

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

+ **FAO No. 224/2017 & CM Nos. 18908-18910/2017**

% **19th May, 2017**

SATISH CHAND

..... Appellant

Through: Mr. Prem Kumar Singh,
Advocate.

versus

BAL KISHAN

..... Respondent

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This first appeal under Order XLIII (1)(d) of the Code of Civil Procedure, 1908 (CPC) is filed challenging the order of the court below dated 24.3.2017 by which the application under Order IX Rule 13 CPC of the appellant/defendant has been dismissed. It may be noted that the application was filed under Order IX Rule 13 CPC but since the suit was filed under Order XXXVII CPC, the court below has rightly treated the application under Order XXXVII Rule 4 CPC instead of being under Order IX Rule 13 CPC.

2. The facts of the case are that the respondent/plaintiff filed a suit under Order XXXVII CPC against the appellant/defendant for recovery of a sum of Rs.9,76,000/- along with interest. The recovery

suit was filed inasmuch as the respondent/plaintiff had given a friendly loan of Rs. 8 lacs to the appellant/defendant. The loan transaction is reflected in the receipt/ikrarnama dated 25.12.2012, and on the basis of which the suit under Order XXXVII was filed.

3. This suit under Order XXXVII CPC was decreed on account of the fact that the appellant/defendant, in spite of service, failed to enter appearance. The suit was decreed in terms of the order dated 8.7.2015 and which order reads as under:-

“ Order dated 8.7.2015

Present: Plaintiff in person with Sh. Rupesh Kumar, advocate

None for defendant despite at least three calls till 2:16 pm. The counsel for plaintiff has pointed out that summons for appearance sent to the defendant for 29-04-2015 at Mathura address were refused by the defendant in the presence of witnesses whose names have been recorded in the report and that photograph of the affixation has also been taken. The refusal and affixation are dated 12-3-2015.

I have also found that summons for appearance sent to the defendant at Mathura address for 15-10-2014 by RCAD were also received back with the report of refusal by defendant on 07-06-2014.

The defendant is held to be served on 12-03-2015. No appearance has been filed by the defendant till date. The period of ten days prescribed u/o 37 CPC for filing appearance has expired long back. Hence, as per Order 37 Rule 2(3) CPC, the allegations in the plaint are deemed to be admitted by the defendant and the plaintiff is entitled to decree prayed for.

Arguments heard. Record perused.

The suit is based on one agreement/receipt dated 25-12-2012 which has been placed on record at pages no.14-15 of the file and hence is covered u/o 37 CPC. The amount was taken by the defendant from the plaintiff at Delhi within the jurisdiction of this Court. Hence, this Court has the territorial jurisdiction to entertain and try the present suit. The suit is within limitation. The rate of interest sought by the plaintiff is as per agreement/receipt and the same does not appear to be exorbitant.

In view of the above discussion, the suit is allowed. A decree of Rs.8 lacs with pendente-lite and future interest @ Rs.24% per annum from today till realization with cost is passed in favour of the plaintiff and against the defendant. Decree sheet be prepared accordingly. File be consigned to Record Room.”

4. Appellant/defendant filed the subject application under Order IX Rule 13 CPC pleading that the appellant/defendant came to know of the decree only on 20.7.2015 from one Sh. Laxman who is a common friend and thereafter the appellant/defendant made enquiries whereupon the respondent/plaintiff told him that he will execute the decree for recovery of the money which has been obtained against the appellant/defendant. It was further pleaded that the appellant/defendant was taken aback at this talk and therefore he made inquiries and contacted Sh. Santosh Kumar, Advocate who applied for the certified copy of the court record on 21.7.2015 whereafter the subject application under Order IX Rule 13 CPC was filed. It was pleaded that the appellant/defendant was never served in the suit and the service report of refusal has been got fabricated by the respondent/plaintiff. It is further pleaded that affixation was not properly done. It was hence prayed that the decree be set aside. There are also averments made with respect to merits of the suit in the application under Order IX Rule 13 CPC as to how the receipt cum ikrarnama dated 25.12.2012 is a forged and fabricated document and that the appellant/defendant never took loan of Rs.8 lacs from the respondent/plaintiff. The relevant paras as regards the non-service of the appellant/defendant in the suit and that the appellant/defendant had not taken loan are those as contained

in paras 3 to 8 of the application under Order IX Rule 13 and which paras read as under:-

“3. That the defendant came to know on 20.07.2015 from one Sh. Laxman who is a common friend of the plaintiff and the defendant about a money decree having been passed against the defendant by this Hon’ble Court. Upon being enquired further Sh. Laxman told the defendant that the plaintiff had told him about the same a few days back and had also said that very soon he will get the kurki done of the defendant belongings to get the money.

