

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

RFA No. 18/2022

Reserved On: 19th of December, 2023
Pronounced On: 30th of December, 2023.

1. Ghulam Mohammad Misgar

S/O Ghulam Rasool Misgar
R/O Dasil Kocha, Dangerpora,
Eidgah, near Safa Kadal, Srinagar.

2. Rukaya Jan Misgar

(Wrongly described as Rifat Jan in the Complaint)

W/O Zahoor Ahmad Shawl
R/O Gulberg Colony, Lane No.2.,
Near Masjid Ahlibayat (RA),
Elahi Bagh Road, Buchpora, Srinagar.

3. Suraya Jan Misgar

D/O Ghulam Mohammad Misgar
R/O Malarata, Nowhatta, Srinagar.

... Appellants

Through: -

Mr Tasaduq H. Khawja, Advocate with
Mr Naseer-ul-Akbar, Advocate.

V/S

Dr. Nazir Ahmad Dhar

S/O Late Haji Ali Mohammad Dhar
R/O Saboon Kocha, Zaina Kadal,
Srinagar.

... Respondent

Through: -

Mr Parvaiz Nazir, Advocate.

CORAM:

HON'BLE MR JUSTICE M. A. CHOWDHARY, JUDGE

(JUDGMENT)

01. Through the medium of this Regular First Appeal, the Appellants have challenged the Judgment and Decree dated 11th of April, 2022, passed by the Court of learned 4th Additional District Judge, Srinagar

(hereinafter referred to as ‘the Trial Court’ for short), in a Civil Suit No. 39/2019 titled ‘**Dr. Nazir Ahmad Dhar v. Rifat Jan Misger & Ors.**’

02. The impugned Judgment and Decree has been assailed by the Appellants/ Defendants, *inter alia*, on the grounds that the same is not in accordance with law and has been passed without following the requisite procedure as prescribed under Order XXXVII of the Code of Civil Procedure (CPC); that the impugned Judgment and Decree was passed in a Suit which was barred by law of limitation, for the reason that the promissory note (*Hundi*), relied upon by the Respondent, as Plaintiff, was alleged to have been executed way back in the year 2005, whereas, the Suit was filed in the year 2019, when as a matter of fact, such a Suit could only be filed within a period of six years from the date of execution of the promissory note (*Hundi*); that the promissory note (*Hundi*), on which the Suit was based, was not filed as an original document with the Plaintiff and the Respondent, as Plaintiff, had filed an application for placing on record the original *Hundi*, relied upon by him, much after issuing Summons for Judgment, and this application had been objected by the Appellants, as Defendants.

03. It was further asserted that the Trial Court rejected the application seeking leave to defend, without deciding the application for taking on record the document and passed the impugned Judgment and Decree, as such, the course adopted by the learned Trial Court was strange; that the Trial Court has not adverted to any of the grounds urged by the Appellants/ Defendants, while refusing leave to defend and the leave has been denied without assigning any reason by passing a non-speaking Order, liable to be set aside; that the Plaintiff/ Respondent herein had failed to apply for summons for Judgment and had not submitted any Affidavit, as required by Order XXXVII of the Code of Civil Procedure, as such, there was no occasion to order for summons for Judgment nor summons for Judgment had been issued in the prescribed format. In this backdrop, it is averred that the Trial Court has failed to notice all these infirmities in the

procedure and has passed the impugned Judgment and Decree, which is liable to be set aside.

04. Learned Counsel for the Appellants/ Defendants, while reiterating the assertions made in the memorandum of Appeal, has argued that the Civil Original Suit had been filed by the Respondent/ Plaintiff, in terms of Order XXXVII of the Code of Civil Procedure as a summary Suit on 25th of January, 2019 and a notice was issued to the Appellants/ Defendants herein, whereafter, the Defendants, in response to the notice, had entered appearance in the Court and had given their addresses/ particulars; that the Suit filed by the Plaintiff was deficient in Court fee and the Trial Court had asked the Plaintiff/ Respondent herein to deposit the deficient Court fee; that the summons for Judgment were issued to the Appellants/ Defendants without filing of Affidavit by the Respondent/ Plaintiff in support of his case, which was a statutory requirement in terms of Order XXXVII of the Code of Civil Procedure; that the Appellants/ Defendants, after causing their appearance before the Trial Court, had also filed Written Statement to the Suit and had taken many defences and denied the execution of the promissory note (*Hundi*) by them and that this note was a forged/ fake one; that this Written Statement filed by the Appellants/ Defendants was treated as an application to defend the Suit, on a motion by the Defendants.

