e.f 1-2-1977.

(2) It will be convenient at the outset to give a broad outline of the procedure to be followed according to the amended provisions : (a) When a suit is presented under this Order, a summons is issued under Rule 2(2) to the defendant in Form No. 4 of Appendix B. Rule 2(3) provides that a defendant shall not defend the suit 'unless he enters appearance.' In default of his entering an appearance, the allegations in the plaint will be deemed to be admitted and the plaintiff would be entitled to decree forthwith. (b) Rule 3 sets out the 'procedure for the appearance of defendant.' It provides that, along with the summons under rule 2, the plaintiff should serve on the defendant a copy of the plaint and the annexures thereto. Thereupon the defendant may at any time within ten days of such service enter appearance either in person or by pleader. The rule requires that, in either case, he should file in court an address for service of notices on him. The effect of this is that once this is done, in the absence of any specific orders of court, all summons, notices and other judicial processes shall be deemed to have been duly served on the defendant if they are left at the address given by him for such service. (c) Another obligation is laid on the defendant by sub-rule 3 of this rule. On the day of entering appearance, notice of such appearance shall be given by the defendant to the plaintiff's pleader (or, if the plaintiff sues in person, to the plaintiff himself) either by notice delivered at or Sent by a prepaid letter directed to the address of the plaintiff's pleader (or of the plaintiff, as the case may be). (d) Once the defendant has entered appearance, sub-rule 4 requires the plaintiff to obtain from the court and serve on the defendant a summons for judgment in Form No. 4A prescribed in Appendix B. This summons shall be made returnable not less than ten days from the date of its service. This summons according to the sub-rule, should be supported by an affidavit verifying the cause of action and the amount claimed and stating that in the plaintiff's belief there is no defense to the suit. (e) The defendant, within ten days from the service of such summons for judgment, should apply to the court for leave to defend a suit, disclosing by way of affidavit or otherwise such facts as may be deemed sufficient to entitle him to defend the same. The court may grant such leave either unconditionally or upon such terms as the court may deem just Leave to defend shall not be however refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a

substantial defense to raise or that the defense intended to be put up by the defendant is frivolous or vexatious.

(3) In the present case, the plaint was filed on 3.1.1977. It appears that the plaintiff was unable to serve the summons under rule 2 on the defendants in the ordinary way. Eventually he was given permission to serve the defendant under Order V, Rule 20 and notice of the summons was published in the Indian Express on 3-11-1977. The summons having been served by way of substituted service, a copy of the plaint and its annexures did not accompany the summons. (These were handed over to the counsel for the defendant only on 24.11.77). Soon after the summons was published, Shri S.P. Kalra, Advocate, filed 'an application on behalf of defendants 1 to 4 for entering appearance in this case and for supply of copy of the plaint.' The application stated that the defendants 1 to 4 'hereby enter appearance in this case' in pursuance of the notice published in the paper. It also requested that the defendants be supplied with a copy of the plaint and its annexures. Accompanying the application was a power of attorney signed by the defendants in favor of Sri S.P. Kalra, Advocate, which set out the address of the Advocate. The defendants or their counsel did not, however, comply with the provisions of sub-rule 3 or rule 3. They did not give the notice of their appearance to the plaintiff or his pleader, as required by that sub-rule.

(4) The plaintiff, on 24.11.1977, made an application before the court accompanied by an affidavit and the form of summons for judgment referred to in sub-rule 4 of rule 3. In the application the plaintiff stated that though the advocate for the defendants had entered appearance on behalf of the defendants no notice of appearance had been given to the plaintiff as provided in the rules. It was claimed that as the defendants had not entered appearance within the prescribed period of ten days as required by the rules and as they had failed to obtain leave to defend supported by an affidavit. After hearing the parties and considering the contents of the affidavit, the learned Sub Judge passed a decree in favor of the plaintiff as claimed.

(5) The decree was passed by the learned Sub Judge against the defendants on two grounds :- (1) The learned Sub Judge was of the view that, in the present

case, the defendants were not entitled to defend the suit and that the court could not even look into the application for leave to defend filed by the defendants because the defendants had not entered appearance in the suit in accordance with law; and (2) Secondly, and alternatively, the learned Sub Judge was of the view that the leave application did not disclose any triable issue and the pleas set up in the application were sham, bogus, illusory and mala fide.

(6) In order to succeed in this revision petition the petitioner has to establish that the order of the learned Commercial Sub Judge is erroneous on both the grounds which have been held against him. But, before; proceedings to discuss the contentions raised on behalf of the defendant/ petitioner, it is necessary to dispose of a preliminary objection raised by Shri Chibber on behalf of the plaintiff. The contention of the learned counsel was that the order dated 6-3-1978 is a composite order. up to para 16 it contains a discussion regarding the defendants' competence to defend the suit and the question whether the defendant should be given leave to defend as prayed for by him. Towards the end of para 16 the learned Sub Judge has rejected the application filed by the defendants for leave to defend. Thereafter, consequential to the above rejection, the plaintiff's claim is decreed by the learned Sub Judge as stated in paras 17 and 18 of the above judgment. The point made by Sri Chibber is that since the order dated 6-3-1978 amounts to a decree it is appealable and hence no revision will lie to this court. If, on the, other hand, the defendants' claim is that he was filling the revision petition only against the part of the order refusing him leave to defend, counsel says that this plea would not help them because,' even if this revision was allowed and this Court granted them leave to defend, the decree which had already been passed in the suit and which had become final would remain unaffected as the defendants on their own showing seek no relief against the decree, either by way of appeal or even by way of revision. This objection of learned counsel, however, is concluded against him, by the decision of the Division Bench of this court in Krishan Bhardwaj v. Manoharlal 1977 Rlr 378. Both the points raised by the learned counsel have been dealt with in the judgment of Prakash Narain, J This judgment of the Bench is binding on me and hence the preliminary objection raised by Sri Chibber is rejected.

