

GAHC010096242024



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRP/55/2024

DIPESWAR SINGHA
S/O.- LATE BIRENDRA SINGHA,
RESIDENT OF H.NO. 15,
P.O.- PANJABARI (BOTAHHULI),
P.S.- SATGAON, DISTRICT- KAMRUP(M),
ASSAM, PIN- 781037.

VERSUS

BIREN SINGH AND ANR
S/O.- LATE BISHEN SINGH,
RESIDENT OF HOUSE NO. 15,
P.O.- PANJABARI (BOTHAGHULI),
P.S.- SATGAON,
DISTRICT- KAMRUP(M), ASSAM,
PIN- 781037.

2:BIMOLA DEVI
W/O- BIREN SINGH
RESIDENT OF HOUSE NO. 15
P.O.- PANJABARI (BOTHAGHULI)
P.S.- SATGAON
DISTRICT- KAMRUP(M)
ASSAM
PIN- 781037

:: BEFORE ::

HON'BLE MR. JUSTICE MRIDUL KUMAR KALITA

For the Petitioner : Mr. J. Kalita, Advocate.

For the Respondents : Mr. N. Nath, Advocate

Date of Hearing : 24.09.2024

Date of Judgment : 03.10.2024

ORDER

1. Heard Mr. J. Kalita, learned counsel for the petitioner. Also heard Mr. N. Nath, learned counsel for the respondents.

2. This application under section 115 of the Code of Civil Procedure, 1908 has been filed by the petitioner including the order dated 02.04.2024, passed in Misc.(J) Case No. 513/2021 by the Court of learned Civil Judge (Jr. Division) No. 3, Kamrup(M), Guwahati, whereby the order dated 30.10.2021 passed in Summary Money Suit No. 3/2021 was set aside.

3. The facts relevant for consideration of the instant revision petition, in brief, are that the petitioner had preferred a summary suit, which was registered as Summary (Money Suit) No. 3/2021 against the respondents in the Court of learned Civil Judge (Jr. Division) No. 3, for realization of an amount of Rs.4,14,000/-. The said amount was borrowed by the respondents from the petitioner through a promissory note. The said summary suit was fixed on 16.09.2021. On that day, the Trial Court issued summons under Order 37 Rule 2 of the Code of Civil Procedure to the respondents and the next day was fixed on 30.10.2021. On 18.09.2021, the petitioner had filed a petition for rectifying the date fixed for appearance of the respondents and accordingly, the Trial Court had re-fixed the date of appearance as 05.10.2021 instead of 30.10.2021.

4. On 05.10.2021, the respondents appeared and filed an application seeking adjournment, however, the Trial Court rejected the said prayer on the

ground that respondents did not comply with provision of Order 37 Rule 3 of the Code of Civil Procedure and the next date was fixed on 26.10.2021. On the said date, the respondents again filed another application seeking adjournment. However, same was again rejected by the Trial Court on the ground that the respondents had not filed any formal application for seeking leave to defend and the next date was fixed for judgment on 30.10.2021.

5. Accordingly, on 30.10.2021, the Trial Court passed the judgment decreeing the suit of the petitioner for Rs.4,14,000/- with interest from the date of filing of the suit till realization of the same.

6. Thereafter, the respondents filed an application under Order 37 Rule 4 for setting aside the *ex-parte* judgment and decree dated 30.10.2021 on the ground that the petitioner did not serve any summons for judgment upon the respondents, which is a *sine qua non* for applying to the Court for seeking leave to defend by the respondents. The said case was registered as Misc.(J) Case No. 513/2021.

7. After hearing the parties, the Trial Court by order dated 02.04.2024 set aside the judgment dated 30.10.2021 and directed the Petitioner to comply with the requirement under Order 37 Rule 3 (4) of the Code of Civil Procedure to enable the respondents to defend the suit so that the matter may be decided on merit.

8. Being aggrieved and dissatisfied with the Order dated 02.04.2024 passed in Misc.(J) Case No. 513/2021, this instant revision petition has been filed by the petitioner.

9. Learned counsel for the petitioner has submitted that the respondents have not followed the provision of Order 37 Rule 3(3) of the Code of Civil Procedure as no notice of appearance was given by the respondents either to the petitioner or the counsel of the petitioner as mandated by the said provision. Learned counsel for the petitioner has also submitted that the respondents have also failed to file in the Court an address for service of notice on them as required under Order 37 Rule 3(1) of the Code of Civil Procedure, 1908.

10. Learned counsel for the petitioner has submitted that unless the respondents had complied with the provisions of Order 37 Rule 3 of the Code of Civil Procedure by filing a notice of his appearance on the petitioner or his pleader and unless he had furnished an address for service of notice upon him, the question of service of summons for judgment does not arise and no address was provided for serving such notice, hence, it is submitted that the Trial Court had erred in setting aside the order dated 30.10.2021.

