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

% *Date of decision: 12.07.2016*

+ CM(M) 802/2015

M/S M M HEALTHCRE LTD Petitioner
Through Mr.Alok Kumar and Mr.Neeraj
Kumar Gupta, Advs.

versus

P K CHAUHAN Respondent
Through Mr.Kunal Kalra and
Mr.P.K.Chauhan, Advs.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (ORAL)

1. By the present petition the petitioner seeks to impugn the order dated 17.7.2015 by which order the application of the respondent under section 10 CPC was allowed and the suit filed by the petitioner was stayed.
2. The plaintiff/petitioner had filed the present suit under Order 37 CPC as a summary suit for recovery of Rs.64,960/-. The respondent No.1 entered appearance and filed an application for leave to defend. He also filed an application under Section 10 CPC for stay of the suit.
3. By the impugned order the trial court has not adjudicated upon the application for leave to defend filed by the respondent but has disposed of the application filed by the respondent under Section 10 CPC allowing the said application.
4. Learned counsel appearing for the petitioner submits that as per judgment of the Supreme Court in the case of ***Indian Bank vs. Maharashtra State Co-operative Marketing Federation Limited, AIR 1988 SC 1952*** the

trial court was obliged to first hear and adjudicate upon the application for grant of leave to defend. In case the trial court came to the conclusion that the application for leave to defend has to be dismissed, then the trial court could proceed and pass an appropriate decree in favour of the petitioner. It is urged that this adjudication had to be done prior to adjudication of the application under Section 10 CPC filed by the respondent.

5. A perusal of the judgment of the Supreme Court in the said case of ***Indian Bank vs. Maharashtra State Co-operative Marketing Federation Limited, (supra)*** would show the following issue was raised before the Supreme Court paragraph 2 of which reads as under:-

“2. The question which arises for consideration in these appeals is whether the bar to proceed with the trial of subsequently instituted suit, contained in Section 10 of the Code of Civil Procedure, 1908 (hereinafter referred to as the ‘Code’) is applicable to summary suit filed under Order 37 of the Code.”

The Supreme Court further held as follows:

“9. The provision contained in Section 10 is a general provision applicable to all categories of cases. The provisions contained in Order 37 apply to certain classes of suits. One provides a bar against proceeding with the trial of a suit, the other provides for granting of quick relief. Both these provisions have to be interpreted harmoniously so that the objects of both are not frustrated. This being the correct approach and as the question that has arisen for consideration in this appeal is whether the bar to proceed with the trial of subsequently instituted suit contained in Section 10 of the Code is applicable to a summary suit filed under Order 37 of the Code, the words 'trial of any suit' will have to be construed in the context of the provisions of Order 37 of the Code. Rule 2 of Order 37 enables the plaintiff to institute a summary suit in certain cases. On such

a suit being filed the defendant is required to be served with a copy of the plaint and summons in the prescribed form. Within 10 days of service the defendant has to enter an appearance. Within the prescribed time the defendant has to apply for leave to defend the 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. If the defendant has not applied for leave to defend, or if such an application has been made and refused, the plaintiff becomes entitled to judgment forthwith. If the conditions on which leave was granted are not complied with by the defendant then also the plaintiff becomes entitled to judgment forthwith. Sub-rule (7) of Order 37 provides that save as provided by that order the procedure in summary suits shall be the same as the procedure in suits instituted in the ordinary manner. Thus in classes of suits where adopting summary procedure for deciding them is permissible the defendant has to file an appearance within 10 days of the service of summons and apply for leave to defend the suit. If the defendant does not enter his appearance as required or fails to obtain leave the allegations in the plaint are deemed to be admitted and straightaway a decree can be passed in favour of the plaintiff. The stage of determination of the matter in issue will arise in a summary suit only after the defendant obtains leave. The trial would really begin only after leave is granted to the defendant. This clearly appears to be the scheme of summary procedure as provided by Order 37 of the Code.

10. Considering the objects of both the provisions, i.e., Section 10 and Order 37 wider interpretation of the word 'trial' is not called for. We are of the opinion that the word 'trial' in Section 10, in the context of a summary suit, cannot be interpreted to mean the entire proceedings starting with institution of the suit by lodging a plaint. In a summary suit the 'trial' really begins after the Court or the Judge grants leave to the defendant to contest the suit. Therefore, the Court or the Judge dealing with the summary suit can proceed up to the stage of hearing the summons for

judgment and passing the judgment in favour of the plaintiff if (a) the defendant has not applied for leave to defend or if such application has been made and refused or if (b) the defendant who is permitted to defend fails to comply with the conditions on which leave to defend is granted.”

6. In view of the above, it is clear that the trial court had to first decide the application for leave to defend. A decree could be passed on the grounds stated in the above judgment i.e. if no application for leave to defend is filed or if filed and dismissed or if conditional leave is granted and the defendant fails to meet the conditions stipulated. In case the application is allowed or conditionally allowed and the defendant fulfils the conditions in that eventuality the trial court could proceed with adjudication of the application under Section 10 CPC.

7. In the light of the above, the impugned order dated 17.7.2015 is set aside. The matter is remanded back to the trial court for adjudication of the application for leave to defend and for further adjudication as stated in the above paragraphs.

8. Parties to appear before the concerned Court on 3rd August, 2016. Petition stands disposed of.

JAYANT NATH, J

JULY 12, 2016

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