05. It is further argued that the original promissory note had not been filed with the Plaint, but the Suit was decreed on the basis of a xerox copy thereof. He also argued that the Plaintiff/ Respondent had sought permission to place on record the original *Hundi* on 5th of March, 2020, to which the Objections had been sought by the learned Trial Court, however, the Court, without deciding the application for placing on record the original *Hundi* as also without deciding the application for leave to defend, disposed of the Suit. He has further argued that the Appellants/ Defendants had raised a statutory ground of limitation, inasmuch as, under Article 103 of the Limitation Act, such a Suit could only be brought within six years

from the date of execution of the promissory note, when, in the instant case, the *Hundi* in question was stated to have been executed on 29th of December, 2005, whereas, the Suit was filed on 25th of January, 2019, i.e., after a period of almost 13 years. He has further argued that the Trial Court had misdirected itself in granting the Suit, without granting leave to the Defendants, to which they were found entitled to, in view of the grounds raised in their application *qua* triable issues to be decided by the Court. Finally, it has been prayed that the impugned Judgment and Decree be set aside and the application for seeking leave to defend be allowed, with a direction to the Trial Court to treat the Suit of summary nature, filed under Order XXXVII of the Code of Civil Procedure, as a 'Regular Suit' for further proceedings.

06. Learned Counsel for the Respondent, *ex-adverso*, argued that the Written Statement, which was treated as leave to defend, had been filed by the Appellants/ Defendants on 26th of June, 2019, when the Suit was filed on 25th of January, 2019. He has also argued that the promissory note (*Hundi*) had been placed on record as an original document on 17th of March, 2020 and that the limitation, as projected by the learned Counsel for the opposite side, is not applicable to those instruments which have expression of "on demand" and, as such, the plea of limitation was not attracted at all in the instant case.

07. The learned Counsel has further argued that the Trial Court, by passing the impugned Judgment and Decree, had very lucidly decided the case, holding that the Appellants/ Defendants have not made out any case for grant of leave to defend the Suit and has, thus, rightly decided the case by passing the impugned Judgment and Decree, which does not call for any interference by this Court, while exercising the Appellate jurisdiction. He finally prayed that the impugned Judgment and Decree passed by the Court below be upheld and the Appeal be dismissed.

08. Heard learned Counsel for the parties, perused the record and considered the matter.

09. The Plaintiff/ Respondent herein had filed a Civil Original Suit of summary nature in terms of Order XXXVII of the Code of Civil Procedure for recovery of an amount of Rs.8.00 lacs, asserting therein that the Appellant/ Defendant No.3-Suraya Jan Misgar, who happens to be his second wife and the Appellant/ Defendant No.2-Ghulam Mohammad Misgar, who happens to be the father of the Appellants/ Defendant Nos. 1 & 3-Rukaya Jan Misgar (wrongly described as Rifat Jan Misgar in the Complaint) & Suraya Jan Misgar, and that on admonition of the Appellant/ Defendant No.3-Suraya Jan Misgar, the Respondent/ Plaintiff had paid an amount of Rs.8.00 lacs as loan to the Defendant No.1, as she was in dire need of the said amount for her marriage expenses, for which, besides the Defendant No.1, her father/ Defendant No.2 and the wife of the Plaintiff/ Defendant No.3, duly executed a *Hundi* in his favour, thereby rendering themselves also liable to pay the said amount; that his wife also executed an Affidavit/ undertaking/ indemnity bond as a collateral security in his favour, in order to ensure the disbursement/ realization of the said amount and that the Plaintiff had to arrange the said amount by availing loan facility from the Bank, so as to pay the same to the Defendant No.1 and had to liquidate the said amount to the Bank by paying a huge interest in this behalf.

10. It was further asserted by the Plaintiff that feeling immense need of the said amount, he demanded the same from the Defendant No.1, who was avoiding the payment under one pretext or the other, which constrained the Plaintiff to inform her husband about the transaction and requested him to prevail upon her to pay the said amount to the Plaintiff along with interest, but, to the dismay of the Plaintiff, the said intimation to the husband of the Defendant No.1 *qua* repayment of the said amount did not yield any fruits and the Defendant No.3 had gone to the extent that she had shunned her relations with the Plaintiff, which left him with no other option, but to approach the Court for the redressal of his just grievance by way of directing the Defendant No.1 to pay the said amount, along with interest. It was further pleaded that the cause of action accrued to the

Plaintiff, when the Defendants categorically refused to pay the said amount and same continued to recur.

