

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

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Date of decision: 14th MAY, 2013

+ CS(OS) 2462/2012

M/S R.T. PHARMA

..... Plaintiff

Through: Mr. S.C. Singhal, Adv.

versus

M/S T & G MEDICARE & OTHERS

..... Defendants

Through: Mr. Niraj Kumar Singh, Adv.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J

IA No.534/2013(U/O XXXVII Rule 4 CPC filed by the defendants)

1. Summons for appearance of this suit under Order 37 of the CPC, for recovery of principal sum of Rs.65,83,110/- from the defendants No. 1 to 4 jointly and severally together with interest at 24% per annum till the date of institution of the suit of Rs.15,79,946/- i.e. for a total sum of Rs.81,63,056/-, were issued to the defendants vide order dated 14th August, 2012. On the next date i.e. 24th September, 2012, the counsel for the plaintiff informed that notice of appearance had been served on him on 17th September, 2012. However no appearance was found on record. Accordingly, while directing the registry to report whether the appearance had been filed or not, at the same time summons for judgment were also ordered to be issued to the defendants at the address provided by the defendants in the appearance

served on the counsel for the plaintiff. The next order dated 30th November, 2012 records that though summons for judgment stood served at the address provided by the defendants for service in their appearance filed on 14th September, 2012 but no application for leave to defend had been filed inspite of the period prescribed for filing leave to defend having expired. None on behalf of the defendants appeared before the Joint Registrar on 30th November, 2012. Accordingly, the Joint Registrar directed the suit to be listed before the Bench of this Court on 4th January, 2013.

2. On 4th January, 2013 also none appeared on behalf of the defendants. However finding that the dishonoured cheques were for the sum of Rs.57,75,525/- only and the claim for the balance (out of the total principal amount of Rs. 65,83,110/-) was not maintainable u/O 37 CPC, the counsel for the plaintiff was informed that the suit for the entire amount of Rs.65,83,110/- could not be treated as under Order 37 of the CPC. The counsel for the plaintiff then confined the relief to recovery of Rs.57,75,525/-, being the amount of dishonoured cheques and interest thereon only and accordingly the decree in favour of the plaintiff and jointly and severally against the defendants No. 1 to 4 was passed for recovery of Rs.57,75,525/- with interest @ 10% per annum for the period prior to the institution of the suit, pendente lite and future.

3. This application under Order 37 Rule 4 CPC has been filed on 8th January, 2013 pleading:

- i). that the application on which summons for judgment were ordered to be issued was not in the prescribed form and was not supported with the requisite affidavit;
- ii. though the counsel for the defendants noticed the listing of the suit on 4th January, 2013 but since he had to go to Bombay to appear in another case, he asked his associate advocate to keep track of the matter;
- iii. however even though summons for judgment had not been served on the defendants, the suit was decreed on 4th January, 2013;
- iv. that the counsel upon returning from Mumbai inspected the file on 7th January, 2013 and learnt that summons for judgment were indeed received by his peon in the office of the advocate for the defendants and which peon did not inform of the same to the counsel for the defendants and merely tagged the summons to the file of the case; thus the factum of service of the summons of judgment was not in the knowledge of the counsel for the defendants and owing where to the counsel could not take any step for filing of the application for leave to defend;
- v. that the non filing of the application for leave to defend is in the aforesaid facts/circumstances;
- vi. that the defendants had diligently entered appearance within two days of service of the summons for appearance and the failure to

apply for leave to defend within the prescribed period of time is bona fide and unintentional;

- vii. that the summons for judgment were not supported by an affidavit having contents of the nature as has been stipulated in Order 37 Rule 3 (4) CPC;
- viii. that the suit and the decree, besides against the defendant No.1 firm, is also against its three partners impleaded as defendants 2 to 4, without disclosing in the body of the plaint as to how the defendants No. 2 to 4 are liable to pay the decretal amount; the defendants No. 2 to 4 having not executed any personal guarantee of indemnity in favour of the plaintiff, are not personally liable for the dues of the defendant No.1;
- ix. that the plaintiff in the plaint has concealed substantial amount having been received by the plaintiff prior to the institution of the suit;
- x. that the amount of Rs.21,22,025/- was defrayed by the defendants during the period from 20th May, 2011 to 12th July, 2011 to the plaintiff;
- xi. in view of having received payment of Rs.21,22,025, that too against the cheque as mentioned in para 10 of the plaint, prior to institution of the suit, the plaintiff has not only intentionally concealed the material facts from this Court but has also artificially enhanced the pecuniary value of the suit;

- xii. that the defendants thus have good or rather substantial defence to the suit;
- xiii. moreover the remaining payment could not be made by the defendants either on account of not having received the goods as per the specifications or having received substandard goods from the plaintiff;
- xiv. the application is filed within two days of knowledge of ex parte decree;
- xv. unless the decree is set aside and the delay in filing the application for leave to defend is allowed, the defendants cannot be permitted to file the said application.

