

Nainmal Vs. Maganmal

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Court : Rajasthan

Decided On : Jul-06-2000

Reported in : 2000(3)WLC724; 2000(3)WLN96

Judge : Sunil Kumar Garg, J.

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

Appeal No. : S.B. Civil First Appeal No. 6 of 1987

Appellant : Nainmal

Respondent : Maganmal

Advocate for Def. : B.K. Bhatnagar, Adv.

Advocate for Pet/Ap. : Devendra Kachhawah, Adv.

Judgement :

ORDER

Garg, J.

(1). This is a defendant-appellant's first appeal against the judgment and decree dated 12.12.1986 passed by the learned District Judge, Sirohi, by which he decreed the suit of the plaintiff-respondent filed under Order 37 Rule 2 CPC for Rs. 10,584.20 and also awarded interest @ 6% p.a. on the principal amount of Rs.

7297/- from the date of suit i.e. 7.11.1983 till realization of amount.

(2). It arises in the following circumstances:-

The plaintiff respondent filed a suit in the trial court on 7.11.1983 under Order 37 Rule 2 CPC alleging that on 8.11.1980, defendant-appellant, after understanding his old accounts, executed a khata Ex.1 in favour of the plaintiff respondent for Rs. 7297/- and further agreed to pay interest. Since the defendant-appellant has not paid the amount mentioned in the Khata Ex.1, the plaintiff-respondent filed the present suit.

After presentation of the plaint, a summon under Order 37 Rule 2 CPC was issued to the defendant appellant and as per order sheet of the trial court and as per the summon which was issued on 5.2.1985, it appears that this summon was served on the defendant-appellant personally on 6.5.1985. Since the summon which was served on the defendant appellant on 6.5.1985 was not returned back by the concerned process server, the order sheets of the court proceedings show that it was ordered again and again that on presentation of process fee etc., summon be issued again to the defendant appellant.

From the order sheet of the trial court dated 17.10.1985, it appears that on 3.9.1985, counsel for the defendant appellant made an application before the court stating that the summon which was issued under Order 37 Rule 2 CPC has been served on the defendant appellant and within ten days of the service of summon, the defendant appellant has put in appearance. But, this fact was brought to the knowledge of the court when the ordersheet dated 17.10.1985 was being written and, thereafter, counsel for the plaintiff respondent made a prayer before the court that since defendant appellant was served on 6.5.1985 and he has made appearance on 3.9.1985, which is time barred.

Note:- This point was reserved to be decided later on by the trial court.

As per order sheet of the trial court dated 1.3.1986, it appears that counsel for the defendant appellant pleaded no instruction and thereafter, ex-parte proceedings were ordered against the defendant appellant and after recording the statement of

PW1, the suit of the plaintiff respondent was decreed against the defendant appellant for Rs. 10584.20 and interest @ 6% p.a. was also awarded on the principal amount of Rs.7297/- from the date of suit i.e. 7.11.1983 till the date of realization of amount, by the learned District Judge, Sirohi vide his judgment and decree dated 12.12.1986.

Aggrieved from the said judgment and decree dated 12.12.1986 passed by the learned District Judge, Sirohi, the defendant appellant has preferred this first appeal before this Court on 28.1.1987.

(3). In this first appeal, the following points have been raised by the learned counsel for the defendant-appellant:-

(i) That though the service of summon issued on 5/6.2.1985 was effected on defendant appellant on 6.5.1985, the cognizance of that service be not taken, as before 6.5.1985, it was ordered again and again in the ordersheets of the trial court that fresh summon be issued against the defendant appellant. Therefore, no effective and legal service has been made on the defendant appellant on 6.5.1985.

(ii) That summon which was issued on 20.8.1985 was served on the defendant appellant and that is why, the defendant appellant has made appearance through his counsel on 3.9.1985 i.e. within ten days from the date of service of summon.

(iii) That no compliance on Rule 3(4) of Order 37 CPC has been made by the trial court, as the summon for judgment in form 4-A returnable not less than ten days from the date of service, has not been issued. Hence, the trial court has not followed the procedure as provided under Order 37 Rule 3(4) CPC, therefore, the whole proceedings conducted by the trial court are without jurisdiction and thus, impugned judgment and decree should be set aside.

(4). On the other hand, the learned counsel for the plaintiff respondent supported the judgment and decree dated 12.12.1986 passed by the learned District Judge, Sirohi.

(5). I have heard the learned counsel for the parties and gone through the record of the lower court.

(6). To appreciate the contentions made by the learned counsel for the appellant-defendant, it would be worthwhile to have a background what the Rules 2 and 3 of Order 37 CPC speak.

(7). The Order 37 CPC provides for a summary procedure in respect of certain suits. The essence of the summary suit is that the defendant is not as in an ordinary suit, entitled as of right to defend to suit. He must apply for leave to defend within ten days from the date of the service of the summons upon him and such leave will be granted only if the affidavit filed by the defendant discloses such facts as will make it incumbent upon the plaintiff to prove consideration or such other facts as the court may deem sufficient for granting leave to the defendant to appear and defend the suit. If no leave to defend is granted, the plaintiff is entitled to a decree. The object underlying the summary procedure is to prevent unreasonable obstruction by a defendant who has no defence.

(8). Rule 2 of Order 37 CPC provides for the procedure of summary suits.

