

Valappil Azeez Vs. Moidu Ammad

Valappil Azeez Vs. Moidu Ammad

SooperKanoon Citation : sooperkanoon.com/903189

Court : Kerala

Decided On : Feb-09-2010

Reported in : 2010(1)KLT974

Judge : V. Ramkumar, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 9, Rule 13 - Order 27 - Order 37, Rules 2(3) and 4; ;Code of Civil Procedure (CPC) (Amendment) Act, 1976

Appeal No. : W.P.(C) No. 1621 of 2010

Appellant : Valappil Azeez

Respondent : Moidu Ammad

Advocate for Def. : B. Krishnan and; R. Parthasarathy, Advs.

Advocate for Pet/Ap. : K. Jayakumar,; P.B. Krishnan,; R. Suraj Kumar,;

Disposition : Petition dismissed

Judgement :

V. Ramkumar, J.

1. The defendant in O.S. No. 40 of 2008 on the file of the Subordinate Judge's Court, Vatakara is the Writ Petitioner. The said suit was filed by the respondent herein for realisation of Rs. 1,50,000/- and future interest at the rate of 18% per

annum on the foot of a dishonoured cheque. The plaintiff had invoked the summary procedure prescribed under Order XXXVII C.P.C. The suit was instituted on 31.3.2008. Ext.P1 is the plaint. The petitioner remained exparte and the suit was decreed ex parte on 16.6.2008. Ext.P2 is the judgment. Thereafter the petitioner filed Ext. P3 application (R.P.I.A. No. 988 of 2008) under Order IX Rule 13 C.P.C. for setting aside the exparte decree. The respondent/plaintiff opposed the application by filing Ext.P4 counter affidavit. The petitioner produced two prescriptions by Dr. M.C. Vasu, Medical Practitioner in support of his contention that he was unable to appear before the court below on the date when the suit was posted for hearing. He also filed Ext.P5 proof affidavit. The plaintiff did not cross examine the petitioner. The Trial Court dismissed Ext.P3 application as per Ext.P6 order dated 3.12.2008 on the following grounds:

- i) It is not Order IX Rule 13 but Order XXXVII Rule 4 C.P.C. which was to be invoked by the petitioner.
- ii) Eventhough Exts.A1 and A2 prescriptions may suggest that the petitioner who gave proof affidavit as P.W. 1 had sufficient cause for his non-appearance before the court on the relevant date, he has failed to make out any of the grounds for granting leave to defend the suit.

Aggrieved by Ext.P6 order the petitioner filed an appeal before the Addl. District Court, Vadakara as C.M.A. No. 8 of 2009. That Court also confirmed the order passed by the Trial Court and dismissed the appeal. Ext.P7 is the judgment dated 19.11.2009 in the said Appeal. Hence, this Writ Petition.

2. I heard the learned Counsel for the Writ Petitioner as well as the learned Counsel appearing for the respondent/decreed holder.

3. Assailing Exts.P6 order and P7 judgment the learned Counsel appearing for the Writ Petitioner/defendant made the following submissions before me:

Order XXVII C.P.C. had been omitted in the State of Kerala as per a Kerala Amendment published on 9.6.1959. It was only in Aravindakshan v. Sukumaran 2000 (1) KLT 107 that a Division Bench of this Court held that the Kerala

Amendment could not survive the Code of Civil Procedure (Amendment) Act, 1976 and that Order XXXVII as substituted by the 1976 Amendment is in force in Kerala with effect from 1.2.1977 onwards. Until the Division Bench held as above everybody was under the bona fide impression that Order XXXVII has no application in Kerala. That is presumably the reason why Ext.P3 application was filed by the petitioner by invoking Order IX Rule 13 C.P.C. In Ext.P3 application the petitioner has pleaded that he has substantial contention in the suit and that no amount is payable by him. The said plea was not traversed in Ext.P4 counter affidavit filed by the plaintiff and therefore, the said averment should be treated as admitted. The plaintiff also did not cross examine the petitioner defendant with regard to the said aspect regarding which specific mention was made in the proof affidavit as well. If so, the petitioner has made out at least the 5th ground for leave to defend the suit as enumerated by the Apex Court in *Sunil Enterprises v. S.B.I. Commercial and International Bank Limited* : 1998 (5) SCC 354 and hence in order to protect the interests of the plaintiff the Trial Court should have directed the petitioner either to pay the amount claimed or furnish security for the said amount and given him an opportunity to defend the suit.