4. The plaintiff has filed a reply to the aforesaid application pleading that the defendants No. 2 to 4 being the partners of the defendant No.1 firm are jointly and severally liable for the dues of the defendant No.1 and without even any pleading to the said effect as partners of a firm are liable for the debts of the firm; that the dishonoured cheques were in fact signed by the defendant No.2; that the payment of Rs.21,22,025/- was not against dishonoured cheques on which the suit under Order 37 is based; that the allegations of substandard goods from the plaintiff has been made for the first time; that the malafides of the defendants are evident from the fact that the defendant No.2 has signed the application in Hindi though has signed the dishonoured cheque in English; that though a notice demanding dues was served on the defendants prior to the institution of the suit but no reply

thereto was given and the case now set up in the application under Order 37 Rule 4 of the CPC is an afterthought.

5. The counsel for the defendants / applicants has argued that the summons for judgment were served on the clerk of the counsel for the defendants. On enquiry, as to what address was given for service of the summons for judgment in the appearance filed before the Court, the counsel for the defendants admits that the address given for service of summons for judgment was of the advocate for the defendants. It has next been inquired from the counsel for the defendants as to how the counsel whose address had been given could be expected to be available at the address during Court hours also and as to how the service could have been expected at the said address on the counsel personally. Faced therewith, the counsel admits that the summons at the said address could have been received by his peon only but states that the default of the peon of the advocate should be condoned.

6. Default in the present case is not only of the peon as claimed. The counsel for the defendants admits that the counsel was aware of the listing of the suit before this Bench on 4th January, 2013. The counsel even then gave preference to his Bombay matter and left, entrusting the present matter to his associate. The counsel for the defendants at least on coming to know of the listing of the matter on 4th January, 2013, ought to have seen the file in which the summons for judgment are stated to have been put and had the counsel so looked at the file, would have known in advance that the summons for judgment had been served. There was yet further default of

the associate of the advocate for the defendants to appear before this Court on 4th January, 2013.

7. I have wondered whether for such defaults of the defendants/their agents, the plaintiff who has earned a decree upon default by the defendants should be deprived of the fruits thereof. I am unable to find any justification therefor.

8. Not only so, an application under Order 37 Rule 4 of the CPC is different from an application under Order 9 Rule 7 or an application under Order 9 Rule 13 of the CPC. The counsel for the defendants also agrees and has himself relied on *Rajni Kumar Vs. Suresh Kumar Malhotra* AIR 2003 SC 1322 holding so and further holding that in an application under Order 37 Rule 4, the defendant has to show not only special circumstances which prevented him from appearing or applying for leave to defend but also the facts which would entitle him to leave to defend. The defendants in the entire application, save for taking the pleas of having prior to the institution of the suit made payment of Rs.21,22,025/-, and which was not disclosed in the plaint and that the goods supplied by the plaintiff were not as per specification or were substandard, have not disclosed any other defence whatsoever to the suit.

9. As far as the plea of the goods being not as per specifications or being substandard is concerned, it has not been stated that the goods were rejected or returned. In fact, the counsel for the defendants admits that the goods were not returned to the plaintiff. Though he argues that a debit note was raised but it is not so pleaded. No particulars of the goods which are alleged

to be substandard and/or not as per specification or the value thereof has been stated. Such general and vague pleas are but a moonshine and cannot qualify as substantial defence to the suit.

10. Similarly the plea of payment of Rs.21,22,025/- is also vague. There is no explanation as to against which of the dishonoured cheques, which payment was made and as to why the dishonoured cheques were not taken back if payments thereagainst had been made. It is not as if the entire payment of Rs.21,22,025/- is made by one cheque. The same is pleaded to be by as many as nine cheques, the values whereof do not tally with the values of the dishonoured cheques. Moreover, it is not the case of the defendants that the only transaction of sale /purchase between the parties were against which the dishonoured cheques was issued. Once that is not the plea and axiomatically there were other transactions also between the parties, a mere plea of payment cannot be said to be a substantial defence to a suit on the basis of dishonoured cheques, when no attempt also is made to justify the said payment against the dishonoured cheques.

11. I am therefore constrained to observe that the application neither disclose any special circumstance preventing the defendants from applying for leave to defend nor any substantial defence to the suit and is accordingly dismissed. However no costs.

RAJIV SAHAI ENDLAW, J

MAY 14, 2013

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(corrected and released on 24.07.2013)