

Picky Sharma Vs. Bhagwati Devi

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Court : Himachal Pradesh

Decided On : May-02-2011

Judge : Deepak Gupta, J.

Acts : Code of Civil Procedure (CPC) (C.P.C) - Order 37 Rules 5, 3; [Constitution of India](#) - Article 227

Appeal No. : CMPMO No.433 of 2010

Appellant : Picky Sharma

Respondent : Bhagwati Devi

Advocate for Def. : Mr.R.P.Singh, Adv.

Advocate for Pet/Ap. : Mr.Anup Rattan, Adv.

Judgement :

1. This petition raises an interesting question as to the procedure which a Civil Court has to follow in cases governed by order XXXVII of the Code of Civil Procedure.

2. The facts necessary for disposal of the petition are that the petitioner (hereinafter referred to as the 'plaintiff') filed a suit for recovery of Rs.4,25,000/- under Order XXXVII, CPC. Thereafter, notice of this suit was issued on 27.7.2010 and while issuing notice, the learned Trial Court specifically directed that the

defendant be served by way of notice mentioned in Appendix B Form No.4, CPC. This is the form prescribed for service of notice under Order XXXVII. The defendant was served and moved an application on 23.8.2010 under Order XXXVII sub rule (3), Rule 5, CPC for leave to defend the suit. The plaintiff filed an application under order XXXVII, Rule 3, sub Rule (4), CPC for permission to serve the summons for judgment upon the defendant. This application was filed on 28.8.2010 and was accompanied by an affidavit.

3. It appears that the case was fixed for 23.8.2010 when the Presiding Officer was on leave. Though power of attorney and application for leave to defend had been filed on behalf of the defendant, on 28.8.2010 none appeared for the defendant and the learned Trial Court directed that notice under order XXXVII Rule 2 be issued to the defendant returnable for 19.10.2010. On the application filed for serving summons of judgment, it was directed that the same would also be considered on the same date, i.e., 19.10.2010. On 19.10.2010, the learned Trial Court directed the defendant to file reply to the application under order XXXVII Rule 3, CPC and adjourned the matter to 18.11.2010. On 18.11.2010, the learned Trial Court recorded that the defendant had already filed an application for leave to defend the suit on 23.8.2010 and directed that the case be fixed for 8.12.2010 for filing of written statement. The petitioner-plaintiff by means of this petition filed under Article 227 of the [Constitution of India](#) submits that the learned Trial Court without considering the merits of the case has directed the defendant to file a written statement which virtually amounts to granting him leave to defend the case and the procedure under Order XXXVII, CPC has not been followed.

4. To appreciate the points involved in the present petition, it would be apposite to make detailed reference to order XXXVII of the Code of Civil Procedure:-

“ORDER XXXVII SUMMARY PROCEDURE 1. Courts and classes of suits to which the Order is to apply (1) This Order shall apply to the following Court, namely:-

**(a) High Courts, City Civil Courts and Courts of Small Causes;
and**

(b) other Courts; Provided that in respect of the Courts referred to in clause (b), the High Court may, by notification in the Official Gazette, restrict the operation of this Order only to such categories of suits as it deems proper, and may also, from time to time, as the circumstances of the case may require, by subsequent notification in the Official Gazette, further restrict, enlarge or vary, the categories of suits to be brought under the operation of this Order as it deems proper.

(2) Subject to the provisions of sub-rule (1) the Order applies to the following classes of suits, namely:-

(a) suits upon bills of exchange, hundies and promissory notes;

(b) suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising,-

(i) on a written contract, or

(ii) on an enactment, where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or

(iii) on a guarantee, where the claim against the principal is in respect of a debt or liquidated demand only.]

2. Institution of summary suits (1) A suit, to which this Order applies, may, if the plaintiff desires to proceed hereunder, be instituted by presenting a plaint which shall contain,-

(a) a specific averment to the effect that the suit is filed under this Order;

(b) that no relief, which does not fall within the ambit of this rule, has been claimed in the plaint; and

(c) the following inscription, immediately below the number of the suit in the title of the suit, namely:- "(Under Order XXXVII of the Code of Civil Procedure, 1908)."

(2) the summons of the suit shall be in Form No. 4 in Appendix B or in such other form as may, from time to time, be prescribed.

(3) The defendant shall not defend the suit referred to in sub-rule (1) unless he enters an appearance and in default of his entering an appearance the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree for any sum, 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 such sum for costs as may be determined by the High Court from time to time by rules made in that behalf and such decree may be executed forthwith.]