11. On receipt of the Suit on 25th of January, 2019, notices were issued to the Appellants/ Defendants, which were duly served and, pursuant to summons served upon the Appellants/ Defendants, they appeared before the Court through their Counsel on 28th of June, 2019 and filed their Written Statement. On 21st of December, 2019, the learned Counsel for the Appellants/ Defendants submitted before the Trial Court that the Objections filed by the Defendants on 28th of June, 2019 be treated as application for leave to defend the Suit and, there being no Objections by the opposite side to this proposition, the Objections were treated as application to defend the Suit of the Plaintiff.

12. The learned Trial Court, vide the impugned Judgment and Decree, has observed that the Objections, which were treated as an application by the Defendants to defend the Suit, did not have any defence, rather the defence raised therein appeared to be illusory, moonshine and sham and, as such, on this analogy of the fact, the application was disallowed and no leave to defend was granted to the Appellants/ Defendants to defend the Suit. The learned Trial Court, vide the impugned Judgment dated 11th of April, 2022, accordingly, allowed the Suit and passed a money decree for recovery of an amount of Rs.8.00 lacs, along with interest @ 12% from the date of institution of the Suit till realization of the amount, in favour of the Respondent/ Plaintiff and against the Appellants/ Defendants.

13. Order XXXVII of the Code of Civil Procedure is a complete code in itself for purpose of trial of the cases of summary nature, inasmuch as, a complete procedure has been provided therein to be adopted by the Courts. On filing of the Suit before a Court and issuance of notice to the Defendants, they are under an obligation to cause their appearance within 10 days from the service of such summons, therefore, the Suits under Order XXXVII of the Code of Civil Procedure are required to be dealt with

strictly in accordance with the procedure prescribed under Order XXXVII of the Code of Civil Procedure. The procedure for entering appearance by a Defendant is prescribed under Rule 3(1) of this Order of the Code and for seeking leave to defend in the Suit, the same is provided under Rule 3(5) of the Order. On filing of a summary Suit, the summons of a Suit has to be issued in Form No.4 in Appendix B or in any such other Form as may, from time to time, be prescribed.

14. As prescribed, when a summon is issued under Rule 2 by the Plaintiff on the Defendant, along with a copy of the Plaint and annexures thereto, the Defendant may, at any time within ten days of such service, enter an appearance either in person or by a pleader and, in either case, he shall file in Court an address for service of notices on him. It has been further provided in Sub-Rule (3) of Rule 3 that, on the day of entering the appearance, notice of such appearance shall be given by the Defendant to the Plaintiff's pleader, or, if the Plaintiff sues in person, to the Plaintiff himself, either by notice delivered at or sent by a pre-paid letter directed to the address of the Plaintiff's pleader or the Plaintiff, as the case may be. Sub-Rule (4) of Rule 3 provides that, if the Defendant enters an appearance, the Plaintiff shall, thereafter, serve on the Defendant a summon for Judgment in Form No.4A in Appendix B or such other Form as may be prescribed from time to time, returnable not less than ten days from the date of service supported by an Affidavit verifying the cause of action and the amount claimed and stating that in his belief there is no defence to the Suit. Thereafter, as per Sub-Rule (5) of Rule 3, the Defendant may, at any time within ten days from the service of such summons for Judgment, by Affidavit or otherwise disclosing such facts as may be deemed sufficient to entitle him to defend, apply on such summons for leave to defend such Suit, and leave to defend may be granted to him unconditionally or upon such terms as may appear to the Court or Judge to be just.

15. Sub-Rule (6) of Rule 3 of Order XXXVII of the Code of Civil Procedure provides that, if the Defendant has not applied for leave to

defend, or if such an application has been made and is refused, the Plaintiff shall be entitled to Judgment forthwith, or, if the Defendant is permitted to defend as to the whole or any part of the claim, the Court or Judge may direct him to give such security and within such time as may be fixed by the Court or Judge and that, on failure to give such security within the time specified by the Court or Judge or to carry out such other directions as may have been given by the Court or Judge, the Plaintiff shall be entitled to Judgment forthwith. It has also been provided in Sub-Rule (7) of Rule 3 that the Court or Judge may, for sufficient cause shown by the Defendant, excuse the delay of the Defendant in entering an appearance or in applying for leave to defend the Suit. Therefore, Rule 3 of Order XXXVII, in itself, is a complete Code of procedure, to be followed by the Trial Courts while trying Suits of summary nature.

