

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

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RSA NO. 13/2010

Date of Decision: April 07, 2010

UMESH AHUJA

..... Appellant

Through: Mr.J.M.Bari, Advocate.

versus

CHARANJIT LAMBA

..... Respondents

Through: None.

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CORAM:

HON'BLE MS. JUSTICE ARUNA SURESH

- (1) Whether reporters of local paper may be allowed to see the judgment?
- (2) To be referred to the reporter or not?
- (3) Whether the judgment should be reported in the Digest ?

J U D G M E N T

ARUNA SURESH, J. (Oral)

1. Respondent herein filed a suit for recovery of Rs.2,50,000/- along with *pendent lite* and future interest at the rate of 18% per annum against the appellant herein under provisions of Order 37 of the Code of Civil Procedure (CPC) on the basis of a cheque bearing No.366736 dated 13th November, 2007 for

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Rs.2,50,000/- issued by the appellant for consideration of a friendly loan of the said amount in the month of December, 2005. Trial Court dismissed the application for leave to defend filed by the appellant and decreed the suit for Rs.2,50,000/- along with *pendent lite* and future interest at the rate of 9% per annum from the date of filing of the suit till realization. Appeal filed against the said judgment and decree of the Trial Court met the same fate. Hence, this appeal.

2. Learned counsel for the appellant has submitted that summons for judgment in the prescribed proforma, as required under Rule 3 (4) CPC were never served upon the appellant and therefore, Trial Court could not have decreed the suit of the respondent. He has asserted that under these circumstances, a substantial question of law needs formulation and adjudication.

3. There is no dispute that summons for appearance were received by the appellant, in pursuance whereof he filed his appearance in Court on 29th January, 2008. Thereafter respondent moved an application under Order 37 Rule 3(4) CPC seeking orders for service of summons for judgment upon the appellant. Vide order dated 31st May, 2008, Court issued summons for judgment under Order 37 upon respondent's filing process fee and registered cover

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by ordinary way and the next date of hearing was fixed as 8th October, 2008. It seems that instead of sending summons for judgment in the prescribed proforma i.e. Form No:4A in Appendix B, *Ahalmad* of the Court issued summons on the proforma No. 4 prescribed under Rule 2. Summons, so issued did contain claim of the respondent. Process was also issued through registered AD cover.

4. Thereafter on receipt of process, appellant filed an application under Rule 3 Sub-Rule 5 CPC along with his affidavit stating grounds for leave to defend the suit. In this application, though appellant did state that he received summons in a summary suit which ought to have been summons for judgment. However, appellant did not raise any controversy in this regard and accepted the said summons as summons for judgment and filed his application for leave to defend. Relevant portion of the application reads as under:-

“ The defendant above named most respectfully submits that the defendant was served on 26.7.2008 through registered post and on 30.7.2008 by process server with a SUMMONS IN A SUMMARY SUIT dated 23.7.2008, which ought to have been the summons for judgment inspect of the present case. Without entering into any controversy in this regard, the defendant is taking the said

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summons as the summons for judgment and accordingly the defendant, therefore, is applying for leave to defend the present suit on the facts, ground and reasons as mentioned in the accompanying affidavit and prays that leave to defend may be granted to him unconditionally in the present suit.....”

5. Thus, it is clear that appellant accepted the summons sent under Order 37 (2) CPC as summons for judgment served upon him in compliance of provisions contained in Order 37 Rule 3 (4). After accepting summons for appearance as summons for judgment, appellant cannot be allowed to raise this objection in the second appeal being technical in nature. True that, court below ought to have served him with summons for judgment, but then appellant was at liberty not to accept summons for appearance as summons for judgment and file his affidavit stating the grounds of his defence with a prayer for grant of unconditional leave to defend. It was under these circumstances that Trial Court proceeded with application for leave to defend and after hearing the parties at length dismissed it and decreed the suit of the respondent.

6. Appellant has referred to '*Wada Arun Asbestos (P.) Ltd. Vs. Gujarat Water Supply & Sewerage Board*', AIR 2009 SC 1027 to emphasize that while decreeing the suit of the respondent, procedure envisaged in Order 37 CPC was not followed by the Trial

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Court. In the said case, a suit under Order 37 CPC was filed, in which conditional leave was granted to the defendant. Since defendant failed to deposit the conditional amount, Court passed a decree as prayed. Order of the Trial Court granting conditional leave was not challenged but at the appellate stage, defendant urged that he should have been granted unconditional leave to defend. It was under these circumstances that Court observed that defendant could raise a contention against order of the Trial Court granting conditional leave to defend, as an order imposing a conditional leave to defend the suit was a jurisdictional question and thus a revision petition would be maintainable. However, if a right or appeal from the decree is conceded to a defendant, he cannot be denied a right to challenge an order which could be the subject matter of the revision in his memorandum of appeal filed from the decree ultimately passed. This judgment is of no assistance to the appellant to urge that a substantial question of law is required to be formulated or needs adjudication.

7. Other contentions of counsel for the appellant are that the cheque issued by the appellant was undated in which respondent had filled the date of 13th January, 2007 and appellant had paid the loan amount in installments on different dates by end of June, 2006

and that Trial Court as well as the First Appellate Court did not adopt correct approach in dismissing application of the appellant for leave to defend while holding that there was nothing on record to suggest that appellant had repaid the loan.

8. It is a common case of the parties that appellant had taken a friendly loan of Rs.2,50,000/- and against the said loan, he had issued the impugned cheque in favour of the respondent. Trial Court as well as the First Appellate Court, while appreciating pleadings of the parties and documents available on record were of the opinion that, if appellant had repaid the entire loan amount by June, 2006, how could the impugned cheque remain with respondent as in the normal course, appellant would have demanded the said cheque or would have secured its return.

9. The Trial Court observed:-

“.....I am of the opinion that the defence set up by the defendant in the present application is practically moon shine and sham without any substance. As such, the application filed by the defendant is hereby dismissed. The suit of the plaintiff is decreed under Order 37 CPC for the principal amount of Rs.2,50,000/- alongwith pendente-lite and future interest @ 9% from the date of filing of the present suit till the realization. Costs of the suit are also awarded in favour of the plaintiff.”

10. Findings of the Trial Court were accepted by the

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Appellate Court. In the second appeal, this Court has no power to interfere in the fact finding of the courts below.

11. In view of these facts, no substantial question of law needs any formulation as appellant by his own conduct waived the procedural irregularity and agreed to proceed with his application seeking leave to defend the suit.

12. Hence, I find no merits in this appeal and the same is accordingly dismissed.



ARUNA SURESH, J.

APRIL 07, 2010
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