3. Procedure for the appearance of defendant

(1) In a suit to which this Order applies, the plaintiff shall, together with the summons under rule 2, serve on the defendant a copy of the plaint and annexures thereto and the defendant may, at any time within ten days of such service, enter an appearance either in person or by pleader and, in either case, he shall file in Court an address for service of notices on him.

(2) Unless otherwise ordered, all summonses, notices and other judicial processes required to be served on the defendant, shall be deemed to have been duly served on him if they are left at the address given by him for such service.

(3) On the day of entering the 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 pre-paid letter directed to the address of the plaintiff's pleader or of the plaintiff, as the case may be.

(4) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment in Form No. 4-A in Appendix B or such other Form as may be prescribed from time to time, returnable not less than ten days from the date of service 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.

(5) The defendant may, at any time within ten days from the service of such 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, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just: Provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious: Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.

(6) At the hearing of such summons for judgment,-

(a) if the defendant has not applied for leave to defend, or if such application has been made and is refused, the plaintiff shall be entitled to judgment forthwith; or

(b) if the defendant is permitted to defend as to the whole or any part of the claim, the Court or Judge may direct him to give such security and within such time as may be fixed by the Court or Judge and that, on failure to give such security within the time specified by the Court or Judge or to carry out such other directions as may have been given by the Court or Judge, the plaintiff shall be entitled to judgment forthwith.

(7) The Court or Judge may, for sufficient cause shown by the defendant, excuse the delay of the defendant in entering an appearance or in applying for leave to defend the suit.]

4. Power to set aside decree After decree the Court may, under special circumstances, set aside the decree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit.

5. Power to order bill, etc., to be deposited with officer of Court In any proceeding under this Order the Court may order the bill, hundi or note on which the suit is founded to be forthwith deposited with an officer of the Court, and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs thereof.

6. Recovery of cost of noting non-acceptance of dishonoured bill or note- The holder of every dishonoured bill of exchange or promissory note shall have the same remedies for the recovery of the expenses incurred in noting the same for nonacceptance

or non-payment, or otherwise, by reason of such dishonour, as he has under this Order for the recovery of the amount of such bill or note.

7. Procedure in suits Save as provided by this Order, the procedure in suits hereunder shall be the same as the procedure in suits instituted in the ordinary manner.”

5. Rule 1 of Order XXXVII, CPC provides for a summary procedure for suits which are based upon bills of exchange hundies and promissory notes; or suits where the plaintiff seeks to recover a debt or liquidated amount on a written contract or on the basis of an enactment where the amount to be recovered is fixed or on the basis of a guarantee where the claim against the principal is in respect of a debt. Rule 2 of Order XXXVII relates to institution of summary suits and provides that the plaintiff must make a specific averment that the suit has been filed under order XXXVII and that no relief which does not fall within the scope and ambit of order XXXVII has been claimed.

6. A specific form No.4 in appendix B has been prescribed for issuing summons in such suits which can be tried in a summary manner. Sub rule (3) of Rule 2 specifically provides that the defendant shall not defend the suit referred to in sub Rule (1) unless he enters an appearance and in case he does not put in appearance then it shall be deemed that he has admitted the claim. Unlike other suits filed in normal process where the plaintiff would still have to appear and prove his case by leading ex parte evidence in a case filed under order XXXVII if summons are issued in proper form, then if the defendant fails to put in appearance, a decree can be passed straightaway.

Rule 3 of order XXXVII lays down the procedure for appearance of the defendant and this is most important aspect falling for our consideration in the present petition. As pointed out above, a suit can be filed under order XXXVII only if it falls within the ambit of sub rule (2) of rule 1.

7. A careful perusal of sub rule (2), Rule 1 shows that these are suits based on documents such as bills of exchange, hundies, promissory notes, written

contracts, enactments or guarantee deeds. The legislature, in its wisdom, thought that where in contractual matters, persons have entered into a written contract then the procedure could be cut short and a summary procedure could be followed because by signing the contract, the burden now shifts upon the person who wants to wriggle out of the contract.

8. Sub Rule (1) of Rule 3 provides that alongwith the summons in form 4 prescribed, the plaintiff shall serve upon the defendant not only a copy of the plaint but all the annexures attached thereto. Within 10 days of service of such notice, the defendant has to put in appearance in the Court either personally or through counsel. He is also required to file in the court the address for service of notices upon the defendant and all notices sent or delivered on such address would amount to proper service of the defendant.