4. I am afraid that I cannot agree with the above submissions. The suit was filed specifically invoking Order XXXVII C.P.C. The suit was filed long after the authoritative pronouncement by the Division Bench of this Court in *Aravindakshan's case* (supra). No party can plead ignorance of law as an excuse. This is not a case where the petitioner had filed a written statement and had thereafter Failed to appear before the Trial Court due to reasons beyond his control. He did not choose to appear before the Trial Court at all. He did not also file a written statement although he was duly served in the suit. He did not contend before the Trial Court that Order XXXVII C.P.C. was not applicable in Kerala. He simply remained ex-parte. The plaintiff was entitled to a decree under a Order XXXVII Rule 2(3) C.P.C. by virtue of the failure on the part of the defendant to enter appearance and such a decree was liable to be set aside only under the special circumstances envisaged by Order XXXVII Rule 4 C.P.C. Even assuming that the two medical prescriptions produced by him would constitute sufficient cause for his non-appearance before the Trial Court on the day when the suit came up for trial, in the light of the decision of the Apex Court in *Rajni Kumar v.*

Suresh Kumar Malhotra and Anr. : (2003) 5 SCC 315 it is not enough. The defendant, in an application under Order XXXVII Rule 4 C.P.C. should not only show sufficient cause for his non-appearance on the relevant date but should also disclose the facts which would entitle him to defend the suit. In the case on hand, except stating that he has valid contentions to be urged in the suit and that he is not liable to pay any amount to the plaintiff, he did not disclose the grounds on which he was entitled to defend the suit. The Apex Court in para.4 in Sunil Enterprise's case (supra) had enumerated the five situations for grant of leave to defend a summary suit filed under Order XXXVII C.P.C. The following are those five situations:

(a) If the defendant satisfies the court that he has a good defence to the claim on merits, the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defence, although not a possibly good defence, the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is, if the affidavit discloses that at the trial he may be able to establish a defence to the plaintiffs claim, the court may impose conditions at the time of granting leave to defend the conditions being as to time of trial or mode of trial but not as to payment into court for furnishing security.

d) If the defendant has no defence, or if the defence is sham or illusory or practically moonshine, the defendant is not entitled to leave to defend.

e) If the defendant has no defence or the defence is illusory or sham or practically moonshine, the court may show mercy to the defendant by enabling him to try to prove a defence but at the same time protect the plaintiff imposing the condition that the amount claimed should be paid into court or otherwise secured.

5. The present case falls under the 4th category i.e. category (d) above. This is not a case where the petitioner defendant deserves mercy of the Court so as to bring his case under the 5th category enumerated above. He had a duty to disclose his

defence as insisted by the Supreme Court in Rajni Kumar's case. Far from disclosing his defence all that he pleaded was that he has substantial contentions in the suit and that no amount was payable by him to the plaintiff. The said stand taken in Ext.P3 application was just an apology for disclosure of his defence. Under these circumstances, it cannot be said that the petitioner has made out a good ground to entitle him to defend the case. A summary suit under Order XXXVII C.P.C. should be carefully insulated from the dilatory, time consuming, multi tier side tracking procedure which has become the bane of the ordinary civil suit. The Courts below, were, therefore, justified in dismissing Ext.P3 application filed under Order IX Rule 13 C.P.C. instead of Order XXXVII Rule 4 C.P.C. I do not find any good ground to interfere with Ext.P5 order of the Trial Court and Ext.P7 judgment of the lower Appellate Court.

This Writ Petition is accordingly, dismissed. The petitioner is given one month's time from today to deposit before the Executing court the amounts due from him.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com