

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA No. 02/2008**

Reserved on : November 26th , 2008

% Date of Decision : December 17th , 2008

M/s. United Cutlery Works
and Others

Through: Petitioner
Mr. Vikram Nandrajog,
Advocate

Versus

Mr. Anoop Khurana

Through: Respondent
Mr. Kailash Sharma,
Advocate.

CORAM:
HON'BLE MR. JUSTICE MUKUL MUDGAL
HON'BLE MR. JUSTICE MANMOHAN

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes. |
| 2. To be referred to the Reporter or not? | Yes. |
| 3. Whether the judgment should be reported in the Digest? | Yes. |

J U D G M E N T

MANMOHAN, J

1. The present appeal has been filed under Section 96 read with Order 41 of the Code of Civil Procedure (hereinafter referred to as CPC) against the judgment and decree dated 2nd February, 2006 and 12th April, 2006 as well as the order dated 2nd June, 2006.

2. The facts of this case are that the Respondent filed a civil suit being Suit No. 260/2005 under Order XXXVII CPC for recovery

of Rs. 10,01,149.00 along with interest at 15% per annum. The primary allegation in the plaint was that the Appellants/Defendants had purchased goods from the Respondent/Plaintiff for which the Respondent had raised bills totaling to Rs. 7,01,017.50. But as the Appellants/Defendants had failed to make payment against said bills, the Respondent had filed the said summary suit for recovery.

3. Since the Appellant No. 1 & 2 did not enter appearance within the stipulated period as prescribed under Order XXXVII CPC, the trial court on 2nd February, 2006 passed an ex-parte decree against the said two Appellants. Though, the Appellant No. 3 had entered appearance, but as he did not file his application for leave to defend within the period of ten days as prescribed under Order XXXVII Rule 4 CPC, the learned ADJ passed a decree on 12th April, 2006 against the said Appellant also.

4. Subsequently, while the Appellant Nos. 1 & 2 filed an application under XXXVII Rule 4 read with Section 151 CPC for setting aside the ex-parte decree/order dated 2nd February, 2006, the Appellant No. 3 filed an application under Order 37 Rule 3 sub Rule 7 and Rule 4 read with Section 151 CPC for setting aside the decree/order dated 12th April, 2006. However, the learned ADJ was pleased to dismiss both these applications filed by the Appellants vide its judgment and order dated 2nd June, 2006. Consequently, the present appeal has been filed before us challenging the abovementioned orders and decrees.

5. Before we proceed further, it would be proper to reproduce, as under, the relevant portions of Order XXXVII CPC :-

“[2. Institution of summary suits.....

(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.....

(4) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons for judgment in Form No. 4A in Appendix B for 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 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.....

(7) The Court or Judge may, for sufficient cause shown by the defendant, execute 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 for 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."

6. Learned Counsel for the Appellants contended that as the Appellant No. 1 was a partnership firm being run by two brothers, the Appellant Nos. 2 & 3, the Appellant Nos. 1 & 2 were under the impression that appearance filed by Appellant No. 3 would be treated as appearance on behalf of all the Appellants/Defendants. Though it was not urged before us but in the trial court the Appellant Nos. 1 & 2 had also taken the plea in their application for setting aside the ex-parte decree that they had not received a copy of the plaint along with the summons. However, the trial court on perusal of the record had found that the Appellants had been served with a copy of a plaint along with summons.

7. Admittedly, the appearance entered by the Appellant/Defendant No. 3 was on his own behalf alone and in law appearance by one defendant cannot be treated as appearance on behalf of other defendants. In fact, order XXXVII Rule 2 sub rule 3

makes it absolutely clear that a defendant shall not be allowed to defend the suit unless he first enters appearance. The said sub rule mandatorily provides that in default of entering appearance, the allegation in the plaint shall be deemed to be admitted and the Plaintiff shall be entitled to a decree for any sum along with interest and cost as may be determined by the Court. Consequently, in our opinion on the Defendant's default in entering appearance, the court had no other option but to pass a decree against the non-appearing defendant – as the trial court did in the present case.

8. Learned Counsel for the Appellants further contended that Appellant No. 3 did not file his leave to defend within the period of ten days as firstly, he was unaware of the contents of the plaint and secondly, there was a strike in Tis Hazari Courts upto 20th April, 2006.

9. Admittedly, the Appellant No. 3 had received summons for judgment on 17th March, 2006. The trial court has also given a finding that the Appellant No. 3 had been served twice with a copy of the plaint, once by way of ordinary summons and secondly along with summons for judgment. In our opinion, even if the lawyers abstained from judicial work in the District Court it does not mean that the said defendant would be absolved from filing its leave to defend application within the stipulated period of ten days. We are also of the view that as the Appellant No. 3 had entered appearance initially within the period of ten days, he was well aware or ought to have been aware of the strict time frame

prescribed by the legislature for filing his leave to defend application. In view of the mandatory consequence provided in Order XXXVII Rule 4 sub Rule 6 we are of the opinion that the trial court had no other option but to pass a decree against Appellant No. 3.

10. During the course of hearing we had asked the learned Counsel for the Appellants as to what was the defence of the Appellants on merits of the case. Learned Counsel firstly referred to some overwriting in the bills and secondly he stated that despite payment of Rs. 2,00,000/- having been made by the Appellants, the same had not been taken into account by the Respondent/Plaintiff.

11. We have perused copies of the bills and in our view, the overwritings are not of such a magnitude that would throw any doubt on the authenticity of the transaction executed between the Plaintiff and the Defendants.

12. Also, learned Counsel for the Respondent satisfied us that the payment of Rs. 2,00,000/- made by the Appellants were against some other transaction, for which goods had been supplied by the Respondent/Plaintiff to the Appellants' sister company.

13. Though we have reached the conclusion that the orders passed by the trial court are perfectly legal and justified, we are of the view that keeping in view the prevalent rate of interest, the

Appellants be ordered to pay the principal sum of Rs. 7,01,017.50 along with 6% simple interest from 20th July, 2002. To this extent, the decree passed by the trial Court is modified. With these observations the present appeal is disposed of.

MANMOHAN, J

MUKUL MUDGAL, J

December 17th, 2008
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