4. That the defendant was completely taken aback by such information as to the best of his knowledge he never had any dealings with the plaintiff. The defendant immediately rushed to Delhi and contacted Sh. Santosh Kumar Advocate who is also native of the village of the defendant but practicing in Delhi. Sh. Santosh Kumar Advocate after making detailed inquiry got applied for certified copy of the courts record on 21.07.2015.

5. That upon the receipt of the certified copy of the courts record and its perusal thereof it transpired that the plaintiff has managed the service report and has planted witnesses to create evidence of “refusal of service”. It is submitted in this regard that the defendant has never resided at A-21, Shyam Colony, Budh Vihar Phase-II, Delhi. The defendant is a Government Employee and is a class IV employee in Panchayat Rajya Vibagh, Rajiv Bhawan, Mathura since last nine years. The plaintiff is completely aware of the said vocation of the defendant and also of the fact that the wife of the defendant is “Gram Pradhan” of Village Kheriya, Mathura U.P. The alleged witnesses who have stood as attesting witnesses to the refusal of “service report” are not residents of Village Kheriya and are planted witnesses at the instance of the plaintiff. Even the report of the postal authorities has been managed by the plaintiff as the post office is situated in the village of the plaintiff and he was capable of manipulating and fabricating the postal report. Even the affixation formalities purported to have been completed by the plaintiff are all fabricated and manipulated. The alleged photograph purported to evidence affixation is not at the house of the defendant and has been manipulated.

6. That the defendant was never served with any summons of this Hon’ble court and an ex-parte decree has been managed by the plaintiff by over-reaching this Hon’ble Court and by indulging in fabrication and manipulation with the help of post authorities and his so-called planted witnesses.

7. That a perusal of the plaint and the documents in support thereof would show that the plaintiff seeks a summary decree on the basis of an alleged Receipt-cum-Ikrarnama dated 25.12.2012 purported to have been executed by the defendant acknowledging having allegedly received a sum of Rs.8 Lacs with a promise to pay back the same by 2014 and also pay Rs.16000/- per month as interest.

8. That the said alleged Receipt-cum-Ikrarnama purported to have been executed by the defendant is a forged, fabricated and manipulated document. The same does not bear the signatures of the defendant. The

signatures of the defendant have been forged on the said document. The defendant never took any loan of Rs.8 Lacs from the plaintiff nor did he execute any such document.”
(underlining added)

5. The court below has dismissed the application. It has been held that the appellant/defendant was duly served in the suit and in spite of the same the appellant/defendant failed to appear. The court below notes that as many as three endeavors were made to serve the appellant/defendant but on one count or the other the appellant/defendant either avoided service or refused service. It is also noted that in one of the service reports, the process server has given the four different houses situated in four different directions of the residence of the appellant/defendant in a Village in Mathura. I may note that it is not disputed before this Court that the address given of the appellant/defendant at Mathura in the plaint is the correct address. In fact, the wife of the appellant/defendant is the *Gram Pradhan* of the concerned village, and which aspect has been observed upon by the trial court to hold that it is difficult to believe that the appellant/defendant who is the husband of a *Gram Pradhan* would not be traceable or that the process server would have succeeded with the respondent/plaintiff to fabricate the service reports. The court below further notes that summons for appearance sent to the appellant/defendant for 15.10.2014 by registered post, and the same

were received back with the 'refusal' of the appellant/defendant. The relevant paras of the impugned order making aforesaid observations are paras 9 to 12 and 15 and these paras read as under:-