16. Since, the grievance of the Counsel for the Appellants, in this case, is that the Trial Court has not followed the aforesaid procedure prescribed in the Code of Civil Procedure, it will be profitable to refer to the Trial Court record, particularly the minutes of the proceedings carried out by the Trial Court. In this behalf, it appears from the record that the Suit was filed on 25th of January, 2019 and notices were issued to the Defendants. The notices are stated to have been issued on the prescribed format, whereafter the Defendants had caused their appearance and filed their particulars on 13th of March, 2019. The Defendants are then stated to have filed Written Statement on 28th of June, 2019. During this period on 19th of November, 2019, the Court directed the Plaintiff to pay the deficient Court fee, which was filed by the Plaintiff. Vide Order dated 27th of November, 2019, the Trial Court directed the Plaintiff to serve upon the Defendants the summons for Judgment first and also file the relevant Affidavit, as required in terms of Order XXXVII of the Code of Civil Procedure. It is not apparent from the record as to when the summons for Judgment were issued. It is further discernible from the record of the Court below that the Written Statement filed by the Defendants was treated as application for leave to defend vide Order dated 21st of December, 2019 and

that, by an Order dated 5th of March, 2020 passed by the learned Trial Court, on an application moved by the Plaintiff for placing on record the original *Hundi*, the Defendants were directed to file Objections to this application. Thereafter, the case appears to have been adjourned on many dates, due to outbreak of COVID-19 Pandemic and the application for placing on record the original *Hundi* was posted for arguments. Finally, the impugned Judgment and Decree came to be passed by the learned Trial Court on 11th of April, 2022.

17. From the perusal of the minutes of the proceedings before the Trial Court, it transpires that the learned Trial Court has not dealt with the application moved by the Plaintiff/ Respondent herein for placing on record the *Hundi*, in original, and that, without placing that on record the said document, the summons for Judgment could not have been issued to the Defendants/ Appellants herein. The Defendants, though did not move a formal application for leave to defend the Suit separately, but the Written Statement filed by them to the Suit had been treated as an application for leave to defend by the Court below, however, on perusal of the impugned Judgement, it appears that without dealing the grounds urged in the Written Statement, treated as an application for leave to defend, the learned Trial Court, in a cursory manner, has termed the same as illusory, moonshine and sham and, accordingly, disallowed the application in one line in paragraph No.2 of the Judgment. The Defendants, in their application, had raised statutory plea with regard to limitation, stating that the Suit was barred under Article 103 of the Limitation Act, as the Suit of such a nature had to be filed within six years and also that the summons for Judgment had not been issued in the format prescribed in the Rules, along with the Affidavit by the Plaintiff. In such a situation, the procedure carried out by the learned Trial Court was not correct, therefore, the impugned Judgment and Decree passed by the learned Trial Court appears to have been passed in a hot-haste, without following due procedure of law as prescribed under Order XXXVII of the Code of Civil Procedure.

18. Having said so and in the considered opinion of this Court, the points raised by the Defendants in their application for leave to defend, particularly with regard to forged promissory note, non-availability of the original *Hundi* on record and the Suit having not been filed within the statutory period of time, the Defendants had raised plausible defence, which could attract for raising of triable issues in the Suit, after seeking a detailed Written Statement from the Defendants. The learned Trial Court was under an obligation to either grant conditional or unconditional leave to defend the Suit to the Defendants. That being so, the Trial Court, in the instant case, has not followed the procedure prescribed in law while trying the Suit of summary nature, as such, the impugned Judgment and Decree dated 11th of April, 2022 is not sustainable.

19. Viewed, thus, the instant appeal is **allowed** and the impugned Judgment and Decree dated 11th of April, 2022 passed by the Trial Court are set aside. The case is remanded back to the learned Trial Court for fresh consideration in accordance with law, after hearing the parties. Parties to appear before the Trial Court on 15th of February, 2024. There shall, however, be no order as to costs.

20. The Record of the Court below be sent down, along with a copy of this Judgment, for information and compliance.

(M. A. CHOWDHARY)
JUDGE

SRINAGAR

December 30th, 2023

"TAHIR"

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| i. | Whether the Judgment is speaking? | Yes. |
| ii. | Whether the Judgment is reporting? | Yes. |