(7) In regard to the merits, the first contention urged by Sri Kalra is that the learned Sub Judge has erred in holding that the defendants had not entered appearance as stipulated in the rules. I am inclined to agree with the contention of the learned counsel. As already stated, on 14.11.1977, counsel for the defendants filed an application which purported to be an application entering appearance in the case by pleader. It was also accompanied by a power of attorney in which the pleader's address was given. The objection of Sri Chibber is that the mere act of filing a letter or power of attorney will not amount to entering appearance which can be said to be complete only when the mandatory requirements of Rule 3(l)(3) are complied with. He points out that these requirements serve an important purpose. The plaintiff would not be aware whether the defendants had appeared within the time of ten days allowed by the rules or not. So these rules require (i) that appearance should be entered giving an address for service of notices on the defendant during the subsequent course of the suit; and (ii) that notice of such appearance should be given to the plaintiff or his pleader. Sri Chibber contends that unless these two formalities are also completed, the defendants cannot be said to have entered appearance within the meaning of these rules. I am unable to accept this contention. A mere reading of the rule makes it clear that 'entering appearance' and giving notice thereof are separate and independent acts. It is after the defendant has entered appearance (or simultaneously therewith) that he has to file in court an address for service of notices on him. That has been done in this case. Again it is only on the day of entering appearance that he is to give notice of such appearance to the plaintiff's pleader or plaintiff. These words clearly imply that the notice of appearance is a subsequent and separate formality which follows upon the act of entering of appearance by the defendant. It would not be correct to say that, until and unless the address for service of notices is given and the notice of appearance is also served on the plaintiff or his pleader the defendant cannot be said to have entered appearance. I am therefore of opinion that the learned Trial Court Judge was not right in holding that the defendants must be treated as not at all having entered appearance in the suit.

(8) Although the above discussion disposes of the above contention, counsel for the petitioner points out that, on his part, the plaintiff had also committed certain defaults and I may touch upon them. Sub rule 1 of rule 3 requires the plaintiff to

serve on the defendant a copy of the plaint and annexures thereto. Learned counsel points out that, in the present case, since the summons was served by substituted service, the service of the copy of the plaint and annexures was made on the defendants only when they appeared in court. The defendant could therefore have taken a period of ten days thereafter to enter appearance. This contention, however, is not of much relevance as the defendant had already entered appearance before he received the copy of the plaint and annexures from the plaintiff. The second point made by Sri Kalra is that, after the defendant had entered appearance, the plaintiff should have taken out the summons for judgment supported by an affidavit verifying the cause of action and the amount claimed and state that in his belief there is no defense to the suit. He points out that in the present case though the plaintiff made an application for the issue of the summons and also filed an affidavit in support thereof, the affidavit did not comply with the requirements of sub rule 4. It does appear that in the affidavit filed by the plaintiff the cause of action was not verified and there was no averment that, in the plaintiff's belief, there was no defense to the suit. I do not, however, think that this defect in the affidavit would constitute a material irregularity vitiating the further proceedings. The affidavit intended to be acted upon by the court before the summons for judgment in Form No. 4A is issued. The court is to satisfy itself, on perusing the affidavit that the elements referred to in sub rule 4 are present. In the present case, the court was so satisfied and did direct the issue of the summons. While the lapse in this case emphasises the necessity for the courts to keep in mind the amended provisions and to insist in future that the affidavit filed before them contains the requirements mentioned in sub rule 4, in my opinion, the defect in the affidavit in support of application for summons will not render the summons for judgment, issued by the court, defective or invalid.

(9) Coming now to the merits of the matter, the learned Sub Judge has discussed at length the various pleas urged on behalf of the defendant. The provisions of Order xxxvii now permit an application for leave to defend being rejected if the court is satisfied that the facts disclosed by the defendant do not indicate a substantial defense or that the defense intended to be put up by the defendant is frivolous or vexatious. I have carefully gone through the order of the learned Sub Judge and I am unable to find any infirmity in his findings that the defense sought

to be raised by the present petitioner were not substantial. Unfortunately, as pointed by Sri Kalra, the learned Sub Judge has applied towards the end of his order the test of triable issue and also referred to the defense being sham, bogus, illusory or mala fide. These were the tests that were generally applied in dealing with such applications before the amendment of the rules. Substantially, however, the finding of the learned Sub Judge is that the defense set up was not substantial. I do not think therefore that this court should interfere with the decision of the learned Sub Judge in revision so far as the merits of the application are concerned.

(10) For the reasons stated above, though the petitioner succeeds on the first contention he fails so far as the merits of the application are concerned. The civil revision is therefore dismissed but in the circumstances I make no order as to costs.

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