

IN THE HIGH COURT OF DELHI

CR No.721/2002

Sangeeta Jewels Pvt. Ltd. & Ors. Petitioners
! through: Mr.Sudhir Kumar Makkar, Adv.

VERSUS

\$ Mr. Ajay Kumar Jain Respondent
^ through: Mr.Tarique Siddiqui, Adv.

RESERVED ON: 05.02.2008

% DATE OF DECISION: 08.02.2008

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

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

: **PRADEEP NANDRAJOG, J.**

1. This petition is directed against the order dated 14.2.2002 passed by the learned Additional District Judge, Delhi thereby dismissing an application under Order XXXVII Rule 4 CPC filed by the petitioners/defendants praying for the setting aside of the ex-parte judgment and decree dated 10.02.1999 passed in favour of the respondent/plaintiff in a suit filed by him under Order XXXVII CPC.

2. Facts necessary to dispose of the present petition are that on 22.10.97 respondent filed a suit under Order XXXVII CPC

against the petitioners for recovery of Rs.1,72,000/-. Suit was based upon three cheques dated 21.10.94 issued under the signatures of petitioner no.2 as director of petitioner No.1 in favour of the respondent.

3. Backdrop to the cheques aforesaid, as pleaded in the plaint, was that petitioner no.1 Sangeeta Jewels Pvt. Ltd. was a company incorporated under the Indian Companies Act and petitioner no.2 Mr.Vipin Sehgal and petitioner no.3 Ms.Sangeeta Sehgal were its directors. That the plaintiff Mr.Ajay Kumar Jain agreed to advance a friendly loan in sum of Rs.80,000/- to the petitioners. That the petitioners agreed to pay interest @ 24% p.a. and to refund the entire amount within a period of one year. That in lieu of same, petitioner no.2 acting on behalf of petitioner no.1 company issued the aforesaid three cheques. That when said the cheques were presented for encashment same were returned unpaid for want of funds.

4. It is relevant to note that there were no averments in the plaint filed by the respondent vis-a-vis petitioner no.3 save and except that she is the director of petitioner no.1 company.

5. On being served with summons in the suit, on 8.12.97, petitioners entered appearance. In the memo of appearance filed by the petitioners address furnished by them for the purposes of service of summons for judgment was 'D-10, Green Park, New Delhi'.

6. Since there was delay in entering appearance petitioners filed an application under Order XXXVII Rule 3(7) CPC for condonation of delay which application was allowed by the learned trial court vide order dated 5.6.98. On said date learned trial court directed the respondent to apply for summons for judgment and adjourned the matter to 14.9.98.

7. On next date i.e. 14.9.98 respondent filed an application under Order XXXVII Rule 3(4) CPC seeking fresh summons for judgment. The petitioners were directed to be served and matter was adjourned to 30.01.98.

8. On 30.01.98 it was found that the summons for judgment were returned unserved thus trial court directed that the petitioners be served by way of affixation and matter was adjourned to 10.02.99.

9. Petitioners were served by way of affixation at D-10, Green Park, New Delhi.

10. Order dated 10.02.99 shows that the counsel for the petitioners appeared before the learned trial court and prayed for an adjournment, which was declined.

11. Noting that the aforesaid three cheques were issued by petitioner no.2 on behalf of petitioner no.1 company and that no application for leave to defend has been filed by the petitioners, vide judgment and decree dated 10.02.99 learned trial court decreed the suit against petitioners nos.1 and 2. Vis-a-vis petitioner

no.3 suit was dismissed on the ground that the no liability could be fastened upon her based on the three cheques merely because she was a director of petitioner No.1.

12. Petitioners filed an application under Order XXXVII Rule 4 CPC seeking to set aside the ex-parte decree.

13. Averments made in the said application were that at the time when petitioners entered appearance, petitioner no.2 was working as a manager in the company M/s Crystal Gold Pvt Ltd which was carrying its business from the premises D-10, Green Park, New Delhi and that is why petitioners furnished said address for the purposes of service of summons for judgment. That soon thereafter petitioner no.2 resigned from the said company but was assured by his colleagues/associates in the said company that he would be duly informed about the receipt of summons for judgment at the said address. That colleagues/associates of petitioner no.2 did not inform him about the receipt of summons for judgment. That thus summons for judgment were not duly served upon the petitioners. Since they had no knowledge about the summons for judgment petitioners failed to apply for leave to defend within the stipulated time.