“9. It is not at all disputed in the application that the defendant is residing at the address in Mathura given by the plaintiff in his plaint. It is stated in the application that the wife of the defendant is gram pradhan of the village. Hence, it is difficult to believe that the address of the defendant (who, admittedly, is the husband of the Gram Pradhan) in the village was not traceable or that the plaintiff managed to give fabricated reports on the summons sent to the defendant by ordinary process as well as by postal authorities. It is difficult to believe that false witnesses have been put by the plaintiff against the defendant whose wife, admittedly, is the pradhan of the village. The record reveals that steps were taken by the plaintiff as many as three times. This fact itself, in my considered view, rules out any manipulation by plaintiff. In case the plaintiff would have been able to manipulate the service, it could have been done on the first opportunity itself or even on the second.

10. An important aspect of the matter is that in the report of the Process Server on the summons for appearance issued on 10-3-2015, specific particulars of the premises of the defendant have been given. It is specifically mentioned what lies in the East, West, North and South of the premises. Hence, mere denial in the application by the defendant is no denial in the eyes of law. The very fact that the defendant has failed to give the necessary particulars about what lies in the East, West, North and South of his house goes against him and hence, the particulars are deemed to be admitted by the defendant. Hence, it stands proved on record that the premises is the address of the defendant.

11. It is pertinent to mention here that, as noted in the order dated 8-07-2015 also, summons for appearance sent for 15-10-2014 to the defendant by RCAD were received back with the report of refusal by the defendant on 7-6-2014.

12. In view of the above discussion, I am of the considered view that the defendant has failed to show that the summons were not duly served. The application is liable to be dismissed on this ground alone.

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15. It is stated in the application that the defendant came to know about the decree from a common friend Sh. Laxman, who told him that the plaintiff had told him (Sh. Laxman) about the same a few days back. No particulars of the said Sh. Laxman i.e his father's name or even the address has been given. Nothing has been placed on record to show that any person by this name even exists. The record reveals that the suit was filed on 4/3/14. It is extremely difficult to believe that the plaintiff did not tell anything about the suit to the alleged Sh. Laxman for more than one year

and then, without any reason, told him about the decree in July, 2015 , and that too without waiting for the limitation period for challenging/setting aside the decree to expire. It is extremely difficult to believe that the plaintiff not only told the alleged Sh. Laxman about the money decree having been passed against the defendant and in favour of the plaintiff but also told the particulars of the case and even the Court and that all the particulars were remembered correctly by the alleged Sh. Laxman for “a few days” as alleged in the application. As per the defendant, after he came to know about the decree on 20-7-2015 through the said Sh. Laxman, he came to Delhi from Mathura and the certified copy was applied on the very next day I.e 21/7/2015 “after making detailed inquiry” by his counsel. Hence, as per the application, the “detailed” inquiry was made and the certified copy was applied in just about one day only. As noted above, summons were sent to the defendant as many as thrice. Hence, in my considered view, it is more reasonable to believe that the defendant was very well aware about all the particulars of the case and even, perhaps, about the passing of and the date of decree.” (underlining added)

6. I completely agree with the findings and conclusions of the court below inasmuch as the present case is not a case where against the appellant/defendant the money decree was passed in a hurry, because, there were as many as three attempts made to serve the appellant/defendant. Also, the appellant/defendant is not justified in contending that the report of the postal department could also be forged on the registered cover as regards the refusal report on the postal covers. Also, in one of the process servers report detailed directions and location of the property of the appellant/defendant was given of all the four sides. Therefore, the appellant/defendant has been rightly found to be falsely stating that that he was not served in the suit.

7. I may note that the court below has also further rightly noted that the pleadings given in the application with respect to the

alleged common friend Sh. Laxman, as also how mysteriously details of the suit could have been obtained, the appellant/defendant was successful in tracing out the subject suit, and which facts show that the appellant/defendant was in fact always aware of the filing of the subject suit against him.

8. I may note that this Court as also the court below do not have to go on merits once it is found that the appellant/defendant was served in the suit, who yet chose not to appear, and failed to file appearance as required under Order XXXVII CPC, and resultantly on account of non-filing of appearance the suit under Order XXXVII CPC was decreed by the order dated 8.7.2015.

9. Dismissed.

MAY 19, 2017
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VALMIKI J. MEHTA, J