(9). Rule 3 of Order 37 CPC provides for the procedure for the appearance of the defendant and consequence for non-appearance of the defendant.

(10). In a summary suit the plaintiff has to serve on the defendant alongwith summons under Rule 2 a copy of the plaint and annexures thereto. The defendant may enter appearance in person or by a pleader at any time within ten days of such service and has to file an address for service of notice on him. On that day, he has also to give notice of such appearance to the plaintiff or his pleader. There is no particular form prescribed for entering appearance.

Note:-It is made clear that it is only the entering of appearance which is mandatory part of Rule 3 of Order 37 and filing of address for service and giving notice to the plaintiff or his counsel of entering appearance are not mandatory provisions and if there is a violation thereof the same can be compensated by cost.

When the defendant enters appearance under Rule 2, the plaintiff has to serve on the defendant thereafter a summon for judgment in Form No. 4A in Appendix B or such other Form as may be prescribed, returnable not less than ten days from the date of service supported by affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the suit.

(11). In a case where the summon under Rule 2 Order 37 CPC is issued against the defendant and the same is served upon him and if he does not make appearance within ten days of service of such notice, as provided in sub-rule (1) of Rule 3 of Order 37 CPC, the plaintiff shall be entitled to a decree for any sum not exceeding the sum mentioned in the summon, together with interest.

(12). Keeping in mind the above legal position, the case of the defendant appellant is to be examined.

(13). In the present case, the facts which are not in dispute are as under:-

(1) That a summon under Rule 2 Order 37 CPC was issued by the Court against the defendant appellant on 5.2.1985, which was dispatched on 6.2.1985 and the same was served on the defendant appellant on 6.5.1985.

(2) That after the service of summon on the defendant appellant on 6.5.1985, no appearance has been given by the defendant appellant in the court within ten days from the date of service of summon.

(3) That first appearance which has been given by the defendant appellant in the court is on 3.9.1985.

(14). The case of the defendant appellant is that appearance which has been given on 3.9.1985 was given in compliance of the summon which was issued on 22.8.1985 by the court and, therefore, it may be taken, for granted that appearance has been given by the defendant appellant within ten days of the service of summon.

Note:- Before proceeding further it may be made clear that this argument is totally baseless as the summon which was issued on 22.8.1985 is on the file and it

clearly reveals that it was served on the defendant appellant on 24.12.1985. When summon dated 22.8.1985 was served on the defendant appellant on 24.12.1985, the defendant's appearance in the Court on 3.9.1985 cannot be said to have been made in compliance of summon dated 22.8.1985. Therefore, it is very much clear that defendant appellant when made his appearance in Court on 3.9.1985, he certainly made appearance in compliance of summon which was served on him on 6.5.1985 and the same appearance, without any doubt, is time barred.

(15). From the facts of the present case, it appears that the defendant appellant was served with the summon issued under Order 37 Rule 2 CPC first on 6.5.1985 and he did not make any appearance in Court upto 3.9.1985. Thus, he has not made appearance within ten days of the service of such summon, as provided under Sub-rule (1) of Rule 3 of Order 37 and, therefore, plaintiff is entitled to a decree against the defendant appellant, which has been rightly passed by the learned District Judge. The judgment and decree passed by the learned District Judge do not suffer from any error either of law or facts and they are also not vitiated either by the procedural or jurisdictional error.

(16). If in a case summon is issued under Rule 2 Order 37 CPC against the defendant and the same is served on him and he does not make appearance within ten days of the service of such summon, the provisions of sub-rule (4) of Rule 3 of Order 37 CPC would not be applicable. Sub-rule (4) of Rule 3 of Order 37 CPC would be applicable only after the defendant makes appearance after service of summon. Hence, the argument that since no compliance of Rule 3(4) of Order 37 CPC was made by, the trial court, the impugned judgment and decree are liable to be set aside, is wholly untenable, for in the present case, the defendant appellant has not made any appearance within ten days of the service of the summon issued u/Rule 2 Order 37 CPC.

In this connection, reference may be made to the decision of the Delhi High Court in M/s Sant Chit and Finance Pvt. Ltd. vs. M/s G.D. Textiles and others (1), where it was observed as under:-

'Civil P.C. (1908), 0.37, Rule 2 and 3- Summary trial- Pronote executed jointly for payment of sum in respect of chit fund subscription-Legal notices served by

plaintiff returned with endorsement of refusal/addressee not found-Notice of suit served on defendant-Defendants not appearing within 10 days of notice or applying for leave to defend-Plaintiffs are entitled to decree under Rule 2 and 3.'

(17). Thus, if, in the above circumstances, the learned trial court has decreed the suit of the plaintiff respondent, it has committed no illegality or irregularity. The learned trial court was competent to pass a decree under Rule 2 Order 37 CPC in case defendant appellant did not make appearance within ten days from the date of service of summon issued under Rule 2 Order 37 CPC.

(18). Thus, from the discussion made above the arguments raised by the learned counsel for the appellant-defendant cannot be appreciated and the impugned judgment and decree passed by the learned District Judge deserve to be upheld.

In the result, this first appeal filed by the defendant appellant fails and is dismissed with costs, after affirming the judgment and decree dated 12.12.1986 passed by the learned District Judge, Sirohi.

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