

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

+ **RFA No.954/2017**

% **14th November, 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)

C.M. Nos.41014-15/2017 (exemption)

1. Exemption allowed subject to just exceptions.

C.M.s stand disposed of.

C.M. No.41012/2017 (for condonation of delay)

2. For the reasons stated in the application delay of 740 days in filing the appeal is condoned inasmuch as the appellant was pursuing the remedy for setting aside the *ex-parte* decree passed under Order XXXVII of the Code of Civil Procedure, 1908 (CPC).

C.M. stands disposed of.

RFA No.954/2017 and C.M. No.41013/2017 (stay)

3. The impugned order which is challenged by the appellant reads as under:-

“ 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 12-03-2015.

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 @ 24% per annum from today till realization with costs is passed in favour of the plaintiff and against the defendant. Decree sheet be prepared accordingly. File be consigned to Record Room.”

4. In law once a defendant in an Order XXXVII CPC suit fails to file appearance, then as per Order XXXVII Rule 2(3) CPC, the allegations in the plaint are deemed to be admitted, and plaintiff is entitled to the decree as prayed in the suit. I fail to understand as to how anything can be achieved in challenging in a first appeal under Section

96 CPC the merits of an impugned order which decrees a suit under Order XXXVII Rule 2 (3) CPC on account of non-filing of the appearance.

5. This Court cannot go into the merits of the matter because merits of the matter would have been gone into if the appearance was filed, and thereafter on service of summons for judgment a leave to defend application was filed. This stage did not arise because the appellant/defendant failed to file any appearance and consequently the suit was decreed under Order XXXVII Rule 2(3) CPC.

6. I may also note that appellant had filed an application to set aside the *ex-parte* decree against him but that application was dismissed. Such an application is in fact filed under Order XXXVII Rule 4 CPC and once such an application is dismissed nothing further survives as there cannot be challenge to an order decreeing the suit under Order XXXVII Rule 2(3) CPC when admittedly appearance was not filed on behalf of the appellant/defendant.

7. There is no merit in the appeal. Dismissed.

NOVEMBER 14, 2017/Ne

VALMIKI J. MEHTA, J