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

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Date of Decision: 22.07.2016

+ C.R.P. 184/2015 & CM Nos.29441/2015, 5807/2016 & 22102/2016

ASHISH KUMAR GUPTA Petitioner

Through Mr.H.S.Dahiya, Advocate

versus

A N AGGARWAL & SONS (HUF) Respondent

Through Mr.Sachin Bansal & Ms.Arati Sharma,
Advocates

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (Oral)

1. By the present petition, the petitioner seeks to impugn the order dated 04.08.2015 passed by the learned Additional District Judge-2, North, Rohini Courts, Delhi filed under Order 37 Rule 4 CPC for setting aside *ex parte* decree.

2. The respondent had filed a suit for recovery of Rs.6,30,000/- on the basis of promissory note cum receipt dated 04.04.2013 under Order XXXVII of CPC. The plaint points out that the amount of Rs.5,00,000/- was taken as loan by the petitioner which was credited to the account of the petitioner by the respondent by RTGS No.167952708 dated 04.04.2013. The court issued summons. The petitioner received summons in the suit on 20.10.2014 and filed his appearance on 28.10.2014. It is the contention of the petitioner that thereafter a second summon for entering appearance was

served on the applicant/petitioner on 09.01.2015. As the petitioner had already entered appearance pursuant to the first summon, no further steps was required to be taken by the petitioner. He was also allegedly advised by his counsel that nothing further needs to be done at this stage by the petitioner and that further steps will have to take only after receiving summons for judgment. As the petitioner took no further steps, the court had passed an *ex parte* decree on 05.02.2015.

3. Thereafter, the petitioner has filed the present application under Order XXXVII Rule 4 CPC for setting aside the *ex-parte* decree stating that the petitioner got knowledge of the decree only on 15.04.2015 when the bailiff came to the house of the petitioner to execute the decree and the petitioner handed over a cheque of the decretal amount in favour of the court. It is at that stage it is urged that the petitioner learnt about the *ex-parte* decree.

4. By the impugned order, the learned trial court dismissed the application of the petitioner under Order XXXVII Rule 4 CPC holding that neither any ground nor any sufficient cause has been disclosed in the application for setting aside the decree. The court held that the summons for judgment had been duly served on the petitioner on 03.02.2015 and the same had been served on the petitioner as per report dated 09.01.2015 of the process server. Accordingly, as the petitioner failed to file his application for leave to defend, the court dismissed his application.

5. The learned counsel for the petitioner strenuously submitted that what was served on the petitioner was not a summon for judgment but only a summon to enter appearance in court. Hence, he submits that the petitioner was misled and cannot be penalised with an *ex parte* decree.

6. The original summons received the second time by the petitioner

reads as follows:

“Whereas the plaintiff has instituted a suit against you for under order XXXVII of the Code of Civil Procedure 1908 for Rs.6,30,000/- and interest you are hereby summoned to cause an appearance to be entered for you, within ten days from the service hereof in default where of the plaintiff will be entitled, after the expiration of the said period of ten days to obtain a decree for any sum not exceeding the sum of Rs.6,30,000.00 and the sum of Rs..... for cost together with such interest, if any as the court may order.

If you cause an appearance to be entered for you the plaintiff will thereafter serve upon you a summons for judgment at the hearing of which you will be entitled to move the court for leave to defend the suit.

Leave to defend may be obtained if you satisfy the court by an affidavit or otherwise that there is a defense to the suit on the merits or that it is reasonable that you should be allowed to defend.

Given under my hand and the seal of the court this 30.12.2014.”

In my opinion, the perusal of the summons shows that it is not summon for judgment but summon for entering appearance having been served under Order XXXVII Rule 3 CPC.

7. The procedure to be followed by a court as stipulated under Order XXXVII Rule 2(2) reads as follows:

2. Institution of summary Suits.- (1) A suit, to which this Order applies, may, if the plaintiff desires to proceed hereunder, be instituted by presenting a plaint which shall contain,—

(a) a specific averment to the effect that the suit is filed under this Order;

(b) that no relief, which does not fall within the ambit of this rule, has been claimed in the plaint; and

(c) the following inscription, immediately below the number of the suit in the title of the suit, namely:—

(Under Order XXXVII of the Code of Civil Procedure, 1908)”.

(2) The summons of the suit shall be in form No. 4 in Appendix B or in such other Form as may , from time to time, be prescribed.

(3) The defendant shall not defend the suit referred to in sub-rule (1) unless he enters an appearance and in default of his entering an appearance the allegations in the plaint shall be deemed to be admitted and the plaintiff shall be entitled to a decree for any sum, not exceeding the sum mentioned in the summons, together with interest at the rate specified, if any, up to the date of the decree and such sum for costs as may be determined by the High Court from time to time by rules made in that behalf and such decree may be executed forthwith.”

8. After entering appearance, the procedure prescribed under Order XXXVII Rule 3(4) & (5) CPC reads as follows:

“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.

(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”

9. CPC prescribes different forms in the two procedure adopted above,

i.e. under Order XXXVII Rule 2 and Order XXXVII Rule 3(4) & (5) CPC i.e. Form No. 4 in Appendix B for summons in the suit and form No.4A in Appendix B is for summons for judgement.

10. It is clear from the summons placed on record by the petitioner that the second summons received was actually in form No.4 in Appendix B of CPC for entering appearance under Order XXXVII Rule 2 and were not in compliance of the Order XXXVII Rule 3 (4) CPC for summons for judgment.

11. A perusal of the application filed by the petitioner under Order XXXVII Rule 4 CPC shows that the same averments have been made. It is further stated that the petitioner had handed over the second summons which were served on 09.01.2015 to his counsel who immediately enquired from the court and was told that same may have been inadvertently issued and there is no need to file appearance as he has already entered appearance before the court. Though the learned counsel for the petitioner made detailed submission on the merits of the case, in my opinion, there is no need to go into the same.

12. In my opinion, on account of the wrong summons served on the petitioner there are reasonable basis to hold that the petitioner was misled into not filing his application for leave to defend within the stipulated period. There are special circumstances which permitted the trial Court to set aside the decree. The fact that the decree has not been set aside despite existence of these facts and circumstances in my opinion is a material irregularity in the impugned order and the impugned decree is liable to be set aside.

13. Accordingly, the *ex-parte* decree dated 05.02.2015 is set aside subject

to certain terms and conditions which are mentioned as follows:

- i. The petitioner will treat the present judgment passed by this court as starting point for filling his application for leave to defend. Accordingly, he shall file an application for leave to defend within a period of ten days from today. If for some reasons, the petitioner does not file application for leave to defend within ten days from today, the decree shall stand revived.
- ii. This court on 07.12.2015 had directed notice and stayed the execution of the decree provided the petitioner deposits a sum of Rs.5,00,000.00 with the Registrar General of this court. The said amount has been deposited. The Registrar General of this court to release this amount to the respondent upon the respondent furnishing an undertaking in the form of an affidavit to this court that he will receive this amount subject to any further direction that may be passed by the trial court on final disposal of the suit and that he will comply with any such direction including refund of the amount with or without interest.
- iii. The trial court will adjudicate upon the application of the petitioner for leave to defend and take subsequent steps as per law.

With these observations, the present petition stands disposed of.

JAYANT NATH, J.

JULY 22, 2016/v