

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

% *Date of Judgment: 26.8.2011*

+ **CM(M) No.2598/2005**

MR.ANIL HADA Petitioner
Through: Mr.Muneesh Malhotra,
Advocate.

Versus

MR.PRAVIN KUMAR AGARWAL & ORS.
..... Respondents
Through: Mr.Vivek Singh and Mr.Dhruv
Gupta, Advocates.

CORAM:
HON'BLE MS. JUSTICE INDERMEET KAUR

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

INDERMEET KAUR, J. (Oral)

1. The order impugned is the order dated 07.9.2005 vide which two applications filed by the defendant; one under Order 6 Rule 17 of the Code of Civil Procedure (hereinafter referred to as "the Code) and the second application under Order 9 Rule 13 of the CM(M) No.2598/2005

Code had been dismissed.

2. Record shows that the present suit had been filed by the plaintiff under Order XXXVII of the Code of the Code. This suit was based on a written document which was an acknowledgement purported to have been executed on 09.8.1997 by the defendant in his favour. After the service of the defendant memo of appearance had been put in by the defendant; defendant had entered his appearance within the stipulated period. The suit was originally filed in the High Court; after the enhancement of the pecuniary jurisdiction of the Civil Courts the matter had been transferred from the High Court to the District Court; this was vide order dated 10.9.2003. On 17.12.2003 the application filed by the plaintiff seeking substituted service on the defendant in view of his submission that the summons for judgment could not be served upon the defendant had been allowed. The summons for judgment were directed to be served upon the defendant by publication in the 'Indian Express' as also by affixation at his last known address which was returnable for 19.01.2004. On 19.01.2004 it had been recorded that the summons for judgment had been served by way of publication in the 'Indian Express' on 09.1.2004 as also by affixation on 15.01.2004. This factual

position is not in dispute. On 30.01.2004 the court had noted that since the prescribed period for filing an application for leave to defend had expired and no leave to defend having been filed, the plaintiff has become entitled to a decree; the matter had however been adjourned to 04.2.2004 on which date the arguments were heard and the matter was reserved for judgment. On 09.2.2004 the suit of the plaintiff was decreed.

3. The first grievance of the plaintiff/defendant is that summons for judgment had been served upon him by affixation on 15.01.2004; next date fixed before the court was 19.01.2004; clear 10 days period for filing application for leave to defend was thus not available to the defendant. Counsel for the petitioner has placed reliance upon a judgment of this Court reported in 114(2004) DLT 264 Hans Raj Vs. Lakhi Ram. Submission being that service has to be effected in terms of the procedure as contained in Order XXXVII Rule 4 of the Code which has not been followed. This submission of the petitioner is wholly incorrect. After service of summons for judgment on the defendant on 15.01.2004 the prescribed ten days time within which defendant was required to file his application for leave to defend elapsed by 26.01.2004; on the next date fixed i.e. 19.01.2004 no order was

passed against the defendant. It was only on 30.01.2004 that Court had noted that since the prescribed period for filing an application for leave to defend had expired, the plaintiff is entitled to a decree. This was after the clear 10 days period to be counted from 15.01.2004. Record also shows that the defendant has been served by publication which had been effected in the 'Indian Express'. This publication shows that it is as per the Form Appendix 4A under Order XXXVII. Summons for judgment had been published in the prescribed form. The impugned order does not suffer from any infirmity on this count. The judgment of Hans Raj (supra) thus does not come to his aid.

4. The second contention of the learned counsel for the petitioner is that "sufficient cause" had been shown by him in his application under Order IX Rule 13 of the Code which application had been filed by him under a misunderstanding of the statutory provision; application actually had to be filed under Order XXXVII Rule 4 of the code but due to an inadvertent mistake it was filed under the wrong provision of law. Contention is that "sufficient cause" as appearing in Order IX Rule 13 of the Code is analogous and of the same nature as that of "special circumstance" as contained in Order XXXVII Rule 4 of the Code; these "special

circumstance” had well been explained by the petitioner. For this proposition reliance has been placed upon a judgment of the Apex Court reported in AIR 1977 SC 577 M/s Mechalec Engineers & Manufacturers Vs. M/s Basic Equipment Corporation. Attention has also been drawn to the application filed by the petitioner/defendant under Order IX Rule 13 of the Code. In this application it has been contended that there were inter se litigation pending between the parties; defendant/petitioner had filed two suits against the plaintiff in the year 2001 and both the said suits were pending; in fact the next date fixed in both the two cases was 10.3.2004. It is pointed out that Shri Anil Gera, Advocate who was the counsel for the plaintiff in the present case was also the counsel for the defendant in those two cases; it is submitted that on 04.2.2004 a submission had been made before the Courts of Sh.Vinay Singhal, Civil Judge (where those two cases were pending) to defer the case as the matters were likely to be settled between the parties. Contention is that the plaintiff all along knew the address and whereabouts of the defendant and was pressing his application under Order V Rule 20 of the Code seeking substituted service which in these circumstances was unwarranted; it was a concealment of material facts. Even on

merits a substantial defence has been made out by the defendant; the whole case of the plaintiff is admittedly based upon an acknowledgment which has been held to be a “written contract within the meaning of XXXVII of the Code. It is pointed out that this acknowledgment dated 09.8.1997 could not have been made the basis of a suit under Order XXXVII of the Code. For all the aforementioned reasons the impugned order is liable to be set aside.