11. Learned counsel for the petitioner has submitted that when the language of statute is clear and it prescribes a particular procedure, same shall have to be followed irrespective of consequences which may follow. He submits that when a statutory provision is unambiguous, it requires no construction for its support by addition and substitution of words or which results in rejection of words and the Court cannot read anything into the said statutory provision which is plain and ambiguous and, therefore, he submits that the Trial Court had erred in setting aside the judgment and decree dated 30.10.2021 passed in Summary Money Suit No. 3/2021. In support of his submissions, the learned counsel for the petitioner has cited following rulings:-

1. *"State of Jharkhand and Anr. -Vs- Govind Singh" reported in "(2005) 10 SCC 437"*
2. *"Sapphire Institute of Nursing and Science -Vs- State of MP" reported in "2021 0 Supreme(MP) 554"*
3. *Rupak Debroy -Vs- State of Tripura and Ors. reported in "2020 (4) GLT 180"*

12. On the other hand, the learned counsel for the respondents has submitted that the Trial Court has rightly set aside the judgment and decreed dated 30.10.2021 passed in Summary Money Suit No. 3/2021 as no summons for judgment as mandated under Order 37 Rule 3(4) of the Code of Civil Procedure was served on the respondents neither the same verifying the cause of action and the amount claimed and stating that in the belief of the petitioner there is no defense to this suit was served on the respondents.

13. It is also submitted that such non-service of summons of judgment has correctly held to be a special circumstance by the Trial Court and, therefore, the Trial Court had not erred in setting aside the judgment and decree dated 30.10.2021.

14. Learned counsel for the respondent has also submitted that the purpose of giving the notice of appearance on the day of entering appearance by the defendant to the plaintiff's pleader or to the plaintiff himself is only to let the plaintiff know that the defendant has entered his appearance. Under Order 37 Rule 3(1) the defendant may appear at any time within 10 days of the service of summons under Rule 2 upon him. However, in the instant case as a fixed date was given i.e., 05.10.2021 and the defendant had entered his appearance and

the engaged counsel for the defendant had filed vakalatnama, hence, he submits that the notice of appearance under Order 37 Rule 3(3) need not to be given separately in such cases and in support of his submission he has cited a ruling of Delhi High Court in the case of "**Indraprastha Finance Company – Vs- Diamond Pictures**" reported in "**1979 0 supreme (DEL)119**".

15. Learned counsel for the respondents has also submitted that the Trial Court was correct in setting aside the judgment dated 30.11.2021 by the impugned order as the present petitioner had not served the summons for judgment on the respondent as required under Order 37 Rule 3(4) of the Code of Civil Procedure which is a *sine qua non* even for the defendant seeking leave to defend in a summary suit. In support of his submission, the learned counsel for the respondents has cited a ruling of the Rajasthan High Court in the case of "**Sewa Ram –Vs- Firm Modaram Tulsiram**" reported in "**2001 0 Supreme(Raj) 21**".

16. Learned counsel for the respondents has also submitted that when the date of appearance of the defendant (respondent) has been fixed in the summary suit as 05.10.2021 and when on the said date the petitioner was also present, the requirement of giving the notice of appearance to the counsel for the petitioner becomes directory as the fact of entering appearance by the respondents had already come to the notice of the petitioner's counsel as both were present before the Court on the same date.

17. Learned counsel for the respondents has submitted that whether a provision of a statute is directory or mandatory would not depend only on the use of words "shall" or "may", such a question must be posed and answered

having regard to the purpose of an object it seeks to achieve and as in the instant case the purpose is to give notice of entering of appearance by the defendant to the plaintiff and as same has already been served as a specific date was fixed in the suit and on which date both the parties were present, hence, the requirement of giving notice of appearance by the defendant is only directory in the instant case. In support of his submission learned counsel for the respondents has cited a ruling of the Supreme Court of India in the case of “**P.T. Rajan –Vs- T.P.M Sahir and Ors.**” reported in “**(2003) 8 SCC 498**” wherein it was observed as follows:-

“45. A statute as is well known must be read in the text and context thereof. Whether a statute is directory or mandatory would not be dependent on the user of the words “shall” or “may”. Such a question must be posed and answered having regard to the purpose and object it seeks to achieve.”

18. I have considered the submissions made by the learned counsel for both the parties and have gone through the materials on record including the case record of Summary (Money Suit) No. 3/2021 as well as the record of Misc. (J) Case No. 513/2021 which was requisitioned from the Trial Court in connection with the instant revision petition.

19. I have also gone through the rulings cited by the learned counsel for both the sides in support of their respective submissions.

20. On perusal of the impugned order dated 02.04.2024 passed in Misc.(J) Case No. 513/2021, it appears that the Trial Court had set aside the *ex-parte* judgment dated 30.10.2021 passed in Summary (Money Suit) No. 3/2021

mainly on the ground that the present petitioner as plaintiff did not serve on the defendant (present respondent) a summons for judgment as required under Order 37 Rule 3(4) of the Code of Civil Procedure and also no affidavit verifying the cause of action an amount claim and stating that his belief that there is no defense in this suit was filed as required by the said provision.

21. The Trial Court regarded the omission to serve the summons for judgment as a special circumstance under Order 37 Rule 4 of the Code of Civil Procedure and thereby necessitating the setting aside of the *ex-parte* decree.