14. Vide order dated 14.02.02 learned trial court dismissed the application under Order XXXVII Rule 4 CPC filed by the petitioners.

15. In such circumstances petitioners have filed the present revision petition.

16. At the outset I may note that there was no occasion for petitioner no.3 to file the present petition for the reason learned trial court had dismissed the suit against her.

17. Once an ex-parte decree is passed in a suit filed under Order 37 it can be got set aside by showing the reasons that prevented the party from entering appearance as well as by demonstrating that there exists a triable issue. Rule 4 of Order 37 not only requires the Court to satisfy itself as to the existence of 'special circumstances' but also about the basis, for the defendant to defend himself, which in the normal parlance is referred to as "triable issue". The compliance with the twin requirements, under Rule 4 of Order 37, was pointed out by the Supreme Court in the decision reported as AIR 2003 SC 1322 Rajni Kumar v Suresh Kumar Malhotra & Anr. After referring to relevant provisions Supreme Court held as under:

"It is important to note here that the power under Rule 4 of Order 37 is not confined to setting aside the ex parte decree, it extends to staying or setting aside the execution and giving leave to appear to the summons and to defend the suit. We may point out that as the very purpose of Order 37 is to ensure an expeditious hearing and disposal of the suit filed thereunder, Rule 4 empowers the Court to grant leave to the defendant to appear to summons and defend the suit if the Court considers it reasonable so to do, on such terms as the Court thinks fit in addition to setting aside the decree".

Where on an application, more than one among the specified reliefs may be granted by the Court, all such

reliefs must be claimed in one application. It is not permissible to claim such reliefs in successive petitions as it would be contrary to the letter and spirit of the provision. That is why where an application under Rule 4 of Order 37 is filed to set aside a decree either because the defendant did not appear in response to summons and limitation expired, or having appeared, did not apply for leave to defend the suit in the prescribed period, the Court is empowered to grant leave to the defendant to appear to the summons and to defend the suit in the same application. It is, therefore, not enough for the defendant to show special circumstances which prevented him from appearing or applying for leave to defend, he has also to show by affidavit or otherwise, facts which would entitle him leave to defend the suit."

18. From the afore-noted dictum laid down by Supreme Court it is clear that in an application filed under Rule 4 of Order 37 the defendant must not only plead the existence of "special circumstances" that prevented him from entering appearance or filing leave to defend within a stipulated time but also the ingredients of triable issue. The defendant is not required to place the entire material in his support before the Court. A particular plea in this regard is sufficient and it is during the course of examination of the application that the necessary particulars be supplemented.

19. In the application filed under Order XXXVII Rule 4 CPC petitioners have pleaded the reasons which prevented them from filing leave to defend within stipulated time. But the pleas as to existence of triable issue are missing.

20. Prima facie the reasons given by the petitioners which prevented them from filing leave to defend within the stipulated time are not convincing.

21. Petitioners had themselves furnished the address where summons for judgment were to be sent. Petitioners were fully conscious of the pendency of the proceedings in the trial court. From the order dated 5.6.98 of the trial court it can safely be presumed that the petitioners were aware of the fact that on 14.9.98 respondent would apply for summons for judgment. Petitioners should have remained vigilant and kept track of the proceedings more so, when they claim that they were no longer available at the address furnished by them for the purposes of service of summons for judgment. Besides, the duty of the plaintiff is to serve summons for judgment at the address given by the defendants.

22. In fact the very version set up by the petitioners they had no knowledge about the summons for judgment is doubtful in light of the fact that their counsel appeared before the trial court on 10.02.99. If petitioners were in dark about the summons for judgment then how come their counsel suddenly appeared before the trial court on the date when the trial court was most likely to pass a decree in favour of the respondent remains a mystery?

23. In view of the law laid down by the Supreme Court in Rajni Kumar's case (supra), absence of plea pertaining to triable issue in the application under Order XXXVII Rule 4 CPC filed by the petitioners and the fact that reasons given in the application which prevented the petitioners from filing leave to defend within the

stipulated time, the learned trial court has rightly dismissed the application under Order XXXVII Rule 4 CPC.