9. Sub rule (3) of Rule 3 provides that notice of such appearance not only has to be filed in Court but has also to be given to the plaintiff if he is appearing in person or to his counsel if appearing through the counsel. Since appearance has to be put in within 10 days of the service of the notice, it is not necessary for the defendant to wait for the date fixed in the case and if in a given case the defendant is served much earlier, i.e. more than 10 days prior to the date fixed in the case, he still has to put in appearance in Court within 10 days of service and has to give notice to the plaintiff and/or his counsel about the fact that he is putting in appearance in the suit. While putting in appearance, the defendant does not have to indicate his defence and has just to inform that he is putting in appearance. After the defendant puts in appearance then the plaintiff has to serve summons for judgment in form 4-A in appendix B. The summons for judgment has to be accompanied by an affidavit verifying the cause of action and the amount claimed etc.

10. The Court on perusal of the affidavit and on being satisfied that the suit has been properly filed under Order XXXVII, CPC will direct that summons of judgment be served upon the defendant in Form 4-A. A bare perusal of sub rule (4) of Rule 3 does not indicate that the system of the Court has to be taken for issuing of the summons for judgment. However, a perusal of Form 4-A, Appendix B shows that

the Court has to go through the affidavit filed by the plaintiff in support of his summons for judgment.

Relevant portion of Form 4-A reads as follows:-

“Upon reading the affidavit of the plaintiff the Court makes the following order, namely.- Let all parties concerned attend the Court or Judge, as the case may be, on the day of 19....., at o’clock in the forenoon on the hearing of the application of the plaintiff that he be at liberty to obtain judgment in this suit against the defendant (or if against one or some or several, insert names) for Rs..... and for interest and costs. Dated the day of19.....”

11. This clearly shows that there has to be some application of mind by the learned Judge before issuing summons for judgment. Within 10 days of the receipt of the summons for judgment alongwith the affidavit, the defendant must apply to the Court for leave to defend the suit. In case the facts disclosed by the defendant do not indicate that he has a substantial defence to raise, or the defences intended to be put up by him are prima facie frivolous or vexatious, the Court can reject the application for leave to defend otherwise leave should be granted.

12. Second proviso to Rule 5 clearly lays down that in case the defendant admits a part of the claim then he shall not be granted leave to defend the entire claim unless he deposits the amount which he admits is due from him to the plaintiff. Thus it is clear that leave to defend should only be granted where the defendant raises a defence which is substantial in nature and is not frivolous or vexatious. This leave has to be granted after hearing the parties in terms of sub Rule (6) of Rule 3.

13. In case the defendant does not apply for leave to defend within 10 days of service of summons then the plaintiff is entitled to a judgment in his favour forthwith. Clause (b) of sub Rule (6) of rule 3 lays down that even where the defendant is permitted to defend the suit as a whole or in part, the Court may

direct the defendant to furnish such security on such terms and conditions that the Court deems fit within the prescribed period and on failure of the defendant to furnish the security within the prescribed period, the plaintiff can again get judgment forthwith. Sub rule (7) of Rule 3 empowers the Court to condone the delay in filing an application for leave to defend. We are not concerned with Rules 4 to 7 of Order XXXVII at this stage in these proceedings.

14. From the aforesaid discussion, it is obvious that the learned Trial Court did not follow the procedure prescribed under order XXXVII, CPC. In fact, it appears that neither the counsel nor the learned Judge was clear about the procedure prescribed under order XXXVII. The defendant while putting in appearance did not even mention the date on which she was served and, therefore, it cannot be said with certainty whether she had put in appearance within 10 days of service or not. Thereafter, when the plaintiff applied for serving the summons for judgment upon the defendant, the Court passed no orders on the same. The learned Trial Court thereafter erred in holding that because appearance had been filed earlier, written statement had to be filed.

This procedure is totally incorrect. Once the defendant was served, she should have within 10 days put in appearance. Thereafter, the plaintiff was required to serve summons for judgment upon the defendant and within 10 days of service of summons for judgment, the defendant had to apply for leave to defend and this leave to defend has to be granted in terms of sub Rule (5), Rule 3, order XXXVII, CPC upon which there are a number of judgments and this Court need not dilate.

15. Since the proper procedure has not been followed, the suit is relegated to the stage of putting in appearance.

Therefore, I direct that the plaintiff shall serve proper summons in Form 4 alongwith affidavit as required at any time on or before the date fixed before the learned Trial Court. Within 10 days thereafter of the receipt of summons of the judgment in proper form, the defendant shall apply for leave to defend before the learned Trial Court. The parties through their counsel are directed to appear before the learned Trial Court on 4.6.2011 and thereafter, the learned

Trial Court shall proceed with the matter strictly in accordance with order XXXVII, CPC.

16. The petition is disposed of in the aforesaid terms. No order as to costs.

17. A copy of this judgment be sent to the Director, H.P State Judicial Academy for circulation amongst all the Judicial Officers in the State of H.P.

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