

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

% Order delivered on: 17th November, 2014

+ **I.A. No.16795/2014 in CS(OS) 1277/2013**

KAMLESH KUMARI AND ANOTHER Plaintiffs
Through Mr.Ankit Jain, Adv.

versus

MATRAM Defendant
Through Mr.R.P.S.Bhatti, Adv.

**CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH**

MANMOHAN SINGH, J.

1. The plaintiffs filed the suit for recovery of Rs.24,15,000/- along with pendente lite and future interest @12% per annum under Order XXXVII CPC. The suit was listed before Court on 5th July, 2013. The summons were issued to enter appearance in the format prescribed under Order XXXVII CPC to the defendant for 21st November, 2013.
2. In the meanwhile, an application for summons for judgment was filed by the plaintiffs, being I.A. No.14372/2013. It was noticed by the Joint Registrar that there was no appearance on behalf of the defendant on record. On 21st November, 2013 when the matter was listed before the Joint Registrar, it was recorded that the application for summons for judgment was not pressed as there was no appearance on behalf of the defendant. The matter was placed before Court on 30th January, 2014.

3. On 30th January, 2014, the Court decreed the suit in favour of the plaintiffs and against the defendant in terms of prayer clause (i) and (ii) by passing the judgment on merit also. The decree was accordingly drawn by the Registry.

4. On 2nd September, 2014, the defendant's above mentioned application was listed before Court when the notice was issued to the plaintiffs through counsel for 18th September, 2014. In the application, the averment was made by the defendant that the defendant put in his appearance in the matter vide application under Order XXXVII Rule 3 (1) read with Section 151 CPC which was filed in the Registry. It is also stated in the application that the defendant came to know about the passing of the decree when the defendant received the notice of Execution Petition No.226/2014. The defendant thereafter made an inquiry from the Registry and came to know that the appearance filed by the defendant did not come to the notice of the Court. Therefore, the judgment was passed in the matter.

5. It is pertinent to mention here that the summons in the main suit were issued for 21st November, 2013. Learned counsel for the defendant does not deny that the summons were received and the defendant or his counsel did not appear before Court on 21st November, 2013 when the actual date was fixed while issuing the summons in the suit under Order XXXVII CPC. Even when the matter was postponed to 30th January, 2014, no one appeared on behalf of defendant before Court when the matter was taken up. The suit was decided on merit coupled with the fact that the defendant did

not appear nor filed any application to defend the suit. Thus, the decree was passed.

6. The application of the defendant is strongly opposed by the learned counsel for the plaintiffs mainly on the following grounds:

1. The suit was decided on merit.
2. Even as of today the defendant's appearance is not on record.
3. The application for leave to defend is not filed.
4. The defendant even did not appear before Court on 21st November, 2013 and 30th January, 2014 when the matter was listed despite of receipt of summons for the actual date.

7. It is argued by Mr.Jain, learned counsel appearing on behalf of the plaintiffs, that the present application does not fulfil the requirement of provision of Order XXXVII Rule 4 CPC as it is settled law that apart from disclosing the reasons for non-appearance, the defendant has to show his defence in the suit. His argument is that no defence in the suit is mentioned in the application under Order XXXVII Rule 4 CPC. Therefore, said application is liable to be dismissed.

8. Mr.Jain has also explained to the Court that firstly on the date of passing of the decree, the appearance, which is allegedly filed by the defendant in the Registry, is not available on record. Secondly, he states that summons for actual date was served upon the defendant and the defendant did not appear before Court on 21st November, 2013 and 30th January, 2014. It was the duty of the defendant to inform about filing of the appearance in the Registry.

Therefore, there is no infirmity in the decree passed by the Court which is also on merit. Learned counsel for the defendant at the time of argument also made another attempt to take the adjournment on the ground that he has moved some application in the Registry for seeking consideration of additional grounds in I.A. No.16795/2014. However, according to him the said application was filed on 31st October, 2014 in the Registry vide Diary No.206055. However, the said application is not listed and not placed on record.

9. It is settled law by the Supreme Court as well as by this Court that in order to set aside the decree under the provision of Order XXXVII Rule 4 CPC, 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. In failure of defendant to disclose such facts which would entitle him to leave to defend the case, the said application is not maintainable. (See **Rajni Kumar vs. Suresh Kumar Malhotra and Anr.**, AIR 2003 Supreme Court 1322)

10. Similar proposition is laid down by this Court in the judgment delivered by Justice Pradeep Nandrojog in the case of **K.N. Shukla vs. B.L.A. Chit Fund Ltd. & Ors.**, bearing C.R.P. No.472/2003, dated 14th January, 2008. It is also pertinent to mention here that the defendant at least had the knowledge about the present suit since 26th July, 2013. The said fact is not denied by the learned counsel for the defendant as according to him, the appearance was filed on that date. The present application has been filed on 12th July, 2014 which is almost after one year. There is no

application for condonation of delay. The grounds stated in the application blaming the earlier counsel for the defendant cannot be believed. It is merely an excuse by the defendant to file the present application by blaming the earlier counsel. It has not been brought to the notice of the Court that what action has been taken against the earlier counsel. Thus, I am not inclined to allow the present application which lacks merit. The defendant has not disclosed anything on merit of the defence in the application in order to show that the defendant is entitled to leave to defend. Secondly, the defendant was aware about the pendency of the present suit in the month of July, 2013 and the present application was filed in July, 2014. There is no application whatsoever for filing the application after about one year. The defendant has totally failed to show the circumstances which prevented him from appearing or applying for leave to defend in the present suit.

11. The application is accordingly dismissed.

(MANMOHAN SINGH)
JUDGE

NOVEMBER 17, 2014