

**Mukesh Kumar Vs. Bhopal Singh**

**Mukesh Kumar Vs. Bhopal Singh**

**SooperKanoon Citation :** [sooperkanoon.com/763374](http://sooperkanoon.com/763374)

**Court :** Rajasthan

**Decided On :** Sep-09-2004

**Reported in :** III(2005)BC243; RLW2005(1)Raj47; 2005(1)WLC251

**Judge :** Prakash Tatia, J.

**Acts :** Code of Civil Procedure (CPC) - Order 9, Rule 13 - Order 37, Rules 3(1), 3(4) and 4

**Appeal No. :** S.B. Civil Revision Petition No. 873 of 2002

**Appellant :** Mukesh Kumar

**Respondent :** Bhopal Singh

**Advocate for Def. :** Sandeep Saruparia, Adv.

**Advocate for Pet/Ap. :** Jitendra Chopra, Adv.

**Disposition :** Application allowed

**Judgement :**

**Tatia, J.**

1. Heard learned counsel for the parties.

2. The petitioner is aggrieved against the order of the Trial Court dated 20th Aug., 2002 by which the petitioner's application for setting aside the ex-parte decree, purported to have been filed under Order 9 Rule 13 C.P.C., was dismissed.

3. Brief facts of the case are that the plaintiff filed the suit for recovery of principal amount of Rs. 60,000/- and interest thereon Rs. 22,800/- total Rs. 82,800/-. The suit was filed under the provisions of Order 37 C.P.C. The summons for defendant appearance under sub-rule (1) of rule 3 of Order 37 C.P.C. were issued to the defendant upon which the defendant put in appearance in time through his advocate on 20th Sept., 2001. The Trial Court ordered to issue summons for judgment under sub- rule 4 of Rule 3 of Order 37 C.P.C. The Trial Court on 18th Jan., 2002 held that the said summon has been served upon the defendant but nobody appeared despite service and thereafter, the Trial Court decreed the plaintiff's suit on 19th Jan., 2002.

4. The petitioner submitted an application before the Trial Court, for setting aside the ex-parte decree stating therein that the summons as required under sub-rule 4 of Rule 3 of Order 37 C.P.C. was not served upon the defendant-petitioner. The petitioner-defendant came to know about the said decree only when Sale Amin came to his resident on 25th July, 2002 and informed that decree has been passed against the petitioner-defendant. The petitioner-defendant immediately after knowing about the judgment and decree, submitted the application on 27th July, 2002 for setting aside the judgment and decree. The Trial Court held that the ex-parte decree can only be set aside in a special circumstance and not merely on showing that the service was not affected properly upon the defendant or for the reasons, which may be sufficient reasons under Order 9 Rule 13 C.P.C. The Trial Court also held that since the application under Order 9 Rule 13 has been filed after the period of 30 days and no application under Section 5 of the Limitation Act has been filed by the petitioner, therefore, the application is barred by time and the Trial Court dismissed the application of the defendant- petitioner. Hence, defendant-petitioner preferred this appeal.

5. Learned counsel for the petitioner vehemently submitted that the mandatory provisions as provided under sub-rule 4 of Rule 3 of Order 37 C.P.C. have not

been followed, which cast duty upon, the plaintiff to serve not only summons for judgment in Form No. 4A as provided in Appendix-B but plaintiff should also submit in court an affidavit verifying the cause of action and the amount claimed and should state on oath that in his belief, there is no defence in the suit. This affidavit is required to be served upon the defendant so that in case, defendant does not rebut the facts mentioned in the affidavit, the court may pass the decree against the defendant on the basis of said piece of evidence. In this case, no such affidavit was filed by the plaintiff in the court below. Therefore, no question of its service upon the defendant arises, hence, the decree deserves to be set aside as has been passed without evidence and in violation of mandatory provisions of law.

6. I perused the facts of the case and considered the submissions of learned counsel for the parties. Learned counsel for the respondent vehemently submitted that in a matter of proceedings for setting aside the ex-parte decree passed under Order 37 C.P.C., the defendant can claim any relief on proving special circumstances and further in addition to the above, he has to plead ground of his defence against the suit claim. Learned counsel for the respondent relied upon the judgment of the Hon'ble Apex Court delivered in the case of Rajni Kumar v. Suresh Kumar Malhotra and Anr., JT 2003 (3) SC 307. It is also submitted that the Trial Court itself issued the summons for judgment under sub-rule 4 of Rule 3 of Order 37 C.P.C., therefore, it maybe presumed that the affidavit was annexed with the notice and the service was validly affected upon the defendant. Learned counsel for the respondent also submitted that the application filed by the petitioner under Order 9 Rule 13 C.P.C. itself was not maintainable in view of the specific provisions of rule 4 of Order 37 C.P.C, which provides the circumstances in which the court may set aside the ex-parte decree passed under Order 37 C.P.C.

7. So far as the contention of learned counsel for the petitioner that the ex-parte decree passed under Order 37 can be set aside only under rule 4 of Order 37 C.P.C. and not by invoking powers under Order 9 Rule 13 C.P.C. is concerned, is well justified argument. The application filed by the petitioner- defendant has been titled as an application under Order 9 Rule 13 C.P.C, but this itself cannot be a ground for rejection of the application and this application can be treated as

application under Rule 4 of Order 37 C.P.C. provided there exists a ground for entertaining the said application under Rule 4 Order 37 C.P.C.