24. But the cause of justice is supreme in every litigation and parties are not to suffer due to lack of legal knowledge and negligence of counsel. Regretfully, in the instant case, there is complete lack of duty of care as expected from a counsel. As noted above, notwithstanding no leave to defend being filed by petitioner no.3 learned Trial Judge did not decree suit against her. Qua her suit was dismissed. Yet inspite thereof she was made to join as an applicant in the application under Order XXXVII Rule 4 CPC and she has been impleaded as a co-petition in the instant petition.

25. Learned counsel for the petitioners has not even bothered to aver in the application under Order XXXVII Rule 4 CPC and in the instant petition that petitioner no.2 stood at par with petitioner no.3 and that mere fact of his having signed cheque on behalf of company could not have made him personally liable.

26. The only averments in the plaint by the respondent vis-a-vis petitioner no.2 are that he was the director of petitioner no.1 company and that while acting on the behalf of the petitioner no.1 company he issued the said three cheques in favour of the respondent.

27. A perusal of the record of the trial court shows that the said three cheques were issued from the account of the petitioner no.1 company.

28. The directors of the company cannot be fastened with the ordinary contractual liability of the company.

29. In the decision reported as 72 (1998) DLT 666 Space Enterprises v M/s Srivivasa Enterprises Ltd this Court while decreeing the suit against the defendant No. 1 company, rejected the plaint qua defendant No. 2 (director of the company) on the ground that there was no contract between the plaintiff and defendant No. 2 and, therefore, no cause of action arose against defendant No. 2. It was observed that the company is distinct from its directors and shareholders. Neither the shareholders nor directors can treat the company's assets as their own. Directors of a company are liable for misappropriation of company's funds and other misfeasance, but not for ordinary contractual liability of the company. The doctrine of lifting of the corporate veil, though could be applied in cases of tax evasion or circumventing of tax obligation, or to cases of perpetuating fraud or trading with the enemy, in the absence of such case, it would be totally improper and inappropriate to hold that the director has lost the privilege of limited liability, and has become directly liable to the creditor of the company.

30. In the decision reported as 117 (2005) DLT 655 Steel Authority of India Ltd v Century Tubes Ltd & Ors while granting unconditional leave to defend the suit under Order XXXVII Rule 3(5) of the Code of Civil Procedure to defendant No. 3 a learned Single

Judge of this Court after noticing that defendants No. 2 & 3, Managing Director and Director respectively of defendant No. 1, had held negotiations for and on behalf of defendant No. 1 and issued 22 post-dated cheques totalling to Rs. 2,7,95,253/- held that merely because defendant No. 3 was a director of defendant No. 1 would not make him liable for any amount due from defendant No. 1 to the plaintiff, more so, as the defendant No. 3 had not stood as a guarantor. It was further held that even the allegation that defendant No. 3 had signed some of the cheques drawn on the account of defendant No. 1 would not make him liable for any civil action for recovery of amounts due from defendant No. 1 to the plaintiff.

31. In view of the aforesaid discussion, the inevitable result is that no liability can be fastened upon petitioner no. 2 who as is abundantly clear from the record of the trial court had issued said cheques for and on behalf of petitioner no.1 company.

32. In view of the fact that the plaint contains no averment that petitioner no.2 had given any personal guarantee, no liability can be fastened on petitioner no.2 as director of petitioner no.1 company.

33. End result is that the impugned order is affirmed in so far it dismisses the application under Order XXXVII Rule 4 CPC vis-a-vis petitioner no.1 company.

34. The impugned order is set aside vis-a-vis petitioner no.2.

Application under Order XXXVII Rule 4 CPC filed by the petitioner no.2 is allowed. No useful purpose would be served in requiring a trial vis-a-vis petitioner no.2 for the reason as noted above the suit can never succeed against him. Thus judgment and decree dated 10.02.99 passed against petitioner no.2 is set aside.

35. Since petition is dismissed vis-a-vis petitioner no.1 company and judgment and decree dated 10.02.99 is upheld respondent would be entitled to receive Rs.1,00,000/- deposited in this court pursuant to the order dated 06.08.02.

36. No costs.

February 8, 2008
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(PRADEEP NANDRAJOG)
JUDGE