22. In arriving at the finding that non-service of summons under Order 37 Rule 3(4) by the petitioner upon the respondents is a special circumstance, the Trial Court relied upon the ruling of the Supreme Court of India in the case of "**Rajni Kumar –Vs- Suresh Kumar Malhotra and Anr.**" reported in "**AIR 2003 SC 1322**" wherein the Apex Court had observed as follows:-

“9. The expression "special circumstances" is not defined in the C.P.C nor is it capable of any precise definition by the court because problems of human beings are so varied and complex. In its ordinary dictionary meaning it connotes something exceptional in character, extraordinary, significant, uncommon. It is an antonym of common, ordinary and general. It is neither practicable nor advisable to enumerate such circumstances. Non-service of summons will undoubtedly be a special circumstance. In an application under Order 37, Rule 4, the court has to determine the question, on the facts of each case, as to whether circumstances pleaded are so unusual or extraordinary as to justify putting the clock back by setting aside the decree; to grant further relief in regard

to post-decree matters, namely, staying or setting aside the execution and also in regard to pre-decree matters viz., to give leave to the defendant to appear to the summons and to defend the suit.”

23. Though, in this case the defendant (respondents) have not given notice of appearance to the petitioner's counsel or the petitioner and also not filed an address or service of notices on them. However, from perusal of the case record, it appears that the respondents had entered their appearance through their engaged counsel before the Trial Court on 05.10.2021. It also appears that on 05.10.2021 as well as on 26.10.2021, the learned counsel for both the parties were present before the Court and, therefore, the fact that the respondents had entered their appearance in the Summary (Money Suit) No. 3/2021 is not disputed.

24. Order 37 Rule 3(4) of the Code of Civil Procedure, 1908 provides as follows:-

“Rule 3(4) If the defendant enters an appearance, the plaintiff shall thereafter serve on the defendant a summons 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.”

25. A bare perusal of the aforesaid provision would make it clear that after the defendants enters appearance in the suit, the plaintiff has to serve on the defendants a summon for judgment which is returnable not less than 10 days

from the date of service upon the respondents. It is also required that the summons for judgment has to be supported by an affidavit verifying the cause of action and the amount claimed and stating that in the belief of the plaintiff, there is no defence in the suit. It is only after such summons for judgment is served on the defendant/respondents, the defendant within ten days of such service may apply for leave to defend such suit. Thus, it is apparent that unless the summons for judgment is served on the defendants, the question of applying leave to defend the suit does not arise.

26. This Court is also of the considered opinion that the summons for judgment has to be served on the defendant before the Trial Court proceed to decide the summary suit. The service of summons for judgment is thus *sine qua non* for conferring jurisdiction on the Trial Court to proceed under Order 37 Rule 3(6) of the Code of Civil Procedure, 1908.

27. This Court is also of the considered opinion that non-service of summons for judgment on the defendant after he had entered his appearance has to be considered as special circumstances under Order 37 Rule 4 of the Code of Civil Procedure, 1908 which gives jurisdiction to the Trial Court to set aside the decree.

28. The submissions of learned counsel for the petitioner that giving of notice of entering appearance on filing of address for service of notice on the defendant are condition precedent serving on the defendant summons for judgment under Order 37 Rule 3(4) of the Code of Civil Procedure, 1908 does not appear to have force.

29. On perusal of the Order 37 Rule 3(4) of the Code of Civil Procedure, it appear that the only pre-condition for serving the summons for judgment on the defendant by the plaintiff is entering appearance by the defendant which this case records shows that the respondents had entered their appearance on 05.10.2021.

30. In this regard, this Court is in agreement with the observation made by the High Court of Delhi in the case of "**Indraprastha Finance Company –Vs- Diamond Pictures** (supra) wherein it was observed as follows:-

“The reason why Order 37 Rule 3 (3) of the Code requiring the defendant to give notice to the plaintiff of his appearance has been introduced in the Code is a very simple one. The initial summons served on the defendant requires him to appear within ten days. The defendant may appear within one day or he may appear within ten days. There may be delay in serving the defendant so the plaintiff can never be sure on which date the defendant has appeared or whether ten days have expired. To serve the interests of the plaintiffs convenience and not leave him in the dark, the law requires the defendant to serve a notice. The notice is merely information of a fact which the plaintiff would not otherwise know. But if the defendant puts in appearance in the presence of the plaintiff then the information is physical and known to the plaintiff and does not require to be the subject matter of a notice. Consequently, there is no necessity of the notice.”

31. Thus, when the respondents have made appearance in Summary Money Suit No. 3/2021 on 05.10.2021 through their engaged counsel and thereafter also they were present before the Trial Court on 26.10.2021, the petitioner's Counsel knew that the respondents have entered their appearance despite the fact that no notice of appearance was given to him, under such circumstances, this Court is of the considered opinion that the requirement of delivering a notice of entering appearance to the plaintiff or plaintiff's pleader under Order 37 Rule 3 (3) is only directory in nature.

32. For the reasons mentioned herein above, this Revision Petition is devoid of any merit and accordingly dismissed.

JUDGE

Comparing Assistant