8. The Rule 4 of Order 37 provides that the court may set aside the ex-parte decree upon finding some special circumstances for doing so. In this case, it is clear from the record the plaintiff did not submit the affidavit in the Trial Court verifying cause of action and his claim about his amount and stating on oath that in his opinion, there is no defence to his claim as required by sub-rule 4 of rule 3 of Order 37 C.P.C. Therefore, in this case, there is total non-compliance of the mandatory provisions of sub- rule 4 of Rule 3 of Order 37 C.P.C. and this itself is a special circumstance for setting aside the decree. The court can issue summons for judgment to the defendant only on the basis of the verification by the plaintiff of cause of action pleaded in the plaint and on his statement on oath that in his belief there is no defence to the claim of the plaintiff. As per clause (a) of sub-rule (6) of Rule 3 of Order 37 C.P.C., the court is required to straightway pass the decree without recording any evidence and court accepts unrebutted evidence of the plaintiff, which is in the form of affidavit as a proof of the claim of the plaintiff. In this case, the Trial Court passed the decree, but without there being any evidence for the namesake on record that the defendant has no defence to the claim of the plaintiff, therefore, it itself is a special circumstance for entertaining the application under Rule 4 of Order 37 C.P.C and it will be in consonance with the judgment of the Hon'ble Supreme Court relied upon by learned counsel for the respondent himself.

9. The Hon'ble Apex Court in Rajni Kumar's case referred above clearly held that non-service of summons will undoubtedly be a special circumstance. Here in this case, the question is of non- compliance of specific provision framed for special purpose and it is not only mere violation of some procedure of law or is a question of irregularity in the service of the summons upon the defendant. The requirement of filing of affidavit in the terms as required by sub-rule (4) of rule 3 of Order 37 C.P.C. is not empty formality because this is the foundation for recording the order to issue summon to the defendant for judgment in the suit filed by the plaintiff against the defendant as summon for judgment contains order of the Court 'Upon reading the affidavit of the plaintiff the court makes the following order,

namely.....' (summon for judgment-Form No. 4A in Appendix B, C.P.C.) At the cost of repetition the court believes the affidavit of the plaintiff filed under sub-rule 4 of Rule 3 of Order 37 C.P.C. and passes the decree unless it is rebutted by the defendant and rebuttal to the extent so as to persuade the court to grant leave to the defendant to contest the claim of the plaintiff. Therefore, the compliance of this provision cannot be taken as lightly as suggested by learned counsel for the respondent.

10. The contention of learned counsel for the respondent that since the court issued summons and there is printed line in the summon that court read the affidavit, therefore, it is to be presumed that the affidavit was, in fact, filed and served upon the defendant. Learned counsel for the respondent emphatically submitted that there is hand written line in the summon for judgment wherein it has been written that the plaintiff is entitled for the decree as per the plaint. This means that the court, after satisfaction about the claim of the plaintiff, issued notice. The said contention of learned counsel for the petitioner is liable to be rejected summarily simple because of the fact that even plaintiff's own case is not that he submitted any affidavit before the court below. A bare perusal of the notice itself shows that there is a printed line in the notice regarding the fact that the court has read over the affidavit and passed the order of issuing notice. This fact stands fully rebutted from the record itself. Even today, it is not the case of the plaintiff that he filed the affidavit in support of his claim as required under sub-rule 4 of Rule 3 of Order 37 C.P.C. Assuming for the sake of argument, the presumption is required to be drawn for correctness of all the proceedings, even then that presumption stands fully rebutted by the facts available on record as well as in view of the fact that it is not a case of the plaintiff that he ever filed the affidavit as required under sub-clause 4 of Rule 3 of Order 37 C.P.C.

11. In view of the above, I do not find any reason to hold that the application containing the title of under Order 9 Rule 13 C.P.C. may not be considered as application under Order 37 Rule 4 C.P.C. The Trial Court has not examined the matter in a right perspective. The disclosure of merit in the defence of the defendant comes when the plaintiff says that there is no defence in his belief to the claim of the plaintiff. Question of disclosure of defence by the defendant arises

only when court feels satisfied on the basis of the affidavit of the plaintiff and draws presumption that cause of action accrued to the plaintiff against the defendant for the money claimed and there is no defence available to the defendant unless shown by the defendant to the satisfaction of the court. In a case where court issued summons to defendant after filing affidavit, then the defendant may in particular facts of the case, be required to disclose his defence also. Therefore, Rajni Kumar's case (supra), has no application to the facts of this case. When the plaintiff himself nowhere says that there is no defence to the plaintiff case, then even if the defendant has not disclosed his defence at this stage it cannot be fatal to the right of the defendant to submit the defence upon service of the notice for judgment.

12. In view of the above, the revision petition of the petitioner deserves to be allowed. Hence, allowed. The application filed by the petitioner is treated under Rule 4 of Order 37. The application is allowed. The decree passed by the Trial Court dated 4th Oct., 2002 is set aside and the matter is sent back to the Trial Court for taking proceedings for stay of sending summon for judgment upon the defendant. Both the parties are directed to remain present before the Trial Court on 4th Oct., 2004. The summons for the judgment may be served upon the counsel for the defendant on the same day or as per the convenience of the Trial Court and thereafter, proceedings may be taken in accordance of law without influenced by any observation made by this Court in this order.