

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH.**

Regular Second Appeal No.4011 of 2011 (O&M)

Date of Decision: July 28, 2016.

Harphul Singh

.....APPELLANT(s).

VERSUS

Parshotam Dass (Deceased) through his LR Sunita Rani

.....RESPONDENT(s).

CORAM:- HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. H.S. Sirohi, Advocate
for the appellant (s).

None for the respondent.

SURINDER GUPTA, J.

This is appeal against the concurrent judgments of the Courts below decreeing the suit of respondent-plaintiff for recovery of ₹1,50,000/- with costs, pendente lite and future interest.

2. Plaintiff Parshotam Dass filed suit under the provision of Order 37 Code of Civil Procedure (for short-CPC) seeking recovery of ₹1,50,000/- as principal and ₹1,08,000/- towards interest with the plea that defendant had borrowed this amount against pronote and receipt dated 18.11.2005 but had failed to repay the same.

3. Defendant/appellant put in appearance on 26.04.2009 on

being served summons for judgment on 08.04.2010. As per the provisions of Order 37 Rule 3 (5) CPC, he did not apply for leave to defend within 10 days from the service of summons for judgment and vide judgment dated 26.04.2010, the suit of the plaintiff was ordered to be decreed.

4. The defendant filed appeal which was dismissed by the District Judge, Bathinda on 18.04.2011.

5. I have heard learned counsel for the appellant-defendant and have perused the paper book with his assistance.

6. It is not disputed that the summons for judgment were served on the appellant-defendant on 08.04.2010. Order 37 Rule 3 (5) C.P.C. prescribes that the defendant within 10 days of receipt of summons had to apply for leave to defend and reads as follows:-

“(5) 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:

Provided that leave to defend shall not be refused unless the Court is satisfied that the facts disclosed by the defendant do not indicate that he has a substantial defence to raise or that the defence intended to be put up by the defendant is frivolous or vexatious:

Provided further that, where a part of the amount claimed by the plaintiff is admitted by the defendant to be due from him, leave to defend the suit shall not be granted unless the amount so admitted to be due is deposited by the defendant in Court.”

7. As per above provision, the suit of the plaintiff was to be decreed forthwith, if defendant had not applied for leave to defend after receipt of summons for judgment.

8. Applying the above law to the facts of the present case, it is evident that on 18.04.2007, plaintiff had become entitled to the judgment in this suit.

9. Learned counsel for the appellant has argued that case was fixed for 26.04.2010 on which date, counsel for the defendant appeared and the Court passed the order as follows:-

“Present: Sh.A.K.Goyal, Counsel for the plaintiff.
Sh.S.S. Kaureana, Counsel for defendant.

Summons for judgment were issued to the defendant but the same have not been received back as per the report of Ahlmad. The learned counsel for the plaintiff requested for a date. Summons of judgment be filed within two days and notice of the same be issued to the defendant for 26.4.2010.

Civil Judge.26.4.2010.”

10. However, the order was not signed by the presiding officer and the same had been cancelled with hand written note “wrongly typed”. Thereafter, another order was passed on the same day, which reads as follows:-

“Present: Sh.A.K.Goyal, Adv., Counsel for plaintiff.

Summons for judgment have been received back duly served upon defendant on 08.04.2010. However, defendant has failed to file any application for leave to defend till date as evident from the report of the Ahlmad. So, in such circumstances, plaintiff gets entitled to judgment forthwith under the provisions of Order 37 CPC.

Arguments heard. Vide my separate detailed judgment of even date forming part of the record, suit of the plaintiff succeed and is decreed with proportionate costs for recovery of Rs.1,50,000/- along with interest @ 12% per annum from the date of execution of the pronote till the date of filing of the present suit and further 12% per annum from the date of filing of the suit till the date of decree on the principal amount and 6% per annum as future interest from the date of decree till its realization on the principal amount. Decree be prepared and file be consigned to the record room.

Announced:26.4.2010

-Sd/-
Civil Judge(Jr. Divn.),
Talwandi Sabo.”

11. Learned counsel for the appellant-defendant has argued that application for leave to defend was ready with the counsel for the defendant but the same was not filed on 26.04.2010 as the Court had ordered issuance of fresh summons for judgment. The Court could not take up the case again on the same day in the absence of counsel for the appellant-defendant and pass the decree.

12. The above submission of learned counsel for the appellant was considered by the first Appellate Court and rightly discarded because of the fact that the defendant after service of summons for judgment, had to apply for leave to defend by 18.04.2010 but he did not do so. Secondly, even on 26.04.2010, leave to defend was not filed despite the fact that service of summons for judgment had been served on the defendant. The first order dated 26.04.2010 was unsigned order as such can not be considered as order passed by Court, particularly

when Court had given a note that it was wrongly typed. The judgment passed by learned Civil Judge (Junior Division), Talwandi Sabo is in accordance with the provisions of Order 37 Rule 3 CPC and call for no interference in this appeal.

13. No substantial question of law requiring determination arises in this appeal, which has no merits.

Dismissed.

July 28, 2016
Sachin M.

(SURINDER GUPTA)
JUDGE

Whether speaking/reasoned:

√
Yes/No

Whether Reportable:

√
Yes/No