5. These arguments have been rebutted by the learned counsel for the respondent. Reliance has been placed upon (2003) 5 SCC 315 Rajni Kumar Vs. Suresh Kumar Malhotra & Anr. to support his submission that “special circumstances” as appearing under Order XXXVII Rule 4 of the Code are different in connotation from “sufficient cause” as appearing under Order IX Rule 13 of the Code; not only has the defendant to show sufficient ground for not appearing or filing his application for leave to defend in time; he must also in addition show that all these facts which could hold him entitled to defend the suit.

6. Record shows that in the application under Order IX Rule 13 of the Code filed by the defendant, there is no dispute to the document dated 09.8.1997; it is not the case of the defendant that he had not executed the aforementioned acknowledgment; his

contention is that an acknowledgement is not a “written contract” within the meaning of Order XXXVII of the Code. A Bench of this Court in a judgment reported in 67 (1997) DLT 13 Daya Chand Uttam Prakash Jain Vs. Santosh Devi Sharma had held that a written acknowledgment falls within the term “written contract” in terms of Order XXXVII of the Code; it has all the essentials for the formation of the “written contract”. This contention is thus negatived.

7. Learned counsel for the petitioner has further vehemently submitted that in terms of his averments in para 19 and 11 of the application (under Order IX Rule 13 of the Code) a triable defence has been set up; the said averment has been perused. Contention of the defendant is that in the suit proceedings interse between the defendant and Prasoon Aggarwal (brother of the plaintiff), Prasoon Aggarwal had admitted in his written statement that he along with his brother and sister-in-law has to take substantial amount from the defendant and he had adjusted this amount against those alleged amounts. Admittedly in these proceedings the plaintiff was not a party; the averment made in the application makes a reference to Prasoon Aggarwal, brother of the plaintiff. In para 11 of the application contention is that the

acknowledgment dated 09.8.1997 could not be a “written contract” in terms of Order XXXVII of the Code; as noted supra in view of the judgment of Daya Chand (supra) this submission is negated. It is thus clear that the defendant had failed to raise any triable issue entitling him for a leave to defend. The judgment of Mechalec Engineers (supra) lays down the undisputed proposition that if the defendant discloses on affidavit such a state of facts which leads to the inference that a trial is required, leave to defend should be granted. This judgment thus does not help the petitioner.

8. The Apex Court in the judgment of Ranji Kumar (supra) had noted herein as under:

“In considering an application to set aside ex parte decree, it is necessary to bear in mind the distinction between suits instituted in the ordinary manner and suits filed under Order 37 C.P.C. Normally the court will not refuse leave unless the court is satisfied that facts disclosed by the defendant do not indicate substantial defence or that defence intended to be put up is frivolous or vexatious. Where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, no leave to defend the suit can be granted unless the admitted amount is deposited by him in Court. Inasmuch as Order 37 does not speak of the procedure when leave to defend the suit is granted, the procedure applicable to suits instituted in the ordinary manner, will apply.

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. 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 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 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. In this respect, Rule 4 of Order 37 is different from Rule 13 of Order 9.

Though appellant has shown sufficient cause for his absence on the date of passing ex parte decree, he failed to disclose facts which would entitle him to defend the case. The respondent was right in his submission that in the application under Rule 4 of Order 37, the appellant did not say a word about any amount being in deposit with the respondent or that the suit was not maintainable under Order 37. From a perusal of the order

under challenge, it appears that the High Court, was right in accepting existing of special circumstances justifying his not seeking leave of the court to defend, but in declining to grant relief since he had mentioned no circumstances justifying any defence. Therefore, there is no illegality much less jurisdictional error in the order under challenge to warrant interference of the Supreme Court.”

9. The present application is an application under Order IX Rule 13 of the Code; the submission of the petitioner as is evident from the record of the case is that this application be treated as an application under Order XXXVII Rule 4; this has been noted in the order of this Court dated 11.02.2009. In fact arguments have been addressed on the “special circumstance” which appears in Order XXXVII Rule 4 of the Code. Even presuming that the application under Order IX Rule 13 of the Code was actually an application under Order XXXVII Rule 4 of the Code, the petitioner had to discharge a double burden; firstly that the defendant is required to show “special circumstances” which prevented him from applying leave for to defend in time; secondly he must shows all those facts which would entitle him to defend the suit. As noted supra and in view of the discussion afore it is clear that none of said grounds has been made out. The defendant was served by affixation on 15.01.2004; for no cogent or plausible reason, the

defendant did not file his leave to defend in time; even on the merits no case is made out. No triable issue has been raised; in fact the defendant had admitted the acknowledgment dated 09.8.1997 which is the basis of the suit of the plaintiff; his contention all along been that an acknowledgment is not a “written contract” within the meaning of Order XXXVII Rule 4 which as noted supra and in view of the judgment of the Daya Chand (supra) is an incorrect proposition.

10. Petition is without any merit. Dismissed.

INDERMEET KAUR, J.

AUGUST 26, 2011
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